**DISTRIBUTABLE (93)**

**GOSPEL OF GOD CHURCH INTERNATIONAL 1932**
**v**
**(1) VENDESENI MUNGWERU (2) MUSARURWA HOMBARUME (3) KEMBO MOYO (4) CASPER CHINAKA (5) FORD MATAMBANESHIRI**

**SUPREME COURT OF ZIMBABWE**
**MAKARAU JA, HLATSHWAYO JA & BERE JA**
**HARARE: JULY 16, 2018 AND NOVEMBER 26, 2019**

*S.M. Hashiti*, for the appellant

*N. Mashizha*, for the respondents

**MAKARAU JA:** This is an appeal against the decision of the High Court handed down on 23 September 2017. In the judgment, the court *a quo* refused to grant an interdict as sought by the appellant but instead granted certain relief, which relief the appellant contends was not prayed for by either party.

**BACKGROUND FACTS**

The appellant is a church. Its members have split into two factions. The respondents belong to one of the factions whilst the deponent to the appellant's affidavit in the court *a quo* and his supporters belong to the opposite faction. The factions fight over the right to access a shrine in Rusape, where the remains of the founder of the church are interred.

The appellant was scheduled to hold its annual synod from 23 September 2017 to 4 October 2017. The synod is held at the shrine. Through a letter addressed to the Police in Rusape, the respondents indicated their intention to visit the shrine during the same period.

When the two factions last met at the shrine, violence had broken out. Fearing that there would be a repeat of the previous clashes, the appellant approached the court *a quo* on 18 September 2017, on a certificate of urgency. In the urgent application, the appellant sought an interim order interdicting the respondents and their followers from entering the shrine pending the determination of certain proceedings that were pending before the court *a quo*. I shall revert to these proceedings below.

As final relief, the appellant sought an order, similar to the interim relief, calling upon the respondents to show cause on the return day, why they and their followers should not be interdicted from entering or approaching the shrine pending the finalisation of the pending proceedings. The respondents were to show cause why they should not be interdicted from assaulting, insulting or threatening members of the applicant at the shrine pending the determination of the pending proceedings.

The pending "proceedings" referred to extensively in the appellant's papers were an application for rescission of a default judgment that had been granted against it and in favour of the respondents on 27 July 2017. In that judgment, the court had declared that the respondents and their followers have a right to worship at the shrine without disturbance from the appellant or its representatives.

In opposing the urgent application, in addition to raising a number of preliminary issues, the respondents relied on this order of the court declaring their right to freely worship at the shrine. Thus, they contended that they too had a clear right to worship at the shrine and the appellant could not bar them from so doing in the face of the extant court order in their favour.

**THE DECISION *A QUO***

Despite the clear issue that fell for determination in this application, it appears that ultimately, the arguments *a quo* centred on whether or not the shrine could accommodate both factions concurrently. I can do no better than quote directly from the judgment *a quo* on how the proceedings unfolded.

> "Ultimately the parties' argument centred on whether or not 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 grave" and gets (*sic*) 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 …."

After describing in full its observation during the inspection *in loco*, the court proceeded to consider whether or not the appellant had established the requirements for an interim interdict. It found that the applicant had not. In particular, the court found that the appellant had not established a *prima facie* right and was therefore not entitled to the order sought. The court was however of the view that:

> "…. 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 … 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 …. I engaged the parties on possible attendance times. Having been made aware of the times coupled with the knowledge of the set up at the shrine, I granted the order in the interests of justice. "

The court *a quo* then granted an order in the following terms:

"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 (sic) are interdicted from entering the Gandanzara Shrine in Rusape pending the determination of the court application for rescission of judgment under case no HC 8227/17.
2. The respondents be ordered to pay costs on an attorney and client scale, one paying the other (sic) to be absolved.

INTERIM RELIEF (ORDER) GRANTED

That pending 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 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.oo a.m to 11.30 a.m. The respondents and their followers shall access the grave site of Baba Johane on 28 September 2017 from 11.30 a.m to 7.30 p.m.

4.2 The applicant's leadership shall facilitate entry by unlocking the locks to the grave site and ensuring free passage through the second entrance to the western side of the perimeter of the shrine.

5. 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.
6. The applicant's followers shall not threaten, assault, insult or disturb the respondents during the period of the convention."

It is this order that has been attacked by the appellant as not having been sought by either of the parties.

At the time of hearing this appeal, the period during which the applicant was scheduled to hold its annual synod had come and gone. The interdict sought was no longer of

any import even if this Court had formed the view that it ought to have been granted in the first place. The appellant however persisted with the appeal as it was of the view that it required protection pending the rescission of the default judgment that erroneously granted the respondents rights of access to the shrine. Mr *Hashiti* for the appellant argued that while the 2017 synod had come and gone, the determination of the appeal was necessary to regulate future similar events.

However, in view of the fact that pending this judgment, the part of the default judgment purporting to grant rights of free access to the shrine to the respondents, was rescinded by an order of the High Court as was duly advised by the office of the Registrar, the argument by Mr *Hashiti* lost its force.

Whilst there is no longer a dispute between the parties, it is in the interests of justice and therefore important that we set aside the judgment *a quo* as the order granted was incompetent.

**ANALYSIS**

As discussed above, the substantive issue before the court *a quo* was whether or not the appellant was entitled to the temporary interdict that it urgently sought. This was the dispositive issue in the matter. Put differently, whether or not the appellants had established the requirements for a temporary interdict was an issue upon which the application could turn. A finding one way or the other on this issue would resolve the matter.

The court *a quo* found that it was not, because the appellant had not established the requirements for an interim interdict.

Having pronounced itself on the fact that the applicant had failed to establish the requirements for a temporary interdict, the court *a quo* ought to have rested its jurisdiction. It ought not to have proceeded any further. In fact, it could not have rightfully proceeded as having found that the appellant had not satisfied the requirements for the relief that it sought, the respondents were entitled to a judgment in their favour.

The above position is derived from the settled practice of the courts in this jurisdiction. It is the settled practice when writing a judgment to decide no more than what is absolutely necessary for the resolution of the legal dispute before the court. (See *Nzara and Others v Kashumba N.O. and Others* SC 18/18 and the authorities cited therein with approval). Thus, for instance, if the court has no jurisdiction, no matter how interesting the legal point being raised by the parties, the settled practice is for the court to merely decline jurisdiction and withhold expressing an opinion on the interesting legal points. Similarly with findings such as *in casu*, that the application is ill founded, the court has no basis for proceeding any further.

A finding on a dispositive issue should mark the end of the court's enquiry and of its curiosity too.

It is on the basis of the foregoing that I further hold that the order granted *a quo* was incompetently granted. It was granted by a court that ought not to have proceeded after finding that the appellant was not entitled to the temporary interdict.

With respect, the court a quo fell into the error of not realising that in finding that the appellant had not established the requirements for an interim interdict it had disposed of the matter. A reading of the judgment shows that the court felt that it had a duty to determine

what was fair and reasonable in the circumstances of the matter. It therefore proceeded on this unnecessary inquiry to come up with the order that it did. In doing so it then fell into the second error of granting relief to a respondent in the absence of a counter-application.

The rules of civil procedures in this jurisdiction are such that a respondent in application proceedings, in the absence of filing a counter-application, is not entitled to any relief other than a dismissal of the application with an appropriate order of costs. This is based on the rule of practice that one is entitled to relief only if they have prayed for relief.

A respondent cannot pray for relief in the opposing affidavit which can only be used to oppose the application and not to claim relief from the applicant. It then stands to reason that a respondent who has not filed a counter-application cannot pray for any relief other than the dismissal of the application with an appropriate order of costs. (See *Sumbureru v Chirunda* 1992 (1) ZLR 240 (H).

In *casu* it is common cause that the respondents did not file a counter-application. There was thus no basis upon which after denying the appellant the interdict sought, the court *a quo* could grant the order that it did, which in essence is an order in favour of the respondents.

In making this finding I am aware that a court has the power to issue an order that it deems fit in the circumstances of the matter notwithstanding the framing of the draft order before it. This power is meant to free the court from slavishly following the draft order that it is presented with in the application. It is however not a licence to the court to issue an order in favour of a party who has not prayed for relief. More importantly, it is not a licence to the court to issue an order as happened in *casu*, to a respondent who has not filed a counter- application.

I am further aware that the respondents have argued that before the court *a quo* made the order that it did, it had heard the parties in argument on the possibilities of co-accessing the shrine. That notwithstanding, it was procedurally incompetent for the court *a quo* to issue an order in favour of the respondents in the absence of a counter application seeking such or similar relief.

Further, I am unaware of authority that holds that such a procedural error may be cured by the factual findings of a court after an inspection *in loco* in application proceedings, itself a contentious manner of proceeding, but one on which it is not important that I make a pronouncement in this judgment. I say this because the respondents have sought to argue that the court *a quo* was justified in coming up with the order that it did after it physically inspected the site at the shrine and was satisfied that both factions of the church needed to visit the shrine during the period in issue.

Whilst the judgement states that the order was issued after the court had engaged the parties, it does not state that the order was granted with the consent of the parties, which situation would have changed matters significantly.

It is on the basis of the foregoing that I come to the conclusion that the order granted *a quo* was incompetent and cannot stand.

Although it is glaring from the record that *a quo*, the appellants sought the same relief in the interim as it was seeking in the final order, an issue that has been competently discussed in a number of authorities, it is not important that I advert to this issue in this judgment. This is in view of the decision I have arrived at on the issues discussed above.

It is therefore my finding that the judgment *a quo* cannot stand because the order granted was incompetent. It must be set aside.

Regarding costs, it was not argued before us that there are any circumstances warranting a departure from the general position that these should follow the cause.

In the result I make the following order:

1. The appeal is allowed with costs.
2. The decision of the court *a quo* is set aside and substituted with the following:

"The application is dismissed with costs."

**HLATSHWAYO JA** **:** I agree

**BERE JA** **:** I agree

*Venturas & Samukange*, appellant's legal practitioners

*Nelson Mashizha Legal Practitioners*, respondents' legal practitioners