REPORTABLE (10)

(1) REPHIO CHIRUMBWA (2) GEORGE SAIZI (3) EMMANUEL HOVE (4) DAVID NJANJI (5) JOHN MUHOMBA (6) PATRICK ALIFANDIKA (7) TINASHE MASIKATI (8) MIKE ONDA (9) MOSES MURONDA

v

(1) BETHLEHEM APOSTOLIC CHURCH (2) BISHOP ZACHARIA CALEB GEMU N.O

SUPREME COURT OF ZIMBABWE
GOWORA JA, MAVANGIRA JA & MATHONSI JA
HARARE: OCTOBER 22, 2019

M.K. Chigudu, for the Appellants.

N. Mugiya, for the Respondents.

MATHONSI JA: This is an appeal against the whole judgment of the High Court handed down on 11 April 2018 in which it granted a spoliation order in favour of the respondents directing the appellants to restore the respondents to the church temple and premises located at Stand 3874 Caledonia, Harare. The High Court also ordered the appellants to release keys to the temple to the respondents and ordered the appellants to pay costs on a legal practitioner and client scale jointly and severally the one paying the others to be absolved.

After reading papers filed of record and hearing arguments from counsel, the court issued the following order:

"1. The appeal partially succeeds to the extent described below:

(a) **The appeal on the merits is dismissed.**
(b) **Paragraph 3 of the judgment of the court a quo relating to costs is set aside and in its place is substituted the following:**
'The respondents shall pay the applicants costs on an ordinary scale.'"

We stated that the reasons for the order would follow.

The following are the reasons.

Factual Background

The resignation of Alfred Zamnkosini as Bishop of Bethlehem Apostolic Church (the church) on 12 June 2015 triggered a leadership wrangle within the church which led to prolific litigation. The appellants are members of the first respondent church who have been involved in a protracted dispute over the control of the church with the second respondent and his followers. The first appellant lays a claim to the position of the Bishop of the church, a position claimed by the second respondent.

In HC 3350/17 the present respondents instituted an action against Alfred Zamnkosini and the present first appellant. The action culminated in the High Court granting an order by consent on 17 October 2017 in the following terms:

"IT IS ORDERED BY CONSENT THAT:

1. Parties be and are hereby ordered to return to the *status quo* as at the time that first defendant tendered his resignation letter on the 12th of June 2015.
2. The second plaintiff who was the archdeacon at that time, be and is hereby ordered to return the position of archdeacon(*sic*)and act as the bishop of the church until 24 February 2018, when the plaintiff holds its annual general meeting in terms of the constitution.
3. Parties are hereby directed to appoint a bishop at the annual general meeting to be held on the 24th of February 2018, in terms of the 1st plaintiff's constitution.

4. Parties be and are hereby directed to worship together as they used to as at the 12th of June 2015, when 1st defendant resigned.
5. Each party to bear its own costs."

Following the consent order the second respondent was appointed to the position of acting Bishop of the church and was handed all church property including the keys to the church building. On 24 February 2018, in compliance with para 3 of the consent order, elections were held at the annual general meeting. The elections for the position of Bishop of the church pitted the first appellant against the second respondent.

There is a dispute, which the court *a quo* did not resolve as it was not an issue for determination before it, as to the outcome of those elections. Both the first appellant and the second respondent claimed victory.

In making an application for a spoliation order in the court *a quo* the respondents' case was that the second respondent was duly elected Bishop at the annual general meeting held on 24 February 2018. He therefore, retained possession of all church property, which possession he had obtained on 17 October 2017 upon his appointment as acting Bishop.

The respondents maintained that on 29 March 2018 the appellants forcibly seized the church property from the second respondent. They had not accepted his election as Bishop insisting instead that it is the first appellant who won the elections. They allegedly forcibly took the keys from the second respondent, assaulted him and then pushed him and his followers out of the church temple, thereby evicting them.

In the court *a quo* the appellants' case was that they did not commit any act of spoliation because it is the first appellant who was elected Bishop. The second respondent refused to accept the outcome of the elections. Instead he declared himself the winner and left the church premises with his supporters to go and celebrate his false victory at his home. Thereafter he never returned to the church premises.

DECISION OF THE COURT *A QUO*

The court *a quo* correctly noted that the matter before it did not concern the results of the elections of the Bishop or the propriety of the conduct of the elections. It had its finger on the pulse of the case when it concluded that what was before it was the issue whether an act of spoliation was committed against the respondents. The court *a quo* reasoned that in order to succeed, the respondents had to establish that they were in peaceful and undisturbed possession and that they were unlawfully dispossessed.

It was the view of the court *a quo* that the second respondent had been given possession of the church property through a consent court order granted on 17 October 2017. He was the acting Bishop from that date and in peaceful and undisturbed possession. There was no mention that he ever parted with possession lawfully after the elections. While acknowledging the dispute of facts relating to who between the first appellant and the second respondent was elected Bishop on 24 February 2018, the court *a quo* found that the balance of probabilities favoured the second respondent in respect of possession. This is because he had been acting Bishop prior to the meeting of 24 February 2018.

It was the court *a quo's* view that if the second respondent was still in possession, he would not have filed a complaint. The fact that he had been acting Bishop before the events

forming the basis of the application raised the probability that he had been unlawfully dispossessed. The court *a quo* then granted spoliatory relief. The appellants were aggrieved and noted an appeal against the judgment of the court *a quo*.

GROUNDS OF APPEAL

The appellants attacked the judgment of the court a quo on 6 grounds namely:

1. The court *a quo* erred in treating this matter as urgent when it was clear from the evidence on record it did not meet the requirements of urgency.
2. The court *a quo* misdirected itself by granting a final order for the occupation and use of the entire property known as 3874 Caledonia, Harare, when the fourth appellant clearly demonstrated that the same was his place of residence.
3. The court *a quo* erred in finding that the legal requirements of a spoliation order had been met.
4. The court *a quo* erred in finding that the second respondent had authority to represent the first respondent despite there being enough evidence to show that he did not have such authority in terms of the church's constitution.
5. The court *a quo* grossly misdirected itself in failing to find that there were material disputes of fact which were incapable of being resolved on the papers.
6. The court *a quo* grossly erred by finding that the respondents were entitled to costs on a legal practitioner and client scale when there was no evidence and/or justification for such costs.

ISSUE FOR DETERMINATION

The only issue for determination by this Court is whether the court *a quo* erred in granting the respondents a spoliation order.

APPLICATION OF THE LAW TO THE FACTS

The order that the court *a quo* granted involved the exercise of judicial discretion first in hearing the matter as urgent and second in granting spoliatory relief. In all their grounds of appeal the appellants do not directly challenge the exercise of discretion by the court. Regarding urgency the point is made in *Econet Wireless (Pvt) Ltd vs Trustco Mobile (Proprietary) Ltd & Anor* 2013 (2) ZLR309 (S) at 320D-E that:

> "It is clear that in terms of Rules 244 and 246 of the High Court Rules the decision whether to hear an application on the basis of urgency is that of a judge. The decision is one therefore that involves the exercise of a discretion. It follows from this that this court has very limited grounds upon which it can interfere with the exercise of such discretion."

In order to satisfactorily challenge the decision to hear an application as urgent, the appellants must show that the court *a quo* did not properly exercise its discretion. The appellants do not even begin to do that. In any event, it occurs to me that once an application is heard on an urgent basis and a decision taken on the merits, it is extremely superfluous to contest the hearing of the application as urgent on appeal. It is to the merits that a party aggrieved by the outcome should look for redress.

The circumstances under which an appellate court can interfere with the lower court's exercise of discretion are settled. As stated in *Friendship v Cargo Carriers Ltd & Anor* 2013 (I) ZLR 1 (S) at 5F-G:

> "It is now settled that an appellate court will not interfere with the exercise of its discretionary power by a lower court unless it is shown that the lower court committed such an irregularity or misdirection or exercised its discretion so unreasonably or improperly as to vitiate its decision: *Halwick Investments v Nyamwanza* 2009 (2) ZLR 400 (S); *Sedco v Chimhere* 2002 (1) ZLR 424 (S); *ZFC Ltd v Geza* 1998 (1) ZLR 137 (S)."

The question which therefore arises is whether it can be said in the present case that the court *a quo* exercised its discretion capriciously or upon a wrong principle. I am unable to find any ground for answering the question in the affirmative. In fact, as already stated, none of the six grounds of appeal relied upon by the appellants address the exercise of discretion by the court *a quo*. That really should resolve the matter.

The court *a quo* fully considered the essential elements of spoliatory relief and came to a decision, on grounds that were relevant, that the essential elements were met. For a party to obtain a spoliation order he or she must establish two essentials namely that he or she was in peaceful and undisturbed possession of something and that the respondent deprived him or her of that possession forcibly or wrongfully against his or her consent. See *Botha & Anor vs Barret* 1996 (2) ZLR 73 (S) at 79; *Chisweto v Minister of Local Government and Town Planning* 1984 (1) ZLR 248 (H).

Mr *Chigudu* for the appellants submitted that the respondents were not in peaceful and undisturbed possession because, after declaring himself the winner, the second respondent wilfully left the church premises with his followers and was never seen at the church premises again. According to Mr *Chigudu*, the court *a quo* erred in relying on the second respondent's possession of the church property from 17 October 2017 when the consent order was granted. I do not agree.

The reasoning of the court *a quo* was sound. Its analysis of the disputed facts was designed to determine where the probabilities lay. It was common cause that the court order granted by consent on 17 October 2017 was respected by the parties and carried into execution. The court order appointed the second respondent as the acting Bishop of the first respondent.

To that extent, it follows that he took custody of the church property from that date. It is correct that the appellants did not address the question of when the second respondent's possession was lawfully lost. It was the second respondent's case that he retained possession until he was forcibly deprived by the appellants on 29 March 2018.

The court *a quo* rejected the appellants' claim that the second respondent voluntarily gave up possession on 24 February 2018 when he elected to leave the church premises to celebrate at his house with a few followers. Clearly that story is improbable. That a person who claimed to have won the elections of Bishop would simply abandon the church premises and not set foot there of his own free will, cannot be taken seriously. There was no misdirection on the part of the court *a quo* in drawing the conclusion that the probabilities favoured the respondents' version.

It follows that the appellants' assertion that there is a material dispute of facts which could not be determined on the papers is illusory and clearly unsustainable. An improbable, if not false, version of events which is rejected by the court on sound grounds, does not create a material dispute of facts requiring referral of an application to trial. The court *a quo* was correct in rejecting the argument on material dispute of facts.

The appellants' second and fourth grounds of appeal raised the issues of the fourth appellant's alleged use of part of the church premises as his residence and the second respondent's alleged lack of authority to litigate on behalf of the first respondent. The two issues were not placed before the court *a quo* but were only raised for the first time on appeal. This was irregular. In fact Mr *Chigudu* conceded that those two grounds of appeal were not well taken.

It remains for me to deal with the issue of costs. The court *a quo* awarded costs on the scale of legal practitioner and client. The court *a quo* did not give reasons for awarding punitive costs. It is trite that the failure by a court of law to give reasons for a decision is a misdirection *per se* which entitles the appeal court to interfere with the decision.

Apart from that, although the award of costs is squarely within the discretion of the court, that discretion must be exercised judicially. Indeed, the scale of legal practitioner and client as a remedy of costs, is an extra ordinary one which is reserved for cases where a litigant conducted itself in a clearly indictable, vexatious and reprehensible manner. The award is exceptional and is meant to punish a litigant.

In the absence on the part of the court *a quo* of reasons justifying the award, this Court cannot resort to guess work. The reasons for that award remain stored in the mind of the court *a quo*.

Mr *Mugiya* for the respondents conceded that there was no legal foundation for the award of punitive costs. This Court was also unable to find any justification for punitive costs.

It is for these reasons that this Court issued the order made.

GOWORA JA I agree

MAVANGIRA JA I agree

Zinyengere Rupapa, Legal Practitioners for the Appellant.

Mugiya & Macharaga Law Chambers, Legal Practitioners for the Respondent.