

APOSTOLIC FAITH CHURCH OF ZIMBABWE
versus
APOSTOLIC FAITH MISSION OF PORTLAND OREGON
(SOUTHERN AFRICAN HEADQUARTERS)
and
THE SHERIFF FOR ZIMBABWE N.O

HIGH COURT OF ZIMBABWE
MUSAKWA J
HARARE, 16 August 2019 & 6 September 2019

Urgent Chamber Application

R. J. Gumbo, for the applicant
M. Nzarayapenga, for the 1st respondent

MUSAKWA J: The applicant is seeking stay of execution from being evicted from stand number 3126 Aerodrome Bindura.

The background to this matter is a series of actions between the first respondent and Richard John Sibanda who was the first respondent's overseer. This culminated in the suspension of Richard John Sibanda from the post in 2012 following a disciplinary hearing. There followed further proceedings that culminated in the first respondent seeking a declaratory order to the effect that Richard John Sibanda, Jonah Mudondo and L.D. Mateza were no longer members of the first respondent. The three were also interdicted from using the first respondent's various properties which were enumerated in the order. Apart from the enumeration of the various properties the order also specifically stated in a separate paragraph "All motor vehicles and church assets under their control." An appeal to the Supreme Court was dismissed on 27 July 2018.

Following the issuance of a writ of ejectment on 9 August 2019, a notice of removal from stand number 3126 Aerodrome Bindura was issued on 15 August 2019. In a founding affidavit deposed to by Shadreck Chando it is averred that the applicant is headed by Davison Pendekwa Matayaungwa. The property in question is said to have been purchased from the Municipality of Bindura by the applicant. In support thereof the applicant attached a memorandum of agreement dated 21 August 2018.

It is further contended that stand number 3126 Aerodrome is not included in the court order. The only Bindura property listed is stand 19/24 Musvosvi Street.

In opposing the relief sought the first respondent contends that the matter is not urgent. This is because similar averments were made by Davison Pendekwa Matayaungwa in case number HC 2216/18 in which he was challenging eviction from the property. It is further averred that in that matter Davison Pendekwa Matayaungwa impliedly admitted that he was appointed by the deposed Richard John Sibanda. Therefore Richard John Sibanda was occupying the property through Davison Pendekwa Matayaungwa.

It was also contended that the applicant has no *locus standi* as it does not legally exist. This is because no documents were produced as evidence of the first respondent's capacity to sue or be sued.

It is also contended that the applicant has withheld some material facts. The first such is that the first respondent purchased the property in question in 1998. The relevant documentation is attached to the notice of opposition.

It is also averred that in C 207/19 the applicant applied for an interdict at Bindura Magistrates Court. In that application Davison Pendekwa Matayaungwa deposed to a founding affidavit in which he claimed to have taken occupation of the property before the date it is claimed the applicant purchased it. That is why Davison Pendekwa Matayaungwa has refrained from making any deposition in the present matter.

The first respondent also takes issue with the draft order. It is contended that the terms of the interim and final orders are the same. Effectively, it means that the applicant is seeking a final order by way of interim without having proved its case.

It is also contended by the first respondent that the non-joinder of the Municipality of Bindura is fatal to the applicant's cause. This is because the applicant claims to have purchased the property from the Municipality of Bindura in August 2018 whereas the latter has confirmed to have sold the property in 1998.

The last point taken by the first respondent is that the application does not meet the requirements for an interdict. This is because the agreement of sale that the applicant places reliance on is fraudulent. In that respect it does not prove a *prima facie* right.

It is also contended that an interim interdict cannot be relied upon to prohibit lawful conduct. This is because the eviction is targeted at Davison Pendekwa Matayaungwa who occupied the stand at the behest of Richard John Sibanda. As such Davison Pendekwa

Matayaunga who occupied the property through Richard John Sibanda has to vacate the property as well.

Submissions by counsel

Urgency

Mr *Gumbo* submitted that the need to act arose on 9 August 2019 when a writ of ejectment was served on the applicant. Concerning Davison Pendekwa Matayaungwa, he submitted that the issue concerns the applicant and not him in his personal capacity. Restoration of church property to the first respondent did not include stand number 3126 Aerodrome.

Mr *Nzarayapenga* submitted that a party seeking urgent relief must disclose facts that are both favourable and adverse to it. Thus he submitted that 19/34 Musvosvi Street is the first respondent's domicilium. He also submitted that the applicant cannot claim to be unaware of the Supreme Court decision when its representative has been involved in other litigation.

Locus Standi

On the aspect of *locus standi*, Mr *Gumbo* managed to produce a copy of the applicant's constitution. He submitted the applicant and the first respondent are two different entities with almost similar names. The issue before the courts had nothing to do with ownership but control of property. The issue is whether the applicant has established *prima facie* rights even if in doubt. If the property belongs to the first respondent why was it omitted in the court orders?

Mr *Nzarayapenga* had initially premised his argument on *locus standi* on the absence of a constitution for the applicant. When Mr *Gumbo* sought to produce the constitution, Mr *Nzarayapenga* objected on the basis that it should have been part of the founding papers. After I allowed the production of the constitution, Mr *Nzarayapenga* made further submissions on the document. He observed that the constitution does not show that it was registered. He slammed it as a sham as it does not identify the members of the church except one.

Mr *Nzarayapenga* further submitted that Davison Pendekwa Matayaungwa is central to the matter. This is because in 2017 he was appointed by the then first respondent's authority for Bindura, Richard John Sibanda. He submitted that when it suited him Davison Pendekwa Matayaungwa would depose to affidavits in litigation purporting to represent the first respondent. He cited the example of litigation that is pending before the High Court in Bulawayo. Then in litigation before the Magistrates Court in Bindura, Davison Pendekwa Matayaungwa claims to represent the applicant. And yet Davidson Pendekwa Matayaungwa has since been disciplined and expelled by the first respondent and has not challenged the dismissal.

Similarity between Interim and final orders

Concerning the similarity in the interim and final orders, Mr Gumbo submitted that this was not fatal. In such a situation, the court ups the onus on an applicant. In support thereof he cited the cases of *The Registrar General of Elections v Combined Harare Residents Association and David Samudzimu* SC 7-02 and *Econet v Mujuru* HH 58-92.

On his part, in attacking the framing of the draft order, Mr *Nzarayapenga* relied on the cases of *Brian Andrew Cawood v Madzingira and Another* HMA 207-17 and *Qingsham Investments (Private) Limited v Zimbabwe Investment Authority* HH 207-17.

Non-Joinder

On non-joinder of the Municipality of Bindura, Mr *Gumbo* submitted that this was not fatal. The issue is whether the applicant can be evicted from the property where the court order does not specify the particular property.

Mr *Nzarayapenga* submitted that non-joinder of the Municipality of Bindura is mala fide. In this regard he placed reliance on a letter from the Municipality of Bindura dated 16 August 2019 which is part of the opposition papers.

Non-Disclosure of Material Facts

On non-disclosure, Mr *Gumbo* submitted that the case before the Magistrates Court involves the first respondent threatening to dispossess the applicant unlawfully. He further submitted that the document the first respondent is relying on as evidence of entitlement to the property does not have the full name of the first respondent as it omits Of Portland Oregon.

Mr *Nzarayapenga* submitted that the applicant should have disclosed the litigation between the parties before the Magistrates Court in Bindura and Bulawayo High Court. He pointed out that in the present matter Davison Pendekwa Matayaungwa has taken a back seat and let Shadreck Chando conduct the proceedings. All that was done was to create a new church in order to lay claim to stand 3126 Aerodrome.

Whether Requirements of Interdict Have Been Satisfied

As regards the requirements, Mr Gumbo submitted that there is an agreement of sale. As such the first respondent should also produce documents in its name. The applicant is said to have developed the property. The balance of equities favours the applicant and the court should exercise its discretion in favour of the applicant. Mr Gumbo took issue with the various points in limine that were raised. He was dismissive of the bulk of arguments raised as he was of the view that this is a simple matter of interpreting an order of court.

Mr *Nzarayapenga* submitted there is no prima facie right but fraud. He further submitted that the eviction is targeted at the one in control of the church property. In such a case, how can church members suffer irreparable harm. He also submitted that there is a case of a double sale, but the balance of convenience favours the first respondent. The first respondent purchased and developed the property. On the other hand the applicant can seek a refund from the Municipality of Bindura. This then means it has an alternative remedy. Mr *Nzarayapenga* further submitted that the applicant has been forum shopping. He prayed for dismissal with costs on a higher scale. He was of the firm view that this is not an application that should have been filed.

Analysis

A look at the history of the dispute between Davison Pendekwa Matayaungwa and the first respondent shows that as far back as August 2018 he was aware of the order that was to be executed following the dismissal of the appeal lodged with the Supreme Court. This is why an interdict against eviction was sought before the Bulawayo High Court. At about the same time (as is discussed elsewhere) an agreement of sale was concluded in respect of stand 3126 Aerodrome. Clearly the need to act arose in August 2018 and not August 2019. The need to act was not triggered by the writ of 9 August 2019. I would therefore hold that the matter is not urgent.

A look at the applicant's constitution shows that it clothes the applicant with legal capacity to sue and be sued in its name. However, one glaring blemish with the document is that it is dated 20 July 2017 but is not signed. It also purports that it was adopted by all church members at the annual general meeting held on that day. The number of those who adopted it is not stated. Although it makes reference to an annual general meeting there is no clause providing for an annual general meeting and its purpose. There is also no provision for a quorum. It also makes no provision on who represents the first respondent in litigation. I agree with Mr *Nzarayapenga* that the document is a sham. Its preamble states that Apostolic Faith Church is led by Reverend Davison Pendekwa Matayaunga. Yet in litigation commenced before the Bulawayo High Court in case number HC 2216/18 Reverend Davison Pendekwa Matayaunga and co-applicants were claiming to be members of the first respondent. This was one year after the formation of the applicant. In short, the constitution was poorly drafted such that it fails to empower the applicant with some legal capacity.

On the similarities between the interim and final relief sought it will be noted that in *Qingsham Investments (Private) Limited v Zimbabwe Investment Authority supra* CHIGUMBA

J cited the case of *Econet Wireless Private Limited v Trustco Mobile Pty Ltd and Another S 43-13* in which at p 16 GARWE JA had this to say:

“It is correct that in general terms a court should not grant interim which is similar to or has the same effect as the final relief prayed for. The reason for this is obvious. Interim relief should be confined to interim measures necessary to protect any rights that stand to be confirmed or discharged, as the case may be, on the return date. Indeed in *Kuvarega v Registrar General & Anor* 1998 (1) ZLR 188 (H), the High Court slammed the tendency by some litigants to seek the same relief both as a provisional and final order.”

The above position does not appear to be a rigid one because GARWE JA went on to say the following regarding the remarks in *Kuvarega v Registrar General & Anor supra*:

“I would certainly agree with the above remarks. Although the learned judge in that case did not suggest that such a defect renders an application a nullity, it seems to me that, whilst no hard and fast rule can be laid down, there may well be cases where a court would be justified in holding, in such a situation, that the application is not therefore urgent and that it should be dealt with as an ordinary court application. There may also be cases where the court itself, as it is empowered to do, may amend the relief sought in order to make it clear that what is granted is interim protection whilst the final order sought would be the subject of argument on the return date. Rule 240 of the High Court Rules permits a court, after hearing argument, to vary an order sought. It is this power to grant an order that is consistent with the facts which a court can use in order to obviate a situation where final relief is granted by way of a provisional order.”

I would therefore hold that the similarities between the interim and final orders would not have been fatal, had I been inclined to grant the application.

Regarding non-joinder, the letter which was written by the Municipality of Bindura chamber secretary states that stand 3126 Aerodrome was leased to the Apostolic Faith Mission on 18 March 1998. On 29 October 2001 the lease was extended to 31 March 2002. There are no changes in the name of the lessee. However, it was noted that in August 2018 one Manasa Mavhengere wrote to the municipality enquiring on leasing or purchasing the stand. Despite anomalies in the correspondence agreements were concluded with an entity called Apostolic Faith Church of Bindura without seeking clarification.

In light of this material issue regarding how Apostolic Faith Church came to purchase the same stand that the first respondent lays claim to it was imperative that the Municipality of Bindura be joined in the proceedings. One would have wanted to know if any consideration

was paid. In any event, there are some issues that the chamber secretary left unclarified in the letter of 16 August 2019.

On material non-disclosure, in *Graspeak Investments (Pvt) Ltd v Delta Corporation (Pvt) Ltd* 2001 (2) ZLR 551 (H) it was held that in urgent applications utmost good faith is required of an applicant. All relevant material facts must be disclosed by an applicant in an urgent application. In the present matter there was no disclosure of litigation in the Magistrates Court as well as Bulawayo High Court. It is significant to note that in the Bulawayo matter a provisional order was granted in which the applicants were restored to possession and enjoyment of all movable property in their possession. The order did not touch on any immovable property. The Sheriff was also interdicted from evicting the applicants from the properties they occupy.

Attached to the first respondent's papers are examples of litigation that invited Mr Nzarayapenga's description of the applicant's conduct as forum shopping. In the Bulawayo matter (HC 2216/16) eight applicants who included Davison Pendekwa Matayaungwa instituted proceedings against the first respondent. The deponent to the founding affidavit was Reverend Lot Dube Matiza. The affidavit was attested on 14 August 2018. Reverend Lot Dube Matiza claimed to be a member of the first respondent. Davison Pendekwa Matayaungwa deposed to a supporting affidavit in which he confirmed authorising Reverend Lot Dube Matiza to the founding affidavit. Of significance is that in his supporting affidavit Davidson Pendekwa Matayaungwa gave his address as 19/34 Musvosvi Street, Bindura. This is the first respondent's *domicilium citandi*. Apparently Davidson Pendekwa Matayaungwa resided or still resides at that address.

Then in the proceedings filed in Bindura Magistrates Court Davison Pendekwa Matayaungwa is the one who deposed to the founding affidavit on 7 August 2019. He now gave his address as 3126 Aerodrome, Bindura.

What the documents before this court reveal is that some seven days after instituting litigation before the Bulawayo High Court and on 18 August 2018 the applicant purchased the same stand against which a writ of execution was issued. This is the same property that was purchased by the first respondent as far back as 1998.

Lest I erred on the preliminary points, I now proceed to deal with the issue of whether requirements for a temporary interdict have been met. It has been held that an interlocutory

interdict is an extraordinary remedy at the discretion of the court. In this respect see *Airfield Investments (Pvt) Ltd v Minister of Lands and Others* 2004 (1) ZLR 511 (S).

The applicant places reliance on a memorandum of agreement that was entered into by itself and Municipality of Bindura on 21 August 2018 regarding the purchase of stand 3126 Aerodrome. This was supposed to be an undeveloped piece of land. And yet the applicant chose that undeveloped land to be its *domicilium citandi*. This then can only mean that the property was already developed when it was purchased.

The agreement gives the applicant 48 months from signing the agreement to develop the stand. Nonetheless the clause providing for that is vaguely expressed as follows-

“4. That the purchaser shall erect on the stand within forty-eight (48) months, 4 years, calculated from the date of signing this agreement.....”

There is also a clause providing that building plans should be submitted within six months. No averment was made as to when the plans were submitted. There is not even a site plan availed by the applicant. No proof has been tendered as to how the applicant developed the stand as it claims.

On the other hand, the first respondent availed an agreement of lease that was entered into between The Apostolic Faith Mission of stand 19/34 Musvosvi Street Chipadze, Bindura and the Minister of Local Government and National Housing in respect of stand 3126 Aerodrome Bindura. This was in April 1998. The agreement shows that the stand was not to be occupied until approved buildings had been erected and there was water supply and a sanitary system. The rent payable was stated. There is also a site plan.

If the applicant purchased the stand as undeveloped, it could not have used it as its *domicilium citandi*. The *prima facie* right which is a requirement for an interdict is not established in favour of the applicant. It becomes irrelevant to consider all the other requirements for a temporary interdict. That the stand in contention is not specified in the Supreme Court order is of no consequence. In my respectful view the part of the order that reads: “All motor vehicles and **church assets** under their control” should cover stand 3126 Aerodrome, taking into account the history of the matter.

Disposition

I find merit on the objections raised by the first respondent on non-urgency absence of *locus standi*, non-disclosure of material facts and non-joinder of the Municipality of Bindura. In addition, in light of the failure to establish a *prima facie* right, the application is hereby dismissed with costs.

Gumbo & Associates, applicant's legal practitioners

Dube-Banda, Nzarayapenga & Partners, 1st respondent's legal practitioners