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COSSAM CHIYANGWA
v
APOSTOLIC FAITH MISSION IN ZIMBABWE

SUPREME COURT OF ZIMBABWE
GUVAVA JA, CHIWESHE JA & CHITAKUNYE JA
HARARE, 10 MAY 2022 AND 13 JANUARY, 2023

L. Madhuku, for the appellant

F. Mahere, for the respondent

GUVAVA JA:

[1] This is an appeal against the judgment of the High Court ("the court *a quo")* in which an order for a *mandamus van spolie* was granted in favour of the respondent. This Court does not find merit in this appeal and it must be dismissed. I outline hereunder the reasons for this decision.

FACTS

[2] The appellant is a former Pastor and Deputy President of the respondent's executive leadership structure. He was formerly stationed and ministered at Marlborough Assembly located at No. 696, New Ardlyn, Westgate, Harare ("the church"). The respondent is a *universitas* which is regulated by a written constitution. The constitution creates regulations which outline the governance structures and the process of electing office bearers into the different structures. From the papers filed of record, it is quite apparent that the appellant and the respondent's representatives have had a long running dispute

regarding the control of the church and its assets. This dispute is what has brought this appeal before this Court.

[3] On 15 September 2018, the respondent conducted a review of its constitution and regulations. At the meeting, a resolution was passed to the effect that all proposed constitutional amendments would be suspended save for those relating to the conduct of elections.

[4] The respondent's office bearers, at different levels of the church's administration, were to conduct elections in 2018. On 21 September 2018, the Apostolic Council of the respondent met to discuss the dates and rules for the pending election. During the meeting, the appellant stated that he did not accept the resolution passed at the meeting held on 15 September 2018. He therefore announced that he was leaving the church in order to form his own. It is alleged that he thereafter left the premises and subsequently handed over the keys to the church to a representative of the respondent.

[5] On 22 September 2018, the appellant and those aligned to him held a separate meeting where several resolutions were made. The implementation of those resolutions resulted in the appellant being elected as the President of the respondent on 20 October 2018.

[6] Following this development, the respondent's representatives made an application for a *declarateur*, challenging the election of the appellant as President of the respondent before the High Court under case number HC 9149/18. On the other hand the appellant and four of his members made an application under case number HC 179/19 for a declaratory order declaring that they had been duly elected as office bearers of the respondent. The matters were duly consolidated, and the court granted the respondent's

application under HC 9149/18 and dismissed the appellant's application under HC 179/19.

[7] In dismissing that application, the court found that the appellant and his colleagues had no *locus standi* to seek a declaratory order as they were illegitimate holders of office. The appellant appealed to this Court against the order of the court *a quo* and the appeal was dismissed on 28 May 2021 in SC 67/21 on the basis that the appellant was not the legitimate leader of the respondent.

[8] Following the order by this Court, and on 10 October 2021, in total defiance of that order, the appellant and his followers gained access into the church premises and proceeded to conduct a service therein. A report was made to the police by the respondent of the unlawful entry. This did not deter the appellant as the following day he and his followers once again gained access to the church by breaking a lock to the gate and taking occupation of the property thereby disrupting all the activities of the respondent. As a result of the appellant's actions, the respondent made an urgent chamber application for a *mandamus van spolie* before the court *a quo* on the basis that it had been despoiled of its premises.

[9] In the application, the respondent, through an affidavit sworn to by Amon Dubie Madawo, averred that the actions of the appellant and those claiming occupation through him, were unlawful and akin to self-help. It was further averred that when the appellant's appeal was dismissed, he had already left the church, handed over the keys of the church to the Secretary of the Marlborough Assembly and proceeded to form his own church under the name 'Apostolic Faith Mission of Zimbabwe' (which was to be held at a different venue from the church premises in dispute). The respondent averred that it could not conduct its church services in the church building because the appellant and people

aligned to him had been unlawfully conducting their services in the church. The respondent further stated that before the appellant unlawfully came to the church on 10 and 11 October 2021, they were in peaceful and undisturbed possession of same and were unlawfully despoiled.

[10] In response to the application, the appellant raised several preliminary points. Firstly, that the matter was not urgent as the disputes in the church started as far back as 2018 and the respondent's representatives had not bothered to seek an appropriate prohibitory interdict. Secondly, that there were disputes of fact that were material and which could not be resolved on the papers. Finally, it was argued that the relief being sought by the respondent was incompetent as they were seeking a final order when the Judge in chambers could only grant a provisional order. On the merits, the appellant denied ever having given up possession of the premises in question and argued that the reason why he had stopped using the premises was because of government regulations meant to curb the spread of Covid 19. He further averred that the ruling under SC 67/21 merely upheld the High Court order granting a declaratory order setting aside the meeting of 22 September 2018 which had elected him into office. It was his contention that the court had not made a determination on the ownership of the respondent's assets and therefore he was still entitled to use them.

[11] In determining the preliminary points raised, the court *a quo* found that the matter was urgent as the facts indicated that there was a need for urgent intervention by the court to stop degeneration of law and order. It also dismissed the remaining preliminary points raised by the appellant on the basis that the question of whether or not there were disputes of fact may only be resolved once the arguments on the merits have been heard. The court

also found that the order sought was proper as a provisional order could not be granted in an application for spoliation.

[12] On the merits, the court *a quo* found that the appellant and a group of congregants aligned to him had broken the lock of the gate at the church on 11 October 2021 and proceeded to have a church service. It also found that this amounted to forceful dispossession of the respondent. In the result the court ordered that the appellant and all those claiming occupation through him restore vacant possession of the premises to the respondent.

[13] Dissatisfied by the decision of the court *a quo* the appellant noted the present appeal on the following grounds:

1. "The court *a quo* erred in law and misdirected itself in granting a spoliation order pursuant to an urgent chamber application in circumstances where a spoliation order being a final order can only be granted pursuant to a court application.
2. The court *a quo* erred in law and misdirected itself in granting a spoliation order in favour of the respondent without making a definitive finding of fact that the respondent was in possession of the property in question.
3. The court *a quo* erred in law and misdirected itself in granting a spoliation order in favour of the respondent without making a definitive finding that the alleged act of spoliation by the appellant was unlawful or wrongful.
4. As an alternative to 2 above, the court *a quo*'s finding that it was the respondent who was in possession of the property in question and not the appellant was grossly irrational in that no reasonable court applying its mind to the disputed facts before it could ever have reached such a conclusion.
5. Given that the respondent is a *persona facta* which can only possess property through agents, the court *a quo* erred in law and misdirected itself in granting a spoliation order in favour of the respondent without establishing the natural persons that possessed for and on behalf of the respondent."

At the hearing of the appeal the appellant abandoned the 5th ground of appeal and therefore motivated the appeal based on the 1st to 4th grounds only. The appellant's four grounds of appeal in my view raise the following issues for determination:

1. Whether or not the respondent's urgent chamber application was improperly before the court *a quo*.
2. Whether or not the court *a quo* erred in granting the respondent spoliatory relief.

SUBMISSIONS BEFORE THIS COURT

[14] In relation to the first ground of appeal counsel for the appellant Mr *Madhuku*, submitted that final relief cannot be granted in urgent chamber application proceedings. He argued that a spoliation order, being a final order, must be sought by way of court application. Counsel thus argued that the application before the court *a quo* ought to have been by way of an urgent court application. He further argued that the jurisdiction of a single judge in chambers is restricted to interim orders only. Counsel further submitted that the effect of r 58 (13) of the High Court Rules, 2021 ("the High Court Rules") is that when an applicant institutes a chamber application in circumstances when he or she should have proceeded by way of a court application, the application cannot be dismissed but it must be struck off the roll.

[15] Counsel further submitted that the court *a quo* erred in failing to make a specific finding that the respondent was in actual possession of the church. In addition, counsel maintained that the facts reveal that the appellant always had access and possession to the church and had merely been restricted by the Covid 19 Regulations.

[16] *Per contra*, counsel for the respondent Ms *Mahere*, argued that there is no rule that prohibits a judge, sitting in chambers, from granting final relief in a matter. Counsel submitted that the appellant failed to provide legal authorities to support the above assertion. She argued that r 60 (9) of the High Court Rules, provides that a judge sitting in chambers is not precluded from making a final order. She further submitted that r 58 of the High Court Rules gives the court discretion to deal with a matter which has been brought in the wrong form as long as there is no prejudice to the other side. On the merits counsel submitted that the record showed that the respondent was in peaceful and undisturbed possession of the premises in question. She further submitted that the facts

reveal that appellant had to break the locks on the gate in order to gain access to the premises. She opined that such blatantly unlawful actions by the appellant show beyond doubt that he took the church premises by force.

ANALYSIS

Whether or not the respondent's urgent chamber application was properly before the court *a quo*.

[17] It is not in dispute that the respondent approached the court *a quo*, through the Chamber Book, on an urgent basis. The court *a quo* found that the application was urgent, had merit and proceeded to grant the order sought by the respondent. The appellant contends that it was wrong for the court *a quo* to grant the spoliation order, which is final in nature, as an urgent chamber application.

[18] The new High Court Rules, 2021 promulgated in S.I 202 of 2021 set out the procedure to be followed in application proceedings Rule 58 (13) of the High Court Rules is key to the disposition of this matter. The rule provides as follows:

> "(13) Without derogation from rule 8 but subject to any other enactment, the fact that an applicant has instituted—
> (a) a court application when he or she should have proceeded by way of chamber application; or
> (b) a chamber application when he or she should have proceeded by way of a court application;
> shall not in itself be a ground for dismissing the application unless the court or judge, as the case may be, considers that—
> (c) some interested party has or may have been prejudiced by the applicant's failure to institute the application in proper form; and
> (d) such prejudice cannot be remedied by directions for the service of the application on that party with or without an appropriate order of costs."(underlining is my own)

In *Chikwinya and Ors v Mudenda N.O & Ors* HH 48/22 Chitapi J commented on the effect of r 58 (13) of the High Court Rules and said:

> "It follows from the above rule that the bringing of an application by way of court application instead of by way of chamber application or vice versa does not on its own standing constitute a ground for dismissing an application. There are however exceptions in the quoted rule when the application may be dismissed in the discretion of the court or judge. The exceptions are detailed in para (c) as read with para (d). They are grounded in prejudice to interested parties who could have been prejudiced by a failure to institute the application in the proper form. For such perceived prejudice to be deemed sufficient cause for the dismissal of the application, the court or judge will consider whether the perceived prejudice cannot be cured by giving a direction that the party(ies) who may be prejudiced should be served and they are given an opportunity to make representations."

[19] I agree. The above *ratio dicidendi* puts to rest the complaint by the appellant about the use of the wrong procedure. From the above it is apparent that the rule was designed to ensure that justice delivery prevails. It also has the added advantage of curbing the associated problem of dismissing or striking off matters which may have merit solely on the basis of procedural mishaps. The rule gives the court discretion to allow access to a party who has not approached the court in the proper form provided there is no prejudice to an interested party. In exercising its discretion the court must have regard to the exceptions set out under r 58 (13) (c) and (d). It follows that the bringing of an application either as a chamber application or a court application does not automatically in itself amount to a basis for the dismissal of the application unless there is prejudice. The court must consider whether the wrong procedure will prejudice an interested party and if such prejudice cannot be cured by giving directions for the service of the application on that party with or without an appropriate order of costs.

[20] The prejudice envisaged under r 58 (13) (c) of the High Court Rules may relate to instances where an interested party is not properly notified of the application, fails to file an opposing affidavit to the application or fails to make oral submissions. Although these examples are not exhaustive, it is the duty of the court to guard against any prejudice that may be occasioned through the use of a wrong type of application. It is only in instances

where the wrong procedure is used in the making of an application and the other party is prejudiced that such application may be dismissed.

[21] *In casu*, the court *a quo* dealt with an application for a *mandamus van spolie* which was brought as an urgent chamber application. The court did not err in doing so. There was no prejudice occasioned to the appellant or any other party in the way the court dealt with the application. The appellant was served with the application, he duly opposed it. Full argument was heard by the court and a judgment was duly issued. In our view the appellant has failed to show, in what way, he was prejudiced in these circumstances neither has he impugned the discretion exercised by the court.

[22] The second issue which is related to the one above is whether a single judge sitting in chambers may grant a final order. It was the appellant's case that the court *a quo* could not do so, as, having been seized with an urgent chamber application it could only issue a provisional order. Ms. *Mahere*, for the respondent, submitted that there was no rule of the court which precludes a judge sitting in chambers from granting a final order. In making this submission she placed reliance on r 60 (9) of the High Court Rules which only deals with provisional orders. She submitted that there is no other Rule save for the one cited above which deals with the peculiar circumstances of this case and arising out of r 58 (13) as presently framed. In other words if an applicant appears before the court by way of a chamber application when it should have done so as a court application and the court allows the parties to make submissions on the merits of the case then the court may grant a final order as there is no rule that prohibits such conduct.

[23] It is trite that the grant of an order for spoliation is final. The court could not have granted a provisional order in this case. (See *Blue Rangers Estate (Pvt) Ltd v Muduvuri & Anor* 2009 (1) ZLR 368 (S) at 377 C; *Mankowitz v Lowenthal* 1982 (3) SA 758). However, in

spite of being final, spoliation applications are generally dealt with as urgent chamber applications (see *Chiwenga v Mubaiwa* SC 86/20). This is because, by its very nature, spoliation must be granted urgently because it is a remedy which seeks to protect a despoiled party against a despoiler. This remedy operates as a safeguard against persons taking the law into their own hands or resorting to self-help instead of following due legal process. Spoliation is an extra ordinary remedy which seeks to protect a party as soon as the unlawful conduct occurs and places the parties in their original positions until the real dispute between them is settled. It is a remedy which preserves the status *quo ante* of parties. As such it is a remedy which may be acquired through an urgent chamber application. Rule 60 of the High Court Rules which deals with chamber applications seems to suggest that a final order may be granted except where a provisional order is sought under r 60(9).

[24] The critical question is that the court must apply the correct test required in the application brought before it. Where a party is seeking a final order the court must be satisfied, on a balance of probabilities, that the applicant is entitled to the relief sought. This Court therefore finds merit in the arguments made by counsel for the respondent that a single judge sitting in chambers may grant spoliatory relief. The court *a quo* clearly did not err when it heard the application. I thus find no merit in this ground of appeal.

Whether or not the court *a quo* erred in granting the respondent's application for a *mandamus van spolie*.

[25] The requirements for an order of *mandamus van spolie* are now settled. In the celebrated case of *Botha & Anor v Barrett* 1996 (2) ZLR 73 (S) GUBBAY CJ stated as follows at p 79 D-E:

> "It is clear law that in order to obtain a spoliation order two allegations must be made and proved. These are: That the applicant was in peaceful and undisturbed

possession of the property; and, that the respondent deprived him of the possession forcibly or wrongfully against his consent."

[26] It is trite that in spoliation proceedings, the lawfulness or otherwise of the possession, is not an issue. The person despoiled must simply prove that he was in peaceful possession of the property and that it has been taken unlawfully without their consent. Where it is alleged that the respondent did not have possession of the property this may be a defense available to the appellant in spoliation proceedings. Possession has been defined as follows:

> "Possession has been described as a compound of a physical situation and a mental state involving the physical control or detention of a thing and a person's mental attitude towards the thing … whether or not a person has physical control of a thing and what his mental attitude is towards the thing, are both questions of fact."
>
> *(Silberberg and Schoeman's 'The Law of Property' second edition* page 114)

The appellant has alleged that he never lost possession of the property as he only failed to utilize it due to the COVID 19 Regulations. It is quite apparent, as will be shown below, that the appellant was no longer in possession of this property. He was not in physical possession nor did he have the intention to possess it.

[27] The record clearly shows the sequence of events which led the respondent to rush to court for protection. The appellant's appeal to this Court under SC 67/21 for an order declaring his legitimacy to hold the office of President of the respondent was dismissed. Following the dismissal of the appeal, the record shows that persons affiliated to the appellant returned the keys to the church with a handover take over being done. The appellant went on to form his own church operating under the name 'Apostolic Faith Mission of Zimbabwe'. The appellant circulated fliers bearing the new church's name and a new venue at which the appellant and those affiliated to him would attend and worship.

[28] The appellant went a step further and recorded an interview in which he openly stated that he accepted the decision of the Supreme Court and that he was moving to a new place of worship. These events looked at wholesomely show that soon after the date when the appeal under SC 67/21 was dismissed on 28 May 2021, the appellant vacated the church premises and proceeded to create his own church at new worshipping grounds. It is therefore clear that he was no longer in possession of the church property nor did he have the intention to do so.

[29] The argument by the appellant that the Supreme Court judgment under SC 67/21 did not determine ownership rights of the parties to the property in question and therefore he still had rights to it does not hold water. The learned authors *Silberberg and Schoeman* confirm the position that in spoliation proceedings the issue of rights is not a consideration. They state the following at p 135-136:

> "… the applicant in spoliation proceedings need not even allege that he has a *ius possidendi: spoliatus ante omnia restituendus est* …. All that the applicant must prove is that he was in peaceful and undisturbed possession at the time of the alleged spoliation and that he was illicitly ousted from such possession …."

[30] In *Minister of Mines and Mining Development and Others v Grandwell Holdings (Pvt) Ltd* SC 34/18 at page 17 this Court held that:

> "It has been stated in a number of cases that issues of rights are irrelevant in spoliation proceedings. In *Yeko v Oana* 1973 (4) SA 735 (AD) at 739 G it was stated that:
>
> > 'The fundamental principle of the remedy is that no one is allowed to take the law into his own hands. All that the spoliata has to prove, is possession of a kind which warrants the protection accorded by the remedy, and that he was unlawfully ousted.'

In the case of *Chisveto v Minister of Local Government and Town Planning* 1984 (1) ZLR 248 (H) the court remarked:

> 'Lawfulness of possession does not enter into it. The purpose of the *mandamus van spolie* is to preserve law and order and to discourage persons from taking the law into their own hands. To give effect to these principles, it is necessary for the status

quo ante to be restored until such time as a competent court of law assesses the relative merits of the claims by each party'"

The above authorities clearly put to bed the averments by the appellant. As stated above the appellant had lost possession of the property when he moved out and formed his own church. The court *a quo* therefore correctly found that the respondent was in peaceful possession of the property.

[31] Having established that the respondent was in possession of the property, one must now turn to assess the evidence in respect to the second rung of the inquiry in spoliation proceedings. The respondent had an onus to prove on a balance of probabilities that it had been deprived of its property. Proof on a balance of probabilities means a reasonable degree of probability but not so high as required in a criminal case. If a court finds it more probable than not based on the evidence before it, then the burden is discharged (see *British American Tobacco Zimbabwe v Chibaya* SC 30/19).

[32] The respondent would only be hindered from proving that it had been unlawfully deprived of its property if the appellant had raised a valid defence. In *Gumbo v Zimbabwe Anti-Corruption Commission* SC 36/18 at p 4-5 the court said the following:

> "Once an applicant has established deprivation, it is incumbent upon the respondent to establish a defence. The defences available in spoliation are very few and are limited to the following:
>
> a) that the applicant was not in peaceful and undisturbed possession of the thing in question at the time of the dispossession;
> b) that the dispossession was not unlawful and therefore did not constitute spoliation;
> c) that restoration of the thing is impossible;
> d) that the respondent acted within the limits of counter-spoliation in regaining possession of the article; see *Kama Construction (Pvt) Ltd v Cold Comfort Farm Co-op & Ors* 1999(2) ZLR 19 at 21G-H.
>
> …
>
> An applicant to an order for *mandament van spolie* has an *onus* to prove on a balance of probabilities that he was unlawfully deprived of the property which is the subject of the dispute."

[33] In *casu*, the respondent's founding affidavit as read with the supporting affidavit of Samson Chabata outlined how the appellant and those affiliated to him, unlawfully gained access to the church premises. He stated that the appellant arrived at the premises on 11 October 2021 with a group of individuals and proceeded to break the gate key and gained access into the property. They then held a church service and continued in occupation of the property. In his opposing affidavit *a quo*, the appellant made bare denials of the alleged unlawful entry into the church premises. The appellant did not raise a valid defence to the application made by the respondent as set out in *Gumbo v Zimbabwe Anti-Corruption Commission* (*supra*). The appellant sought to argue that he had lawful rights to the property but as already determined above the issue of rights has no place in an application of this nature.

[34] It seems to me that the court *a quo's* judgment cannot be impugned. It correctly found that the bare denials made by the appellant, of never having left the church and never having generated the brochure for his new church, had no merit as concrete evidence had been placed before the court by the respondent showing that indeed appellant had formed his own church and was operating from another venue. The respondent managed to discharge the burden of proof which was required of it and proved that the appellant had indeed despoiled it of its property.

DISPOSITION

[35] The evidence, as appears on the record, shows that the respondent was in peaceful possession of the church. That the appellant unlawfully gained access into the church premises which were under the control of the respondent. The respondent, as was expected, acted with haste and proceeded to make an urgent chamber application for a *mandament van spolie*. The court *a quo* correctly found that the matter was urgent, and

that the appellant had despoiled the respondent of its property. There is no basis upon which this Court may interfere with the judgment of the court *a quo*. The appeal is thus devoid of merit and must be dismissed.

[36] As is the practice, where a party has been successful, he must be awarded the costs. I can find no plausible reason to detract from this practice.

In the result, it is ordered as follows:

'The appeal be and is hereby dismissed with costs.'

CHIWESHE JA I agree

CHITAKUNYE JA I agree

G.S. Motsi Law Chambers, appellant's legal practitioners
Mtetwa & Nyambirai, respondent's legal practitioners