DOREEN VUNDLA

Versus

NETSAYI MAGUNDA

IN THE HIGH COURT OF ZIMBABWE
MANGOTA J
BULAWAYO 12 JUNE& 15 AUGUST 2024

B. Mhandire, for the applicant
*N. Mazibuko, f*or the respondent

MANGOTA J:- The see-saw which characterizes the case of the applicant and that of the respondent is unprecedented. It is unprecedented in the sense that it appears to have little, if any, end-in-sight. Indeed, its characteristics fall into the realms of the court's *dictum* which is to the effect that there should be finality to litigation.

That the case of the parties does not appear to have any end-in-sight is apparent from a reading of its history. The history unfolds in the following manner:

a) the respondent, who is the applicant in the main matter, sued the applicant with a view to claiming from her USD 15 750 or its equivalent in the local currency plus interest at the prescribed rate;
b) the applicant entered appearance to defend as a result of which…
c) the respondent successfully applied for summary judgment -and ,
d) following that, she issued a writ of execution against the property of the applicant-and
e) before the writ could be executed upon, the applicant appealed the summary judgment decision-and
f) following the appeal, the respondent applied for leave to execute pending the appeal-and
g) on the date that the application for leave to execute was to be heard, the court's attention was drawn to the existence of the present application.

The applicant seeks to introduce into the application for leave to execute a supplementary opposing affidavit the information of which was not included in her notice of opposition because counsel for the applicant, it is alleged, was indisposed. She states, in the application which she filed on 1 December 2023, that her opposing papers were prepared on her behalf by temporary counsel who did not have any background information of her case with the respondent. She alleges that her principal legal practitioner, one *Ndabezihle Mazibuko,* was not available at the time because he was unwell. She claims that *Mr Mazibuko* who was at the time of the application still on sick leave managed to pop into his office a few times for limited periods and it was on such visits to his office that he had the occasion to look at the opposing papers which were prepared and filed on her behalf in the main matter. He, she asserts, decided that certain crucial information which should have been included in her notice of opposition was not in the same whilst the respondent's answering affidavit persisted with a blatant untruth. She alleges that, because of the mental stress which she underwent at the hands of the respondent, she struggled to act in her best interests. She claims that she just signed the opposing affidavit not only because she was running out of time but also because she presumed that the legal practitioner who stood in for *Mr Mazibuko* had considered the papers through. She moves me to allow her, in the interests of justice, to file the supplementary affidavit which, according to her, contains the crucial information which she intends to have the attention of the court drawn to.

The respondent opposes the application. She expresses surprise at the applicant's suggestion which is to the effect that her notice of opposition to the main matter was prepared by her legal practitioner and not by herself. She insists that, when the applicant signed her opposing affidavit before the commissioner of oaths, the latter must have read out, and explained, to her the contents of the opposing affidavit which she appreciated as well as understood. She states that it defies logic for the applicant who is a legal practitioner, by profession, to state, as she is doing, that her opposing affidavit was prepared by a temporary legal practitioner who works with *Mr Mazibuko*, her permanent legal practitioner. She insists that, as a qualified legal practitioner, the applicant knows that an affidavit is prepared by the deponent to it and not by his/her legal practitioner. She insists that the applicant's act of appending her signature to the opposing affidavit signifies that she was/is in agreement with its contents. It is her statement that, if the applicant maintains the position that she did not take part in the drafting of the opposing affidavit, the logical conclusion which is reached is that the

affidavit does not belong to her and it should, therefore, be expunged from the record rendering the application to execute to remain unopposed. She dismisses the allegation which is to the effect that *Mr Mazibuko* was on sick leave as being of no moment. She insists that the applicant should have availed the crucial information to the legal practitioner who assisted in the preparation of her opposing affidavit. She asserts that the facts which the applicant alleges to have been omitted were/are known to no one else but to the applicant herself. Because it is, according to her, the applicant who is being sued, nothing prevented the latter from availing the information which she wants to produce now to her temporary legal practitioner for inclusion in her notice of opposition. She denies having ever told a lie in her application for summary judgment save to insist that she paid what the applicant owes to her. Her claim, she insists, is premised on the acknowledgment of debt which the applicant signed. She states that it defies logic for the applicant to having omitted to include the alleged crucial information in her plea and/or in her notice of opposition to the application for summary judgment and only seeks to introduce it in an interlocutory application such as the present one. She states that the applicant's appeal is without merit. She insists that it was filed only as a delaying tactic. She denies having ever stressed the applicant as the latter claims. She asserts that the applicant's mental anguish arises from her own making as counsel for her states in his affidavit which he filed in support of this application. *Mr Mazibuko*, she claims, states in his supporting affidavit that there are numerous files which he is handling at the instance of the applicant relating to complaints which were/are raised against the applicant with the Law Society of Zimbabwe. She moves me to dismiss the application with costs.

The rules of court as read with precedent do not prohibit a litigant from filing further evidence which he (includes she) considers to be crucial to his case after pleadings have been closed. In motion proceedings, for instance, pleadings close with the applicant filing his answering affidavit. Where, therefore, such has occurred and the respondent remains of the genuine and honest view that evidence which he should have included in his notice of opposition was, for some reason or other, excluded from the same, the respondent has the opportunity of seeking leave of the court or a Judge to have such included in his case. He applies, on notice to the applicant in the main case and through the chamber book, to be allowed by the court or a Judge to file a supplementary affidavit which contains the crucial information which he left out of the opposing affidavit.

The above-stated position is provided for in sub-rule (12) of Rule 59 of the High Court Rules 2021. The sub-rule reads as follows:

> "After an answering affidavit has been filed, no further affidavit(s) may be filed without the leave of the court or a Judge".

Case authority explains the reason as to why leave of the court or a Judge remains a *sine qua* non aspect of filing, by a litigant, of further evidence after pleadings have closed. It, for instance, stands to good logic and reason that an applicant who intends to be granted leave to file affidavit(s) in addition to those allowed by the rules (of court) should satisfy the court or a Judge, by way of an explanation, as to:

a) the importance to his case of the evidence which he seeks to include in the same-and
b) the reason why it was not included in his earlier affidavit(s): *Associated Newspapers of Zimbabwe & Anor* v *Minister of Information and Publicity*, HC 20/2007.

The litigant, it goes without saying, must explain the importance of the evidence as well as the reason which militated against its inclusion in the main affidavit. His explanation must satisfy the court or a Judge which/who is seized with the application for leave that the inclusion of the evidence has some semblance of fairness to the administration of justice as well as that the reason which made it difficult or impossible for it to be included in the affidavit at the time that the applicant was preparing the same is a plausible one.

Inclusion of further evidence in the case of the applicant is not there for the mere asking. It is present at the discretion of the court or a Judge which/who must decide to include, or exclude, it in the interests of fairness and/or justice to parties whose application it/he is considering. Inclusion into the record of further evidence after pleadings have closed is therefore more of an exception than it is a rule. Reference is made, in the mentioned regard, to the *dictum* which the court was pleased to enunciate in *Tichaona Revesai* v *Windmill (Pvt) Ltd*, HH 163/16 in which it remarked as follows:

> *"There are exceptions when the court will allow the filing of further affidavits. The court, in the exercise of its discretion, will only allow an additional affidavit when exceptional or special circumstances have been shown to exist or if the court considers such a course advisable.*
>
> *The requirement to observe the rules (of court) should not undermine the interests of the administration of justice thereby depriving a litigant an opportunity to ventilate his case. The court dealing with such an application must consider that the requirement that the*

dispute between the parties must be adjudicated upon all the relevant facts surrounding the dispute and the need to allow some flexibility in order to balance the interests of justice. The court has a discretion which it must exercise judiciously after considering all the relevant and surrounding circumstances of the case. The court must be guided by principles of fairness".

The question which begs the answer is: is it in the interest of fairness and justice for me to admit into the record which the respondent filed under HC 2105/23 a supplementary affidavit which the applicant is moving me to admit into the same. The answer to the question is, in my view, in the negative. It is in the negative for a number of reasons. The first reason is that the application remains very prejudicial to the respondent. It is prejudicial to her not only because it was filed after pleadings in HC 2105/23 had been closed but also because it was filed after the applicant and the respondent had filed their respective Heads and a notice of set down had been applied for by the respondent.

A brief analysis of the time-lines of the two cases -HC 2105/23 and HC 2386/23- serves to drive home the point which is relevant to the observed set of circumstances and the prejudice which the respondent stands to suffer if HC 2386/23 is granted. The following events unfold in respect of HC 2105/23 :

a) the respondent filed HC 2105/23 on 23 October, 2023;
b) the applicant filed her notice of opposition on 7 November, 2023;
c) the respondent filed her answering affidavit as well as her Heads on 9 November, 2023
d) the applicant filed her Heads on 23 November, 2023.

The applicant does not explain why she waited until 27 November which is the date that the respondent applied for set down of HC 2105/23 on the opposed roll for her to file her application for leave under HC 2386/23. She filed HC 2386/23 only on 1 December, 2023. She, in short, did so when all what relates to HC 2105/23 had been said and done, so to speak. Her reasons for her inaction would appear to be *mala fide* as opposed to being *bona fide*.

The prejudice which the respondent stands to suffer is evident from a reading of the above-observed set of time-lines. The second question which begs the answer is: can what the applicant did *in casu* be cured by an order of costs. The answer to the same is, in my view, once again in the negative. It is in the negative for the simple reason that the applicant is not placing before me information which she should have included in her opposing affidavit to the main matter. She is not placing before me evidence which stands in defence of herself. She is,

in fact, inviting the respondent, through me, to comment on the information which she wants to be included in her opposing papers which she filed under HC 2105/23. She is, if a comparison may be favoured, moving me to direct the respondent to file a supplementary answering affidavit. Not only is she doing that, she is also moving me to allow both the respondent and her to file supplementary Heads to the application which the respondent filed under HC 2105/23. It is for the mentioned reason, if for no other, that I put HC 2105/23 on hold and proceeded to hear HC 2386/23. Both parties are in agreement with me on the point that the outcome of HC 2386/23 has a bearing on the course of action which the court shall take in respect of HC 2105/23.

The snow-balling character which the applicant wants HC 2105/23 to assume cannot be condoned let alone accepted by the court. It cannot be accepted when it places an application which is in itself clear and unambiguous into the realms of oblivion. It is therefore discouraged in the extreme sense of the word.

The second reason which militates against the success of the application is contained in the assertions of *Mr Mazibuko*. These are found in his supporting affidavit to the application. He states, in the same, hat the applicant engaged him from as far back as 2022 when she had issues with the Law Society of Zimbabwe. He avers, further, that in January, 2023 he filed papers on the applicant's behalf in the Legal Practitioners Disciplinary Tribunal. He asserts that he represented her in a criminal matter in the regional court.

It is *Mr Mazibuko's* testimony that he was on sick leave from 6 November, 2023 to 6 December, 2023. It was, according to him, during the stated period that a colleague from his law firm prepared and filed with the court the applicant's opposing affidavit which excluded the crucial information. Annexure P which he attached to his supporting affidavit confirms his statement. The annexure appears at page 36 of the record. It shows that the doctor examined him on 3 November, 2023 and he gave him leave of absence from work for the period 6 November-6 December, 2023.

When the above-stated matters are juxtaposed to the application for summary judgment which the respondent filed on 20 September, 2022 the falsehood which *Mr Mazibuko* and the applicant are peddling becomes clear even to the eyes of a non-legal person. The summary judgment application, it is evident, was served on the applicant's counsel on 21 September, 2022. The certificate of service which appears at record HC 1827/ 22, page 34, is relevant. The

applicant filed her notice of opposition to the summary judgment application on 4 November, 2022. She prepared and filed it with the assistance of *Mr Mazibuko*. *Mr Mazibuko* and her had, therefore, every opportunity to file the information which they seek to file through the supplementary affidavit now. They do not explain why they did not do so at the mentioned stage and only seek to do so now. *Mr Mazibuko* was in the best of his health then. He was only sick in November and December, 2023. He, in fact, appeared for, and on behalf of, the applicant when the application for summary judgment was heard and determined on 10 October, 2023. Reference is made in the mentioned regard to HC 1172/22 the judgment of which was delivered under HB 87/24,

It is disquieting to know that the applicant who is a legal practitioner herself and *Mr Mazibuko*, counsel for her, made up their mind not only to mislead me but also to tell a blue lie under oath in the vein hope that they would get away with the lie which they chose to tell. I accept that litigants have some measure of latitude in terms of which they can lie, or even do so under oath. I do not, however, accept that legal practitioners who took the oath of office at the commencement of their practice as officers of the court can arrogate to themselves the authority to depose to affidavits which contain falsehoods as the applicant and counsel for her are doing in the instant case. The trite position of the law is that, if a litigant gives false evidence, as the applicant and counsel for her have done *in casu*, his story will be discarded and the same adverse inferences may be drawn as if he has not given any evidence at all: *Leather Trade (Pvt) Ltd* v *Smith*, HH 131/ 2003; L.H. Hofmann and D.T. Zeffert, *Law of Evidence, 3rd edition, page 472*.

The applicant and *Mr Mazibuko* chose to remain tongue-tied in respect of the challenge which the respondent posed in her notice of opposition to this application. Her challenge in the same is clear and straightforward. It centres on why the applicant and/or *Mr Mazibuko* refrained from including the information which they seek to introduce through the supplementary affidavit in the applicant's plea or in her notice of opposition to the application for summary judgment. None of them was able to answer that pertinent question.

The challenge of the respondent was neither denied, affirmed nor clarified. It was left hanging in the air, so to speak. It was left hanging for any one's guess. It was, in short, left to conjecture. It was left to conjecture in a situation where the applicant claims, as she is doing now, that crucial information which works in her favour was left out. She does not explain why

the information in question was left out when, as it unfolds, *Mr Mazibuko* was representing her at the time that she filed her notice of opposition to the application for summary judgment. This is *a fortiori* the case given that he argued the applicant's case in the application for summary judgment.

It is a trite position of the law that what is not denied in affidavits is taken as having been admitted: *Fawcett Security Operations* v *Director of Customs & Excise*, 1993 (2) ZLR 121 (SC); *DD Transport (Pvt) Ltd* v *Abbot*, 1988 (2) ZLR 92.

The response which the applicant gave on the stated matter is most telling. It, in short, betrays the mind of a person who has no answer to the relevant question which has been posed. She states, in response to the respondent's direct challenge, that she indicated in her opposition to the application for summary judgment that the amount claimed was not due and that she did not sign the acknowledgment of debt freely and voluntarily. Whatever she means to convey by her statement remains a matter for anyone's guess. She, it is evident, avoided to give a clear and unambiguous explanation as to why she did not include the crucial information in her plea or in her opposing affidavit to the application for summary judgment. She cannot, in the observed circumstances, apply to include into her opposing affidavit information which she had every opportunity to give at a time which is earlier than her answer to the application for leave to execute.

The application which the applicant filed under HC 2386/24 cannot succeed. It is filed not with the *bona fide* intention to assist the court to come to terms with her own side of the case. It is filed with the clear intention to mislead the court and, because the application is premised on a clear lie which neither the applicant nor *Mr Mazibuko* is able to explain away, I cannot but show my displeasure by ordering that the applicant pays costs of suit at attorney and client scale. It is, in the premises, ordered that:

The application be and is hereby dismissed with costs which are at attorney and client scale.

Masawi and Partners, applicant's legal practitioners
Calderwood, Bryce Hendrie and Partners, respondent's legal practitioners