

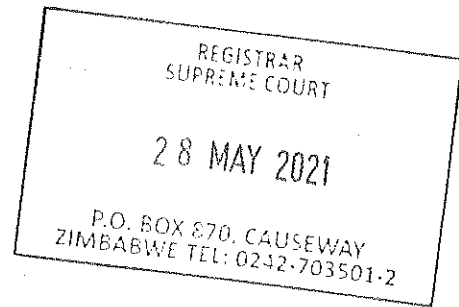
REPORTABLE (65)

(1) COSSAM CHIANGWA (2) AMON CHINYEMBA (3) NATHAN
NHIRA (4) SHEPHERD SEBATA (5) APOSTOLIC FAITH MISSION
IN ZIMBABWE (6) DONARD MDONI (7) ARTHUR
NHAMBURO (8) M. MASHUMBA

v

(1) APOSTOLIC FAITH MISSION IN ZIMBABWE (2) ASPHER
MADZIYIRE (3) AMON DUBIE MADAWO (4) MUNYARADZI
SHUMBA (5) TAWANDA NYAMBIRAI (6) CLEVER MUPAKAIDZWA
(7) BRITON TEMBO (8) CHRISTOPHER CHEMBERE

SUPREME COURT OF ZIMBABWE
MAVANGIRA JA, MAKONI JA & KUDYA AJA
HARARE: 5 JUNE, 2020 & 28 MAY 2021



T. Magwaliba and *L. Madhuku*, for the appellants

F. Girach and *Ms. F. Mahere*, for the respondents

KUDYA AJA: This is an appeal against the entire judgment of the High Court dated 4 September 2019, in which the court *a quo* granted a *declaratur* and consequential relief sought by the respondents against the appellants and dismissed the application for a *declaratur* sought by the appellants against the respondents.

The order of the court *a quo* erroneously confirmed the terms of a provisional order of the initial urgent chamber application that had by consent of the parties been removed from the roll of urgent chamber matters on 8 October 2018, and enlisted on the opposed roll. The provisional

order was substituted by an “amended draft order” filed together with the respondents’ answering affidavits and heads of argument on 2 November 2018.

The erroneous order was, with the consent of the parties, corrected by this Court in terms of s 22 (1) (a) of the Supreme Court Act [Chapter 7:13] in Civil Appeal No. SC 527/2019, which was specially lodged by the respondents for that purpose and heard just before the present appeal. The corrected order of the court *a quo*, therefore forms the basis of the present appeal.

THE FACTS

The appeal concerns a church dispute between two formations for the control and leadership of the Apostolic Faith Mission in Zimbabwe (the AFM or the church). The appealed judgment is a consolidation of two applications that were filed separately by the parties.

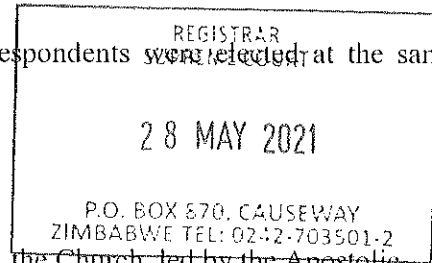
The first application, HC 9149/18, was filed by the first five respondents against the seven hominal appellants on 10 October 2018, while the second application, HC 179/19, was filed by the first five appellants against the second, third, sixth, seventh and eighth respondents on 10 January 2019.

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CAUSEWAY

In the first application, the respondents sought the nullification of a meeting held by the appellants on 22 September 2018, and all subsequent acts flowing from it while in the second application the appellants sought recognition as the duly elected office bearers of the church and consequential relief. The High Court granted the first application and dismissed the second, with costs.

The church is a *universitas* with a written constitution and consequent regulations, which inscribe its foundational values, confession of faith, mission and governance structures and reposes the power to sue and be sued in its national office bearers in clauses 1.2, 1.3, 1.4 1.4. 6 (f) and 12.4.1, respectively.

The dominant protagonists in the two applications were the second respondent and the first appellant, respectively, who were elected President and Deputy President of the church at the triennial elections in April 2015. The third and fourth respondents were elected at the same elections as General Secretary and National Administrator.



Between August 2015, and 15 September 2018, the Church, led by the Apostolic Council and Workers Council, conducted a constitutional review process (CRP) through a Constitutional Review Committee (CRC) chaired by the fifth respondent, a co-opted member of the Apostolic Council. The CRP was designed to address acute electoral, financial and governance shortcomings through the amendment of the constitution and geared to deliver free, fair and credible church elections, strengthen accountability and transparency and engender parity and equity in the conditions of service of the clergy and development programs of the church in both rural and urban areas.

The CRP culminated in the Extraordinary General Meeting, EGM, of the Workers Council of 10 February 2018, which resolved to hold the triennial Provincial and Workers Council elections due on 28 April 2018, after “the Workers Council considers and if deemed fit, passes, with or without amendment, the proposed amendments to the Constitution of the Apostolic Faith

Mission in Zimbabwe in terms of the attached draft” at its scheduled meeting of 28 April 2018.

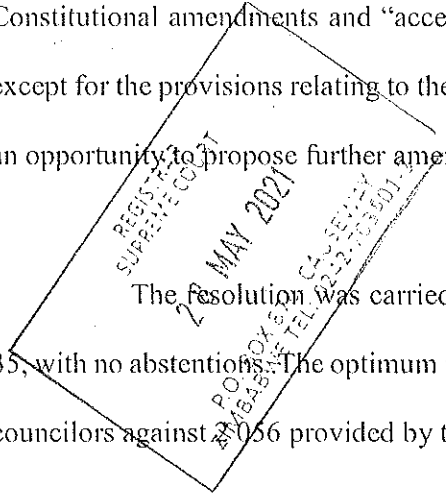
The meeting of 28 April 2018, was terminated unceremoniously without resolving the proposed resolution. Tonderai Mathende took the Church, the first, second and fifth respondents and the first appellant to court under HC 4756/18 and obtained an order compelling the 2015 office bearers to reconvene and conclude the aborted Workers Council meeting of 28 April 2018.

By a letter dated 31 July 2018, the second respondent called for a Workers’ Council Meeting to be held on 15 September 2018 in compliance with the court order issued under HC 4756/18.

On 15 September 2018, the Workers Council met and considered the proposed Constitutional amendments and “accepted” them subject to the suspension of all the provisions, except for the provisions relating to the conduct of elections in order to give other church members an opportunity to propose further amendments to the amendments.

The resolution was carried by 2 021 votes, inclusive of the appellants’ votes, against 35, with no abstentions. The optimum number of councilors supplied by the respondents was 3 475 councilors against 2 056 provided by the appellants.

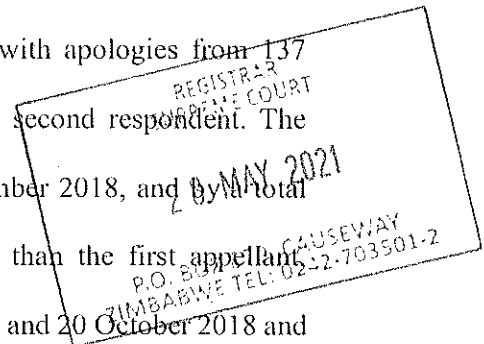
On 21 September 2018, the Apostolic Council met to consider the dates and rules for the impending triennial elections. The provincial elections were to be held on 29 September and 3 October 2018, while the national elections would be on 3 November 2018. The first appellant



told the meeting that “he would go his own way because he did not accept the resolution that was passed by the Workers Council on 15 September 2015”. Whereupon he served written notice, dated 20 September 2018, and co-signed by all the appellants, except the fourth, on his fellow national office bearers of the meeting of 22 September 2018. Para 2, of the notice implored the targeted audience to:

“Please note that this is a National Workers Council of all those councilors who strongly feel the adoption of the DRAFT resulted in the formation of a totally different church and is in itself a departure from the church that they have always cherished and loved. It is, therefore, a National Workers Council of those councilors who would like to remain in the AFM in Zimbabwe Church which is governed by the old constitution which the 15th September National Workers Council attempted to repeal.”(My emphasis)

The meeting of 22 September 2018, was purportedly attended by 2 056 councilors comprised of 1 562 delegates and 567 pastors from 513 assemblies with apologies from 137 assemblies. The attendees ignored the cease and desist call from the second respondent. The meeting, *inter alia*, reviewed and nullified the resolution of 15 September 2018, and by a total of 1 557 affirmative votes dismissed the serving national bearers other than the first appellant, arrogated to themselves the power to conduct triennial elections on 6, 13 and 20 October 2018 and incited the members to revolt against the defrocked office bearers.



On 25 September 2018, the Apostolic Council abandoned the saved electoral amendments because they were in complete dissonance with the preserved governance structures of the amended constitution.

On 26 September 2018, the appellants spurned the cease and desist order and call to

return to the mainstream fold issued by the third respondent. They appointed their own 26 provincial overseers and the fourth appellant as the national administrator to whom church funds were to be remitted. They also urged all church members to ignore the triennial dates set by the apostolic council.

On 27 September 2018, appellants were suspended without pay and benefits and subsequently charged with participating in an illegal meeting and fomenting rebellion, disharmony, confusion, destabilization, disorder and disturbances against the church, forming a splinter group and usurping the powers of the Apostolic Council and the other office bearers in violation of clauses 1.4. 2 and 1.4.6 of the constitution.

They snubbed the charges and notices of hearing, and were dismissed from their official positions on 15 October 2018, with effect from their respective dates of suspension. They refused to vacate church premises and surrender church assets in their possession or under their control. They were permanently replaced as office bearers at the national elections held by the respondents on 3 November 2018.

The appellants conducted parallel provincial elections on 3, 6, 7, 13 and 14 October 2018 and Worker's council elections on 20 October 2018, where the first four appellants were elected as President, Deputy-President, General Secretary and National Administrator. It was in their collective capacity as purported office bearers that they lodged the second application.

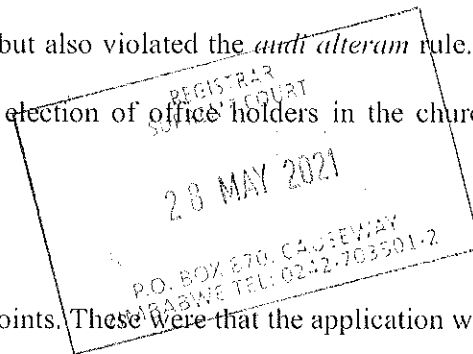
THE ARGUMENTS PRESENTED IN THE COURT *A QUO*

The first application

In the first application, the respondents submitted that they were the duly elected office bearers of the church, who had legal standing to sue on its behalf for the vindication and protection of its assets through a *declaratur* and an interdict. They contended that they had satisfied the requirements for a *declaratur* prescribed in s 14 of the High Court Act [*Chapter 8:06*] and the common law requirements for a final interdict and were thus entitled to such relief.

They argued that the meeting of 22 September 2018, was *ultra vires* the constitution in that it violated the notice and quorum requirements stipulated in clause 12.7.1 as read with 12.3, clause 13.3.1 of the regulations and clauses 12.6 and 12.9 and the financial probity arrangements enshrined in clause 12.5 and 12.6 of the constitution. They also argued that the vote of no confidence was not only alien to the constitution but also violated the *audi alteram* rule. Lastly, they contended that the appointment, instead of election of office holders in the church, was anathema to the constitution.

The appellants took five preliminary points. These were that the application was not urgent; the respondents did not have *locus standi* to represent the church as their tenure of office as national office bearers had expired on 28 April 2018, and had not been renewed, the matter was *lis pendens* in *Mujokeri v Madziyire* HC 4583/18, in which judgment had been reserved; the application was a disguised review of the outcomes of the meeting of 22 September 2018, which could not be sought urgently, on review, or through a declarator. And lastly, that there were material disputes of fact pertaining to the quorum of the meeting of 22 September 2018, which could not be resolved on the papers.

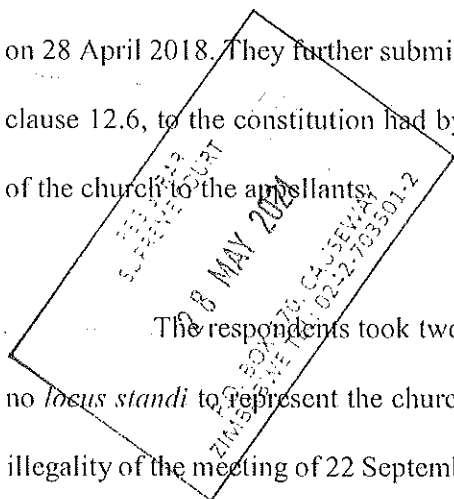


On the merits, the appellants implicitly conceded that their meeting was not convened in terms of the constitution by ascribing the call to “a big constituency of the church which was clearly not happy with the way the church was going about the constitutional changes”. They, however argued that this amorphous grouping had the power to dis-appoint just as it had the power to appoint the respondents. They strongly contended that the resolution of 15 September 2018, was in breach of the mandatory procedural requirements of the two-thirds quorum prescribed in clause 12.6 of the constitution.

The second application

In the second application, the appellants, who baptized themselves as “the Originals”, submitted that as the office bearers elected by the church at the triennial elections of 20 October 2018, they had the power to vindicate and protect the assets of the church from the respondents, whom they christened “the Reform Side”, whose tenure of office expired by the effluxion of time on 28 April 2018. They further submitted that the respondents by violating the amendment clause, clause 12.6, to the constitution had by public acclamation forfeited their claims to the leadership of the church to the appellants.

The respondents took two preliminary points. They contended that the appellants had no *locus standi* to represent the church as their election to the national offices was tainted by the illegality of the meeting of 22 September 2018, from which they traced their authority. The second was that there were material disputes of fact on the procedure, substance and effect of the meeting of 22 September 2018, which could not be resolved on the papers.



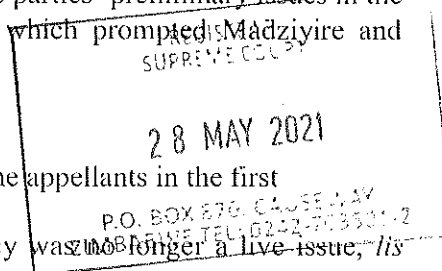
On the merits, the appellants contended, for the first time in argument that, the appellants had seceded from the church on 22 September 2018 and therefore did not have *locus standi* to represent the church. They argued that the respondents sought to overhaul the constitution and reframe the church in their own image by abandoning the confession of faith and the fundamental doctrines of the church.

THE DETERMINATION OF THE COURT A QUO

The court *a quo* criticized both parties for raising preliminary points “in such a contentious matter.” It prefaced its decision on the preliminary objections by remarking that:

“Both Madziyire and Chiangwa should have realized that preliminary matters, though permissible in terms of the rules of court, served no purpose in such a contentious matter as the present one. They should have remained alive to the fact that the same required the court to consider the merits of the case as opposed to having the same resolved on the basis of technical issues. Any technical issue which is not capable of resolving the dispute of the parties is not worth the paper on which it is written. It becomes a time-wasting exercise which does not enhance the work of the court. It should, therefore, be avoided as it constitutes an exercise in futility which is of no benefit to anyone. It does not benefit the party which raises it, let alone the party against which it is raised. Apart from the issue of *lis pendens* which Chiangwa raised, I shall, therefore, deal with all the parties’ preliminary issues in the body of this judgment. They all relate to the reasons which prompted Madziyire and Chiangwa to file their respective applications.”

In regards to the preliminary objections moved by the appellants in the first application, the court *a quo* ruled that, the question of urgency was no longer a live issue, *lis pendens*, could not be sustained as the pending judgment in *Mujokeri v Madziyire* HC 4583/18, had been handed down on 25 March 2019, prior to the hearing before it, there were no material disputes of fact on the quorum of 15 September 2018, and the use of a declarator rather than a review in the circumstances of the application was proper, as a nullity could not be reviewed. And



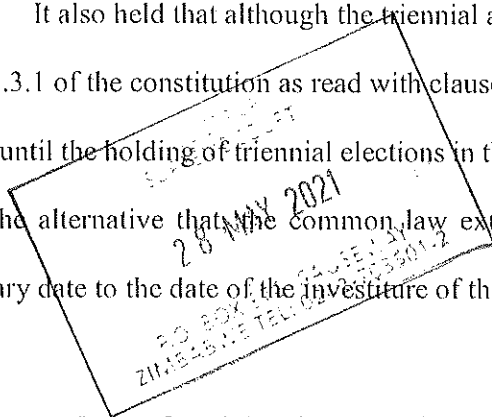
lastly, that as the respondents were the only office bearers of the church at the time the proceedings were instituted, they had the requisite *locus standi* to do so.

On the merits, the court *a quo*, found that on a proper application of the operative constitution of the church, the respondents had established their case on a balance of probabilities and granted them the relief set out in the amended draft order filed on 2 November 2018, as corrected by this Court.

It specifically found that they were the office bearers of the church vested with the power to call for, hold and preside over the Workers Council meetings.

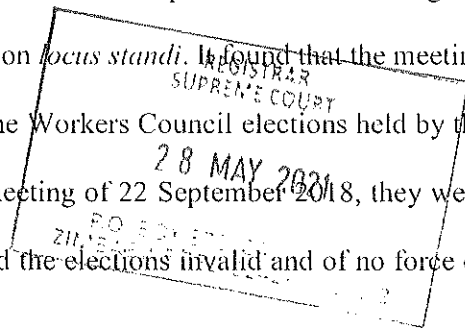
It also held that although the triennial anniversary date had passed on 28 April 2018, clause 13.3.1 of the constitution as read with clause 13.1.1 of the regulations, preserved their term of office until the holding of triennial elections in the calendar year in which the triennial year fell. And in the alternative that the common law extended their appointment beyond the triennial anniversary date to the date of the investiture of their elected successors.

It thus found that the respondents had proved that the conduct of the appellants on 22 September 2018 had been motivated by selfish ambition to “illegally snatch power within the church through a coup” and “split the church in their quest for power” and not over any constitutional reform dispute, which reforms they voted in favour of. It further determined that the meeting of 22 September 2018, suffered from fatal and incurable extrinsic and intrinsic irregularities that were in violation of the constitution, which rendered the meeting void *ab initio*.



Lastly, it held that any outcomes that flowed from that meeting were also void and of no force or effect.

On the preliminary issues raised by the respondents in the second application, the court *a quo* ruled that there were no material disputes of fact, which could not be resolved on the averments on quorum on the papers of the appellants in respect of the meeting of 22 September 2018. It upheld the respondents' objection on *locus standi*. It found that the meeting violated the constitution of the church. Further that, as the Workers Council elections held by the appellants on 20 October 2018, were premised on the meeting of 22 September 2018, they were tainted by these violations. It found both the meeting and the elections invalid and of no force or effect.



On the merits, it held that the appellants bore the onus of establishing on a balance of probabilities that the respondents had seceded from the mainstream church and formed a new church by abandoning the church constitution and adopting the proposed amendments to that constitution. It found that the appellants had not placed any evidence capable of discharging the onus. They had not filed the proposed amendments nor particularized the clauses in the accepted but suspended constitution that violated the operative constitution. Rather, they had produced and relied on the same constitution as the respondents. The court dismissed the appellants' contention that at the time the meeting of 15 September 2018, was held, the respondent's tenure of office had expired on two grounds. The first, was that clause 13.3. 1 of the constitution as read with clause 13.3 of the regulations allowed the office bearers to continue in office beyond the triennial anniversary of their election to any date within the calendar year of such anniversary. The second

was that the common law abhorred a vacuum and thus allowed office bearers of a *universitas* to continue in office until elections were held to replace them.

It was on the basis of these findings that the court *a quo* granted the first application and dismissed the second application with costs.

THE GROUNDS OF APPEAL

The five grounds of appeal raised by the appellants were framed as follows:

- “1. The High Court erred in failing to find that the adoption of a new constitution by the second to eighth respondents and their followers on 15 September 2018, was unprocedural and not in accordance with the provisions of the Constitution of the fifth appellant.
2. The High Court consequently erred in failing to find that the second to eighth respondents and their followers seceded from the church of the fifth appellant as from 15 September 2018 and therefore had not *locus standi* to challenge the proceedings of the fifth appellant’s church subsequent to that date.
3. The High Court further erred in finding that the appellants had no *locus standi* to institute the proceedings in case number HC 179/19 and having so found in going ahead to determine the merits of that application.
4. The High Court further grossly erred in finding that the new Constitution adopted by the second to eighth respondents was not a renunciation of the fifth appellant’s Constitution when the said constitution was not placed before the court by the respondents who had the onus to place it before the court.
5. The High Court further erred in finding that the appellants could not seek consequential relief upon the grant of a declarator unless it was combined with an interdict or a claim for a vindicatory relief.”

ISSUES FOR DETERMINATION ON APPEAL

The cumulative import of the first four grounds of appeal was that the court *a quo* grossly misdirected itself in finding that the respondents and not the appellants were the proper office bearers of the church imbued with the requisite legal standing to act on its behalf. The last ground of appeal interrogates the correctness of the observation of the court *a quo* that the

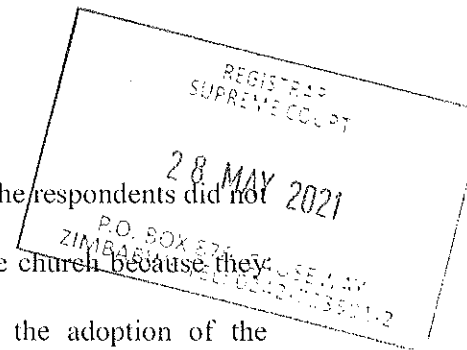
declarator sought by the appellants was fatally defective for want of vindicatory consequential relief. The two issues for determination on appeal that arise from all the grounds are:

1. Whether the court *a quo* was correct in finding that the respondents and not the appellants were the recognized office bearers of the church, who had *locus standi* to act on its behalf.
2. Whether the declarator sought by the appellants was not conjoined with consequential relief and therefore fatally defective.

SUBMISSIONS IN THIS COURT

In this Court, Mr *Magwaliba*, for the appellants submitted that the respondents did not have *locus standi* to institute or defend legal proceedings on behalf of the church because they seceded from the church on 15 September 2018. He contended that the adoption of the constitutional amendments by the Workers Council on 15 September 2018, constituted the act of secession in two respects. The main one was that the adoption was in breach of the peremptory notice and quorum requirements prescribed in clause 12.6 of the constitution. And the alternative was that the very adoption of the amendments whose content was materially at variance with the content of the amended constitution constituted a renunciation of the original constitution, and was therefore an act of secession. He also contended that the duty to place the constitutional amendments before the court *a quo*, which would have established secession, lay on the respondents. He argued that the effect of the act of secession was that the respondents ceased to be office bearers of the church and concomitantly lost the right to represent the church in any legal proceedings lodged after that date.

He further contended that it was remiss of the court *a quo* to further determine the



second application on the merits once it had decided the issue of *locus standi* against the appellants.

Lastly, he contended that the finding of the court *a quo* that the relief sought in the second application was fatally defective for failing to conjoin the declarator with an interdict *cum* vindication was incorrect.

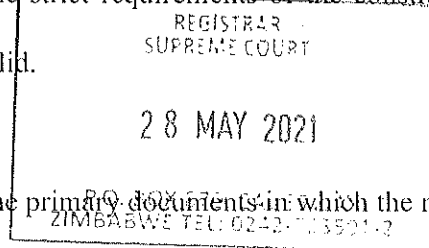
Mr *Girach*, for the respondents, submitted that the secession argument could not be properly raised in the court *a quo* or in this Court because it had not been pleaded by the appellants in their opposing affidavits in the first application and founding affidavits in the second application. He contended that the appellants' case in both claims was based on the purported illegal stay in office subsequent to 28 April 2018.

In the alternative, he argued that the resolution accepting and immediately suspending the constitutional amendments other than those relating to elections did not constitute secession. He contended that the respondents remained the only office bearers of the church imbued with the power to represent it in all legal proceedings launched by or against the church.

In reply, Mr *Magwaliba* argued that the oblique reference to the negation of the “foundational and fundamental doctrines of the AFM in Zimbabwe and of the AFM International” in the appellants' memorandum of 24 September 2018, and the averments in para 46 to 49 of the appellants' founding affidavits sufficed to found secession as a cause of action.

THE LAW

The law concerning *universitas* and the power of the courts to interfere in their affairs is reproduced in Bamford's *The Law of Partnerships and Voluntary Associations in South Africa* 3rd ed at p 849 and restated in various cases such as *Dynamos Football Club (Pvt) Ltd & Anor v ZIFA & Ors* 2006 (1) ZLR 346 (S) 355G and 356A, *Independent African Church v Maheya* 1998 (1) ZLR 552 (H) at 556E and *Independent African Church v Maheya* 2000 (1) ZLR 39 (H). It is that courts generally construe the articles of association or constitution of voluntary associations' strictly. Thus, any conduct, which falls outside the strict requirements of the constitution of a *universitas* would generally be adjudged to be invalid.



This is because the articles constitute the primary documents in which the nature, manner and scope of voluntary associations are reposed. It is also from these articles that voluntary associations derive universal recognition by the courts.

Another established principle of our law is that an applicant's cause stands or falls on his founding affidavit and not in an answering affidavit while the defence of a respondent stands or falls on his opposing affidavit. See *Steinberg v Cosmopolitan National Bank of Chicago* 1973 (4) SA 564 (RA) at 575G, *Austerlands (Pvt) Ltd v Trade and Investment Bank Ltd & Ors* SC 2006 (1) ZLR 372 (S) at 378D-E; *Moyo v Zvoma* SC 28/10, *Bonnyview Estates (Pvt) Ltd v Zimbabwe Platinum Mines (Pvt) Ltd* SC 15/18 and *Pountas' Trustee v Lahamas* 1924 WLD 67 at 6.

The principles on which secession is based are well settled in this country. They are crystallized in the case of *The Church of the Province of Central Africa v Diocesan Trustees*,

Harare Diocese 2012 (2) ZLR 392 (S). In that case at 415B and in *Sibanda & Ors v The Apostolic Mission of Port Oregon (Southern African Headquarters)* SC 49/18 at p 11, secession was equated to schism and unilateral declaration of independence and was authoritatively defined as “the separation of a Church into two Churches or the secession of a group owing to doctrinal, disciplinary differences”.

Again, the common law principle governing the expiration of fixed tenure of office bearers was settled in the cases of *Padayiche v Pavadai NO & Anor* 1994 (1) SA 662 (W) at 672G and *Exparte United Party Club* 1930 WLD 277 at 281. It is that the tenure of office of elected office bearers is not terminated by the effluxion of time but by subsequent elections that are held for new office bearers.

APPLICATION OF THE LAW TO THE FACTS

Whether the court *a quo* was correct in finding that the respondents and not the appellants were the recognized office bearers of the church, who had *locus standi* to act on its behalf.

The appellants nailed their colours on the secession argument. In so doing, the appellants lost the opportunity to attack the bases upon which the court *a quo* held that the respondents and not the appellants were the proper office bearers of the church who had the legal standing to represent it in legal proceedings.

The case pleaded by the appellants in the second application was predicated on the expiration of the triennial tenure of the respondents on 28 April 2018. This was expressly stated in paras 17 to 19 of the appellants’ main founding affidavit deposed to by the first appellant. That was why the court *a quo* relied on clause 13.3.1 of the constitution as read with clause 13.3 of the

regulations and the common law principle stated in the *Padayiche* case and *Ex parte United Party Club* case for its decision.

The secession argument was raised by the appellants for the first time in their supplementary heads of argument filed *a quo* some two months after the respondents had filed their own heads. The supplementary heads were not based on the pleadings before the court *a quo*. The failure to plead secession hamstrung the appellant's case in that they failed to particularize the changes rendered to the constitution, which overhauled rather than amended the constitution, was the basis for the finding *a quo* that the appellants had failed to discharge the onus on them to establish secession.

It is for these reasons that I agree with the submission made by Mr. Gwete in this Court that the appellants could not properly premise their grounds of appeal on a cause of action, which they did not plead *a quo*. The correctness of the submission is borne out by the well-established principle of our law that a case stands or falls on its founding affidavit. It does not stand on the answering affidavit or in correspondence exchanged between the parties before the institution of litigation.

Thus, the contention by Mr *Magwaliba* that the oblique reference to the breach of “foundational and fundamental doctrines of the AFM in Zimbabwe and of the AFM International” in the appellants’ memorandum of 24 September 2018, coupled with the averments made in paras 46 to 49 of the appellants’ founding affidavit sufficed to found secession as a cause of action is incorrect.

The letter addressed to the respondents on 24 September 2018, is not a pleading. The contents of that letter were not pleaded in the appellants' founding affidavits and they do not, standing on their own, constitute pleadings.

Paras 46 to 49 of the appellants' founding affidavit merely summarized the schism that existed in the church in the aftermath of the unconstitutional meeting held by appellants on 22 September 2018, and constituted the concluding remarks of the cause of action raised in paras 17 to 19 of the same affidavit. These paras do not plead secession to be a derivative of the meeting of 15 September 2018.

The submissions made by Mr *Girach* in this respect have merit and must be upheld.

The import of this finding is that the appeal should really be dismissed at this stage. I, however, proceed to deal with the appeal in the further respects that were argued for the sake of completeness.

Mr *Magwaliba* contended that the failure to strictly abide by the requirements of clause 12.6 of the constitution invalidated the meeting of 15 September 2018, and the outcomes that flowed from it. *Per contra* Mr *Girach* argued that that meeting together with its outcomes was valid.

In terms of clause 12.9.1 of the constitution the *quorum* required for a valid meeting

for the despatch of a constitutional amendment is a simple majority of the full complement of the Workers Council. Whether reliance is placed on the 3 475 total membership figure provided by the respondents or 2 056 figure supplied by the appellants, the quorum was achieved by the recorded total number of 2 056 councilors in attendance on 15 September 2018.

Clause 12.6 of the constitution provides that:

“To amend this Constitution written notice shall be given to the General Secretary by Provincial Workers Council, the Apostolic Council, at least six months before the next Workers’ Council meeting. In the said notice, details must be given of the proposed amendment. Such notice shall then be forwarded to all Provincial Workers Councils in preparation for the next Workers Council Meeting. A two-thirds majority of the Workers’ Council shall decide whether the Constitution should be amended or not.”

PROVINCIAL WORKERS COUNCIL
28 MAY 2021
P.O. BOX 100
ZIMBABWE TEL: 0242-763501

The cumulative and conjunctive requirements to pass a valid constitutional amendment

are that:

1. Six months written notice from either the Provincial Workers Council or the Apostolic Council or both be given to the General Secretary before the Workers Council meeting at which the amendments are to be considered;
2. The details of the proposed amendments must accompany the notice;
3. The notice and the detailed amendments must be sent to all Provincial Workers Councils before that Council meeting;
4. The quorum for passing the amendment is a two-thirds majority of the optimum membership of the Workers Council.

Mr *Magwaliba* correctly contended that clause 12.4.1 and 12.3.1 of the constitution enjoins the Workers Council and the Apostolic Council and the office bearers, acting of their own accord, to strictly abide by the letter and spirit of the constitution. He also correctly contended that

the courts are enjoined by case law, such as in the *Dynamos* matter, *supra*, to generally construe the constitutions of *universitas* like the church strictly.

The meeting of 15 September 2015 was, however, convened on a month's and not six months' notice. The notice emanated from the President and General Secretary and not the Workers Council or Apostolic Council. However, the notice together with the proposed amendments were dispatched to the Provincial Councils for the next Workers Council meeting by the General Secretary. The parties were at variance on whether the resolution of that day was passed by the two-thirds quorum prescribed in clause 12.6.

The second and third respondents did not convene that meeting of their own accord. They did so in obedience to a judicial command emanating from the unopposed Mathende application. They were commanded to convene the Workers Council meeting on 30 days' notice to the members of the Workers Council. The 30 days were to be calculated to commence within 7 days of the service of the order on the last of the respondents cited in that order.

The onus to establish, on a balance of probabilities, the date on which the last of the respondents in HC 4756/18 was served with the court order was on the appellants. They did not adduce any evidence to that effect in their papers. In the absence of that evidence, the argument by Mr *Magwaliba* that 15 September 2018, fell outside the outer limits of the court order is unsustainable.

It seems to me that the failure of the respondents to abide by the constitutional time

frame would not affect the constitutional validity of the meeting for the reason that the time limits for convening the meeting of 15 September 2018, were prescribed by a duly constituted court of law. It is trite that extant court orders must be obeyed. This principle was affirmed by this Court in *Econet Wireless (Pvt) Ltd v Minister of the Public Service, Labour and Social Welfare & Ors* SC 31/16 at p 6, where BHUNU JA aptly remarked that:

“The doctrine of obedience of the law until its lawful invalidation was graphically put across by Lord Radcliffe in *Smith v East Elloe Rural district Council* [1956] AC 736 at 769 when he observed that:

“An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of illegality on its forehead. Unless the necessary procedures are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders.” If it were not so, and every litigant challenging the validity of any law was excused from obeying the law pending determination of its validity, there would be absolute chaos and confusion rendering the application of the rule of law virtually impossible. This is because anyone could challenge the validity of any law just to throw spanners into the works to defeat or evade compliance with the law.”

To the same effect is *Hodkinson v Hodkinson* (1952) 2 ALL ER 567 (CA) at 569C:

“It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it even extends to cases where the person affected believes it to be irregular or even void”

That order was extant on the date of the meeting. It, therefore, conferred the *imprimatur* of validity to the meeting, notwithstanding that it was not in accordance with the constitutionally stipulated six month notice period and that the notice did not come from the constitutionally mandated source. It is clear to me that the first three requirements prescribed by clause 12.6 were met.

The only issue that has exercised my mind was whether the two-thirds threshold of the

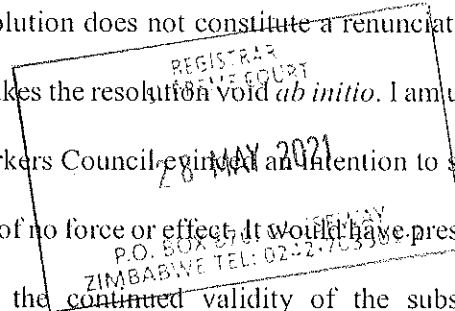
optimum membership of the Workers Council was met. If the full membership was the tally sheet figure of 3 475 supplied by the respondents, then the 2 021 councilors who passed the proposed amendments would have been short by 296 of the 2 317 members required to pass the resolution. My burden was removed by the finding of the court *a quo* on this aspect. It accepted the figure of 2 056 councilors furnished by the appellants as the established optimum number of the Workers Council. That finding was not appealed. The effect of this finding is that the proposed amendments were passed by 98 per cent of the total Workers Council membership, which figure exceeded the minimum 67 per cent constitutional threshold. Consequently, the resolution of 15 September 2018, met all the procedural requirements prescribed in Clause 12.6.

The alternative contention on secession submitted by Mr *Magwaliba* is unsustainable. The import of the submission is to deny the Church the constitutional power to reframe itself in tandem with evolving contemporary religious developments and thought, which would impact on its shared fundamental religious doctrines and principles. The constitution of any organisation is a living document, which must evolve and be amenable to necessary periodic reviews to remain relevant to its vision, mission and core values. The church is no exception. It cannot remain trapped in a time warp of a bygone era.

In *casu*, there were no entrenched or pillar clauses in the church constitution which precluded the Workers Council from amending the Constitution. Rather, the constitution contemplated its own amendment, including the clauses relating to the church's confession of faith, ecclesiastical doctrines, governance, worship and discipline. All that was required of the Workers Council was to follow the requirements of Clause 12.6 and the prescribed consultative processes.

It did so subject to the intervening order of court that had to be obeyed in accordance with the doctrine of obedience to the law; an aspect the rule of law.

In any event a reading of the *Church for the Province of Central Africa* case, *supra*, at p 407E suggests that the passing of an invalid resolution does not constitute a renunciation of the fundamental doctrines of the church but merely makes the resolution void *ab initio*. I am unable to find that, by passing an invalid resolution, the Workers Council evinced an intention to secede from the Church. A void *ab initio* resolution would be of no force or effect. It would have preserved the subsisting status *quo ante*, thus guaranteeing the continued validity of the subsisting constitution and tenure of the elected office bearers.



The alternative submission predicating secession on the content of the constitutional amendments would, therefore, be dismissed for lack of merit.

There is a further basis for dismissing the secession argument. It is that the appellants were aware, before their meeting of 22 September 2018 that the resolution had suffered a still birth at inception and would not be applied to the impending triennial elections. The awareness is shown by the following factors. Firstly, the appellants characterized the resolution in the notice of meeting of 20 September 2018, as an “attempt to repeal” the constitution. Secondly, they boasted in their memorandum of 26 September 2018 that their unsanctioned meeting had prompted the Apostolic Council to abandon the electoral amendments. Lastly, they declined to return to the mainstream fold when entreated to do so on 26 September 2018. There was therefore no secession by the respondents emanating from the adoption of the resolution at the time the appellants held the

meeting of 22 September 2018, conducted their own triennial elections in September and October 2018 and lodged the second application in January 2019.

The further contention by Mr *Magwaliba* that the appellants were prevented from particularizing the decimation of the subsisting constitution by the respondents' failure to attach the constitutional amendments to their pleadings *a quo*, is clearly disingenuous.

This contention, which relates to the fourth ground of appeal, seeks to place the onus of placing the amendments on the respondents. In so doing, the appellants overlooked the trite principle of our law that he who alleges must prove. This point was emphatically restated by this Court in *Zimbabwe United Passenger Company Limited v Packhorse Services (Pvt) Ltd* SC 13/2017 at 11 as follows:

“The cardinal rule on *onus* is that a person who claims something from another in a Court of law has to satisfy the Court that he is entitled to it. See *Pillay v Krishna*, 1946 AD 946 at 952 – 953. It also settled that he who alleges must prove. See *MB Investments (Pvt) Ltd v Oliver & Partners*, 1974 (3) SA 269 (RA).”

See also *Goliath v Member of the Executive Council for the Eastern Cape* [2014] ZASCA 182 at p.8.

It is trite that the existence of secession is a question of fact. The appellants bore the *onus* to establish secession by producing the proposed constitutional amendments. They disingenuously claimed that the amendments were hidden from them by the respondents when it was common cause that both hard and soft copies of the documents had been dispatched to all structures on 18 February 2018 and 31 July 2018. It is clear that the appellants did not attach the

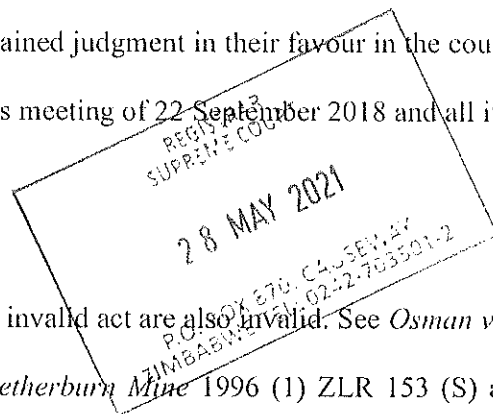
proposed amendments to their own pleadings because they were not necessary to establish the case they pleaded in the second application. This last point on secession is also unmeritorious.

The appellants' failed to establish the jurisdictional facts upon which they sought to predicate the secessionist argument. Accordingly, the first four grounds of appeal must fail.

In the premises, the respondents wielded the power to institute legal proceedings for and on behalf of the church and were entitled to the declaratory order and consequential relief sought, which were designed to protect the assets of the church from the interlopers in the parallel formation. They properly exercised that power and obtained judgment in their favour in the court *a quo*, which judgment correctly declared the appellants meeting of 22 September 2018 and all its subsequent outcomes invalid.

It is trite that all outcomes flowing from an invalid act are also invalid. See *Osman v Jhavary & Ors* 1939 AD at 361 and *Muchakata v Netherburn Mine* 1996 (1) ZLR 153 (S) at 1578BC. The meeting of 22 September 2018 was the genesis of the appellants' secession from the mainstream church which had matured by the time they held their own parallel elections in October 2018 and filed the second application in January 2019. The finding *a quo* that it was the appellants who seceded is therefore unassailable.

I uphold the finding *a quo* that election year referred in clause 12.9.1 of the constitution as read with 13.3.1 of the regulations correlated to the 2018 calendar year in which the triennial cycle fell. Again the *Padayiche* and *Ex parte United Party Club*, cases, *supra*, are authority for the



proposition that office bearers continue to hold office even beyond their prescribed time until replaced by election. The finding of the court *a quo* to the same effect is unassailable.

The finding that the meeting of 22 September 2018, was a nullity, undermines the basis upon which the second application was conceived. It was premised upon the legitimacy of the 20 October 2018, elections, which in turn derived efficacy from the invalid meeting of 22 September 2018. The appellants brought this application as office bearers of the Church, which they were not. They, therefore lacked the legal capacity to do so. The court *a quo* correctly held that they did not have the *locus standi* to institute proceedings on behalf of the Church.

It is correct that the court *a quo* then proceeded to deal with other ancillary issues. The issue of *locus standi* had been raised by both parties as a preliminary issue in their respective applications. The finding that the respondents had *locus standi* while the appellants did not adequately resolved the dispute between the parties. It was not necessary for the court *a quo* to delve into the other issues.

Whether the declarator sought by the appellants was not conjoined with consequential relief and therefore fatally defective.

It is correct that the court *a quo* erroneously remarked at the tail end of its judgment, on page 26, that it was incompetent to seek consequential relief in an application for a declarator that was not conjoined with an “interdict *cum vindication*”. In contrast, at page 7 of the judgment the court stated that:

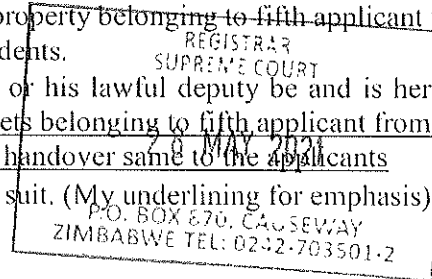
“They allege that the respondents adopted a new constitution for themselves, and in the process have broken away from the church to form their own church which is separate and

different from the Old AFM church. They move me to interdict them from using the name, accessing the assets of the church without their authority." (My underlining for emphasis)

The relief sought by the appellants *a quo* was worded as follows:

IT IS ORDERED THAT:

1. The application for a declaratory order be and is hereby granted.
2. The 1st to 4th applicants be and are hereby declared to be the duly and properly elected officials of the fifth applicant.
3. The respondents are hereby barred from using the name of the fifth applicant in the conduct of their activities without the authorisation of the applicants.
4. The respondents are hereby barred from accessing or using any assets or property of any kind belonging to the fifth applicant.
5. The respondents and their followers or agents or assignees be and are hereby directed to relinquish to the fifth applicant all and any property belonging to fifth applicant that is in possession or under control of the respondents.
6. Failure of 5 above, the Sheriff of Zimbabwe or his lawful deputy be and is hereby authorised to take all and any property and assets belonging to fifth applicant from the control and possession of the respondents and handover same to the applicants
7. The respondents shall pay applicant's costs of suit. (My underlining for emphasis)



I agree with Mr *Magwaliba* that the appellants did seek a declarator conjoined with prohibitory interdicts in para 3 to 4 and vindication in para 5 and 6. The finding of the court *a quo*, though *obiter*, was therefore incorrect. It, however, did not constitute the rationale on which it based its judgment.

The *ratio decidendi* was that the appellants did not have the requisite *locus standi* to institute HC 179/19 because they were not office bearers of the Church. This how the court *a quo* expressed itself on the question of *locus standi* at p. 22 of the judgment:

“The question which begs the answer is did Chiangwa act in terms of the constitution and its regulations when he convened the meetings of 22 September 2018? The answer to the same is in the negative. The second question which flows from the first and its answer is was the meeting of 22 September 2018 which was called in violation of the constitution valid? The answer is in the negative. The third and final question is does any act which resulted from

the invalid meeting carry any semblance of validity. The answer is, once again, in the negative. On the strength of the above mentioned three questions and their respective answers, therefore, it cannot be said that Chiangwa has any *locus standi* to apply as he did under HC 179/19. His conduct which emanated from the meeting of 22 September 2018 is a complete nullity. All the activities which he undertook on the basis of that meeting were a nullity” Madziyire, and not Chiangwa, has *locus standi* to sue as he did. He has substantial interest in the affairs of the Church. Chiangwa does not have such.”

It must have been apparent to the appellants that the remarks upon which the fifth ground of appeal is founded were *obiter*. It is improper to note an appeal against such remarks.

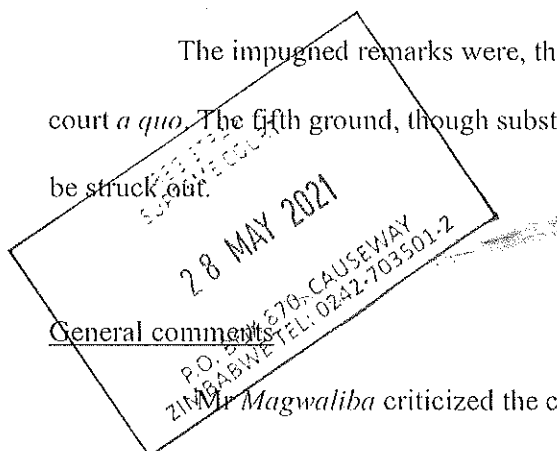
This Court pronounced itself on the issue in *Muza v Saruchera & Ors* SC 45/18 thus:

“The appellant erred in noting an appeal against findings that were made by way of *obiter* remarks. His error is however understandable in that he is a self-actor who could not discern between the ratio of a judgment and the other findings of the court *a quo* by way of *obiter*.”

The impugned remarks were, therefore, inconsequential to the decision made by the court *a quo*. The fifth ground, though substantively correct, is devoid of procedural merit and must be struck out.

General comments

Mr Magwaliba criticized the court *a quo* for using the merits to determine the preliminary points. Mr Girach conceded that such an approach was “inelegant but not blatantly wrong.” The approach of the court *a quo* was colored by its misunderstanding of the sentiments made, *inter alia*, in *Telecel Zimbabwe (Pvt) Ltd v Postal and Telecommunications Regulatory Authority of Zimbabwe & Ors* HH 446/15 at p 7, which deplored the futility of raising unsustainable preliminary points in a bid to avoid decision on the merits. That case did not advocate the procedure adopted by the court *a quo*. It ought to have determined the matter without



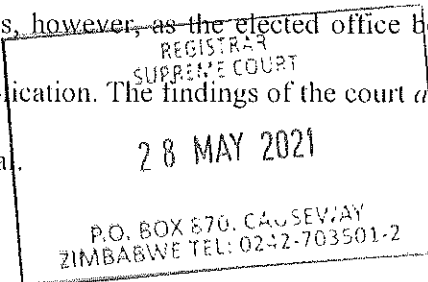
delving into the merits by assessing the admitted conduct of the parties against the provisions of the constitution. It is significant, however, that in the end justice was properly served.

Costs

The respondents sought the dismissal of the appeal with costs on the ordinary scale. They have substantially succeeded on appeal. There is no reason to depart from the general rule that costs follow the cause.

Disposition

The appellants did not have *locus standi* to launch the second application because their claim to office was anchored on their initial meeting of 22 September 2018, which was void *ab initio* and of no force or effect. The respondents, however, as the elected office bearers of the Church had the *locus standi* to bring the first application. The findings of the court *a quo* in these respects were correct and are upheld in this appeal.



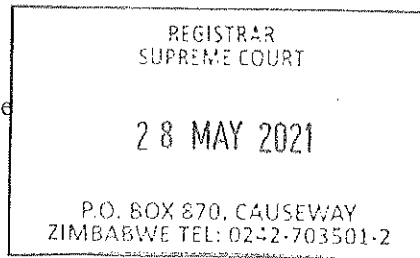
In regards to the second issue, the *obiter dictum* of the court *a quo* that the appellants did not conjoin the main relief that they sought in the second application with the consequential relief of an “interdict *cum vindication*” was incorrect. However, as the fifth ground of appeal, which related to this issue was improperly conceived, it is struck out.

Accordingly, it is ordered that:

1. The fifth ground of appeal be and is hereby struck out.
2. The appeal be and is hereby dismissed in its entirety with costs.

MAVANGIRA JA: I agree

MAKONI JA: I agree



G.S. Motsi Law Chambers, appellants' legal practitioners

Mtewa & Nyambirai, respondents' legal practitioners