CHURCH OF GOD OF PROPHECY (INTERNATIONAL)
versus
CHURCH OF GOD OF PROPHECY
and
ABIGAIL MAPINGURE
and
DAVID MTISI
and
PIO CHIDYAMAKUNI
and
KENNEDY CHINYOWA
and
NAISON SHARA
and
MOSES MUDAYA
and
GODFREY MATANGI
and
JOSHUA NYAMHUKA

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 16 October, & 16 January, 2020

Opposed Application

S Mushanga , for the applicant
R G Zhuwarara, for respondents

MANGOTA J: I heard this application on 16 October, 2019. I delivered an *ex tempore* judgment in which I dismissed the same with costs.

On 18 October, 2019 the applicant addressed a letter to the registrar of this court. It advised that it wants to appeal my decision. It requested for what it termed a full judgment which would enable it to process the appeal. This is it:

Church of God of Prophecy ("the Church") which is the first respondent *in casu* is an universitas. Its founder and leader one Kenneth Nyamhuka ("Kenneth") allegedly appointed the second to the eighth respondents as the church's trustees. ("the trustees") These and him, it is

alleged, took charge of the affairs of the church. The nineth respondent, Joshua Nyamhuka, ("Joshua") who is the son of Kenneth, it is claimed, left the church in 2010.

Kenneth died in April 2014. After Kenneth's death, Joshua teamed up with his two married sisters, namely Elizabeth Hove and Risca Mwandiambira. The three, it is claimed, made every effort to wrestle control of the church and its assets from the trustees and have the same placed into their own hands. The dispute of the trustees against Joshua and his two sisters spilled into the courts.

The trustees applied for a spoliatory relief against Joshua and his sisters. They filed their application in April/May 2014. They filed it under HC 4399/14.

On 15 July, 2015 this court dismissed the trustees' application. They appealed the same and, on 21 September, 2017, the Supreme Court upheld the appeal and set aside the judgment of the court *a quo*. It remitted the matter back to this court with the directive that:

(i) the trustees' notice of motion should stand as the summons- and

(ii) Joshua's notice of opposition stands as his appearance to defend – and

(iii) the matter should proceed to trial in terms of the rules of this court

Following upon the application turned- into-an-action, the trustees filed their declaration on 23 November 2017. Joshua filed his plea on 25 January, 2018. The trustees filed their pre-trial conference minute on 27 March, 2019 and Joshua filed his pre-trial conference minute on 31 October 2019 which, in my view, was erroneously stamp – dated 31 October, 2017. I say erroneously because he could not have filed any pre-trial conference minute before the Supreme Court's ruling of 21 September, 2017 which turned the trustees' application into an action.

I have made a deliberate effort to recount the genesis and history of the parties' dispute so as to place the current application into context . It is one for a joinder. It was filed on 19 June, 2019.

Church of God of Prophecy (International) has its head office in the United States of America. It, on 12 June 2019, resolved to file this application. It claims that the church which is the subject of proceedings under HC 3499/14 is its affiliate. It alleges that Kenneth was its ordained member who, according to it, made several financial requests from it. It avers that Kenneth received, up to his death, financial and material support from it. It, in support of its claims, attached annexures AA (i) (ii). It claims that the financial contributions which it injected into the church

were deployed into the acquisition of several movable and immovable properties for the church. It states that the followers of the church would contribute in the acquisition and construction of various immovable properties for the church. It acknowledges the dispute which arose between the trustees and Joshua after the death of Kenneth as well as the causes thereof. It also acknowledges the support which it is getting from Joshua in so far as its claim to ownership of the church and its assets – movable and/or immovable - is concerned. It alleges that, when Kenneth died, it appointed Joshua as a field officer or temporary overseer of all church property as well as church operations in Zimbabwe. It states that as the overall owner of the church's property – movable and/or immovable - it has a legal right and obligation to be heard in the resolution of the dispute of succession which arose upon the death of Kenneth. The respondents, it alleges, would not suffer any prejudice if it is made a party to the ongoing dispute. It claims that its joinder would address all the issues which the parties raised in their pre-trial conference minutes. It moves me to grant its application for a joinder.

The second to eighth respondents oppose the application. The ninth respondent did not file any notice of opposition. I assume that he intends to abide by my decision.

The second to eight respondents state that they are trustees of the church. They claim to have been appointed to their position by the late Kenneth and in terms of the constitution of the church. They query the deponent's position of field secretary of the applicant's Zimbabwe chapter. They allege that the church has no link at all with the applicant. It is, according to them, a self-administering and independent institution which owns its own property separately from that of the applicant. They deny the allegation that the church is affiliated to the applicant. They claim that the church was funded from tithes and offerings which its members made as well as from donations. The applicant, they aver, has no mission stations in Zimbabwe. They insist that HC 3499/14 has nothing to do with the applicant. The applicant, they state, has no members nor assets in Zimbabwe. Joshua, they claim, is not a member of the church. They state that he left the church in 2010 and he was never re-admitted into the same. They insist that the deponent to the founding affidavit was never a member of the church. The applicant, they claim, did not demonstrate that it acquired the assets which the church holds. HC 3499/14, they say, is predicated upon acts of spoliation which Joshua and his two sisters committed. They insist that the applicant which was not a party to the proceedings which the Supreme Court dealt with cannot be joined to HC 3499/14.

They alleged that the application remains prejudicial to them because the pre-trial conference which should have been conclusively dealt with was postponed *sine die* pending the outcome of this application. They state that the applicant can sue the church separately from HC 3499/14 if it has any cause of action against it. They move me to dismiss the application with costs.

This application is anchored on r 87 (2) (b) of the High court Rules, 1971. The rule relates to misjoinder or non-joinder of parties. It reads:

> "(2) At any stage of the proceedings in any cause or matter the court may on such terms as it thinks just and either of its own motion or on application-
> (a) …..;
> (b) Order any person who ought to have been joined as a party or whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, to be added as a party…" [emphasis added]

The above-cited rule confers a discretion upon the court. It can act on its own without being moved by any party where, from circumstances which have been placed before it, it remains of the view that a person who should have been joined to the case was not so joined as long as its view is that the person's presence in the proceedings is necessary for a complete determination of the issues which it is called upon to decide. It can also exercise its discretion when, as *in casu,* a person applies to be joined to proceedings which have already commenced and/or are pending at court. The rider which guides the court in the second exercise of its discretion is that the person who applies for a joinder must have a clear relationship with the dispute which the parties who are already in the case have placed before it for determination.

CHEDA J discusses this second aspect of the court's discretion in *Sibanda* v *Sibanda & Anor* 2009 (1) ZLR 64 (H) at 66 wherein he cites with approval, the case of *Marais & Anor* v *Pongola Sugar Milling Co & Ors*, 1961 (2) SA 698 (N) in which the two-tier approach in the determination of a joinder was formulated. The approach states that:

> "(i) a party who is seeking joinder must have a direct and substantial interest in the issues raised in the proceedings before the court, and that
> (ii) his rights may be affected by the judgment of the court."

The applicant's narration of events shows that its reason for applying for a joinder is misplaced. It is divorced form the issue which the trustees and Joshua placed before the court under HC 3499/14. It states, in paragraph 3.6 of its founding affidavit, that, as the overall owner of the church's property, it had the right as well as the obligation to be heard in the resolution of *the dispute of succession.*

The pleadings which the trustees and Joshua filed under HC 3499/14 to which the applicant seeks to be joined have nothing to do with the issue of succession at all. The issue which the parties placed before the court does not deal with the question of the person who shall succeed the late Kenneth. It deals with the issue of despoliation which Joshua, the trustees claim, made against them as well as his alleged intention to change the leadership structure of the church.

The trustees do not claim that they have assumed the role which Kenneth played during his life time. They acknowledge him as the founder and overall leader of the church. They allege that he appointed them in the position of trustees of the church. They state that he and them managed the affairs of the church. They do not want anyone, let alone Joshua, to interfere with the leadership structure which their founder and overall leader left in the church. The issue of Kenneth's successor upon which the current application is anchored is, therefore, not before the court.

The applicant claims to have a direct and substantial interest in HC 3499/17. Its interest, it alleges, arises from the claim it is making which is to the effect that it is the overall owner of the property – movable and / or immovable – of the church. Its interest, it claims further, is based on the allegation that the church is its affiliate. It produces no evidence which shows that:

i. it owns the property of the church; and/or
ii. the church is affiliated to it.

Annexure AA (i) which the applicant attached to its application in support of its above claim is at p 10 of the record. It is described as a disbursement voucher. Its contents are so illegible as to render what it is meant to convey and / or support completely meaningless. One cannot tell what was disbursed, when the disbursement was made and to whom it was made, if such was.

Annexure AA (ii) which the applicant attached to the application appears at p 11 of the record. The annexure is a letter which the applicant's World Mission Secretary addressed to Kenneth on 30 September, 1978. It offers to him a personal allotment of US$400 per month payable by the first of each month beginning October 1st, *if funds are available* and a work allotment of US$125 per month, payable as above, beginning October 1st, *if funds are available*. The work allotment was meant to assist or supplement only.

It cannot, from the two annexures, be suggested that the applicant purchased movable and/or immovable properties for the church. A *fortiori* when the work allotment from which purchases were made was meant to assist or supplement only. It is trite that assistance or

supplementary money only augments what the persons who are being assisted are doing for themselves.

The trustees state, and I agree, that they purchased the property of the church from their own contributions, from tithes as well as from donations. If the applicant assisted in the endeavours of the church's membership as the letter of 30 September 1978 suggests, the assistance which the applicant offered to the church cannot turn whatever property which the church acquired and continues to acquire into being owned by the applicant. The church, and not the applicant, owns that property. The statement which the applicant makes in paragraph 2.6 of its founding affidavit confirms the view which l hold of the matter. It states, in the same, that the church's membership contributed in a financial and material respect towards the acquisition of the property.

The contents of annexures C1 and C2 which the trustees attached to their notice of opposition are very revealing. These appear at pp 53 and 54 of the record respectively. They show, in a clear and lucid manner, the absence of the applicant in Zimbabwe. I make the stated observation for the following two reasons:

i. Annexure C1 is the organogram of the applicant's top leadership throughout the world. The applicant has what it refers to as the General Overseer of the Church of God of Prophecy. He is at the helm of the applicant. Immediately under him is the Presbyter Board. It comprises seven (7) General Presbyters. These represent the following regions of the world:

    1. Africa
    2. Asia & Oceania
    3. Caribbean
    4. Central America
    5. North America
    6. South American
    7. Europe, CIS & Middle East.

General Presbyter Stephen Masilela is the applicant's representative in the region of Africa. Annexure C2 are the countries which fall under General Presbyter Masilela. These are forty (40) in number. They criss-cross the entire continent of Africa. However, Zimbabwe is conspicuously

absent from the list of countries which fall under the administration of General Presbyter Masilela. The applicant's claim about the church being its affiliate is, therefore, misplaced.

The applicant offered no explanation for Zimbabwe's absence from the list of African countries which are, as it were, affiliated to the applicant. Counsel for it stammered at the question which related to Zimbabwe's absence from the list of countries which fall under its administration. He eventually honed up and stated that he did not know why Zimbabwe was not one of the countries which fall under the applicant's administration in Africa.

The above-observed matter dovetails neatly into the attitude of the applicant towards HC 3499/14. The case commenced in April / May, 2014. It progressed from the mentioned period of time. It passed through a number of stages which comprised:

a) the dismissal of the application.
b) the trustees successful appeal to the Supreme Court;
c) The remittance of the case back to the court *a quo* following the directive of the Supreme Court to turn the application into an action;

'(d) the parties compliance with the rules of court as a result of which:

(i) the trustees filed their declaration - and
(ii) Joshua filed his plea.

(e) the parties' filing of their pre-trial conference minutes.

It is only after the parties had filed their respective pre-trial conference minutes that the applicant filed this application for a joinder. It does not explain why it folded its hands for a period which stretches from April/May 2014 to 19 June, 2019. Its inaction which stretches for five (5) consecutive years requires a clear explanation which the applicant has, however, failed to give.

The applicant's inaction towards HC 3499/14 displays nothing else other than the attitude a person who has no interest in the case which is before the court. Its statement which is to the effect that it has a direct and substantial interest in HC 3499/14 is, if anything, totally misplaced. It does not have any such interest, let alone substantial interest, in the case at all.

Given the above-described set of circumstances, the question which begs the answer is why has the applicant suddenly taken an appearance of interest in HC 3499/14. The applicant provides the answer to the same. The answer becomes obvious when one refers to para 2.14 of its founding

affidavit. It states, in the same, that the position of Joshua, as captured in his plea to HC 3499/14, is legally and materially correct and it associates itself with his plea.

It is not difficult to observe, from the contents of the paragraph, that it decided to do the bidding for Joshua. Sight should not be lost of the fact that Joshua's father, Kenneth, associated with the applicant in 1978 albeit in an undefined but very small measure. Joshua, in my view, must have realised that the trustees have a strong case against him. He must, therefore, have enlisted the support of some person (s) who were/are known to his father and are in the applicant to come to his rescue. This, in a nutshell, explains the fact that both the applicant and him chose one team of legal practitioners to represent them in this application. The applicant is, no doubt, fighting in Joshua's corner.

That the applicant failed to prove its case on a balance of probabilities is evident from a further reading of para 2.14 of its founding affidavit. It states, in the same, that it seeks to make discovery of certain documents which pertain to its role in:

(a) appointments,

(b) financial contributions - and

(c) overall administration of the local chapter of the church.

It acknowledges, from a reading of the above statement, that the documents which it wishes to discover in HC 3499/14 are not part of the current application. One wonders why they were left out of the same in a situation where the applicant claims that it has a direct and substantial interest in the outcome of HC 3499/14. Such documentary evidence would have tipped the scales of the case in its favour. Their exclusion from the application contributes to the downfall of this application.

The applicant's statement which is to the effect that the joinder, if granted, will not prejudice the trustees was made by it just as a matter of course.

The trustees state, and I agree, that the application has already prejudiced them. They insist, correctly so, that HC 3499/14 has already been placed in absence because of this application.

Granting the application would mean that HC 3499/14 would, in terms of the rules, have to be served upon the applicant which would then:

(i) enter its appearance to defend:

(ii) file its plea and other relevant processes of the court, so that

(iii) its case is at the same stage with that of the parties to HC 3499/14.

The grant will, in short, compel all the parties to HC 3499/14, the applicant included, to comply with r 88 of the High Court Rules, 1971. The prejudice which the trustees stand to suffer remains immeasurable.

The applicant failed to prove its case on a balance of probabilities. It is, in the result, dismissed with costs.

Mushonga Mutsvairo and Associates, applicant's legal practitioners
Danziger and Partners, 1st – 8th respondents' legal practitioners