HB 159/18
HCA 105/16

FULL BLESSINGS OF GOD APOSTOLIC CHURCH

Versus

SALVATION ARMY OF THE TWELVE APOSTLES CHURCH

IN THE HIGH COURT OF ZIMBABWE
BERE & MATHONSI JJ
BULAWAYO 22 MAY 2017 & 21 JUNE 2018

Civil Appeal

N. Mangena, for the appellant
Miss B. Dube, for the respondent

BERE J: The feuding parties in this case are the appellant represented by Aaron Tshuma and the respondent represented by Jephias Ncube.

When the two parties appeared in the lower court the dominant issue that the court felt required determination was which of the feuding parties owned stand 965 Mathendele, Plumtree. After a fully fledged trial, the court *a quo* found in favour of the respondent prompting the appellant to lodge this appeal.

In its detailed notice of appeal filed in this court the appellant attacked the lower court's findings on the following grounds:

"1. The court *a quo* grossly erred and misdirected itself in holding that the legal question that arose was "who between the Salvation Army of the Twelve Apostle … and the Full Blessings of God Apostolic Church … is the owner of stand 965 Mathendele Township Plumtree …, when in actual fact the legal question was whether the "two" were separate entities or not.
2. Pursuant to the ground above, the court *a quo* consequently erred in concluding or dealing with the matter as if there were two separate entities, or alternatively in not determining that question.
3. The court further erred and misdirected itself by concluding that "… It is indisputable that Mr Tshuma's evidence that he founded the Salvation Army of the Twelve Apostle is not consistent" when in actual fact it was, and corroborated by two other witnesses, without challenge."

I propose to summarize the other grounds of appeal.

The main issue in the other grounds of appeal was simply to emphasise the fact that the court *a quo* failed to properly analyse the evidence that was presented before it especially that which tended to favour the appellant.

The court *a quo* was further attacked for having found the evidence led favourably to Jephias Ncube (for the respondent) instead of finding for the appellant.

The court *a quo* came under heavy criticism for failing to appreciate that the respondent had seceded from the appellant to form another church called the Will of God Apostolic Church.

Finally, the court *a quo* was attacked for having awarded costs on attorney and client scale which costs had not been sought for in the pleadings let alone justified.

I wish now to deal with the appeal in detail taking into account the grounds of appeal raised.

Did the court *a quo* err and misdirect itself in determining who between the appellant and the respondent was entitled to claim ownership of the stand in issue?

In this court's view this criticism of the court *a quo* was unfortunate, ambitious and clearly misplaced.

The appellant failed to appreciate that this issue was in fact put as one of the issues for determination formulated by both parties in their joint pre-trial conference memorandum filed in this court on 17 August 2016 (issue 1, 5, record page 41). If the magistrate felt that this was the dominant issue for determination and on which all other issues revolved, the court *a quo* cannot be criticized for doing so.

In fact, a fair analysis of the evidence that was presented to the court *a quo* suggests in my view that the court *a quo* was correct in zeroing on this issue because it was central and decisive to the dispute between the parties.

General Assessment

In his brief but fairly compact judgment the learned magistrate highlighted those facts which swayed him to find in favour of the respondents. There is nothing that was tabled before the presiding magistrate that suggests that the respondent had seceded from the appellant as argued by appellant's counsel. See the case of *Church of the Province of Central Africa* v *Diocese Trustees, Harare Diocese*[1] referred by the appellant's counsel.

The magistrate was particularly impressed by the fact that all the documentary exhibits tended to support the respondent's position and that not a single exhibit was produced to support the appellant's position. For example, the lease agreement in respect of the stand in question bore the respondent's name and the fact that it was in fact Mr Ncube who had applied for same in 1995. See exhibit 1, 2 and 4 which were produced in the court *a quo*. The magistrate was further persuaded to afford more weight to Mr Ncube's evidence as it was neatly corroborated by Mr Vikani and above all by Mr A. S. Khumalo of Plumtree Town Council, who confirmed that the lease agreement for the stand in question was signed by Mr Ncube and Mr Vikani. The ZESA account for the stand which bore Mr Ncube's Name as opposed to Mr Tshuma was a further piece of evidence which swayed the magistrate to find in favour of the respondent.

For the reasons that are fully stated in the lower court's judgment, the story told by Mr Tshuma was found to be unconvincing. Even the witnesses called by the appellant did not help matters as the court found them to be generally unimpressive.

We do not believe that when all is considered, there is merit in the appeal. The appellant's case is further severely weakened by the total absence of any documentary exhibits in its favour.

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[1] 2012 (2) ZLR 392 (S)

The issue of Mr Ncube having acted as either a messenger or agent of Mr Tshuma in applying for the stand in question was considered and dismissed by the lower court for what we consider to be sound reasons.

As Mr Tshuma's case was found to be leaning on unconvincing evidence, the lower court could not possibly have found in his favour. It got worse when Mr Tshuma could not produce documentary evidence to support his contention that he had applied for the stand in 1986 as opposed to the well supported position of Mr Ncube who produced written and corroborated evidence that the stand was in fact acquired in 1995.

Appeal against the awarding of costs on a higher scale

Perhaps the only other point raised on appeal is the decision by the lower court to award costs against the appellant on an attorney and client scale.

It is generally accepted that the court uses its discretion when it comes to the award of costs. But what must not be missed is that that discretion must be properly used. See the case of *Nel* v *Waterberg Leandbouwers Kooperative Vereeniging*[2], per LORD TINDALL JA and the case of *Mahembe* v *Matambo*[3] per CHEDA J. In the instant case, the court *a quo* dismissed the appellant's case with costs on a punitive scale. The judgment does not explain why this punitive scale was invoked, more so given that the parties were not invited to address the court on this issue. It becomes even more confusing if regard is had to the respondent's declaration in the court *a quo* which was silent on the issue of costs.

This court's view is that the lower court did the most unusual by awarding costs at a punitive scale and without any explanation as to its justification. That order cannot stand.

Consequently, the decision of the lower court is slightly amended to read,

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[2] 1946 AD 597

[3] 2003 (1) ZLR 149 (H)

"The defendant pays costs on the ordinary scale."

Other than this minor amendment to the order of the court *a quo*, it is ordered that the appeal be and is hereby dismissed with costs.

Mathonsi J …….. I agree

Messrs Coghlan & Welsh, appellant's legal practitioners
Messrs Mathonsi Ncube Law Chambers, respondent's legal practitioners