LEEROY REECE
versus
ARCHFORD DUBE

HIGH COURT OF ZIMBABWE
CHILIMBE J
HARARE, 30 March and 27 July 2022.

Opposed application

Advocate T.G. Musarurwa for the applicant,
Mr.G. Maseko for the respondent

CHILIMBE J

THE MATTER BEFORE THE COURT

[1] The applicant stands barred in a matter wherein he seeks declaratory relief. The cause of his bar is failure to file heads of argument in terms of rule 42 (9) of the High Court Rules SI 202/20. The application is opposed by respondent who also raised *in limine*, the protest that applicant filed and withdrew a similar application. This latter point was neither pursued seriously nor was it in any event, meritorious in my view.

THE POINTS *IN LIMINE*

[2] Applicant reciprocated with a point *in limine* of his own. He attacked (a) the validity of Advocate *Wilbert Pfungwadzashe Mandinde* ("Advocate Mandinde) `s authority to represent the United Kingdom based respondent, (b) the propriety of the advocate`s affidavit filed in opposition of the condonation sought. On the earlier point, applicant contended that the special power of attorney restricted *Advocate Mandinde`s* mandate to "act only in relation to the property cited therein and other related matters." This is precisely what *Advocate Mandinde* has done and am satisfied that he acted within the prescription of his mandate as defined by the special power of attorney.

[3] Regarding the second part of the objection, applicant argued that *Advocate Mandinde`s* affidavit contained hearsay evidence. Applicant averred that *Advocate Mandinde* deposed to matters that he had no personal knowledge of. As such, his affidavit was in breach of rule 58 which stipulates the requirement that; -

> (4) (a) An affidavit filed with a written application— shall be made by the applicant or respondent, as the case may be, or by a person who can swear to the facts or averments set out therein;

[4] This rule (and its predecessor) was interpreted, in *Newman Chiadzwa v Herbert Paulerer* SC 116/91 and *Bubye Minerals and Another v Rani International Limited SC 60-06,* to mean that deponents to affidavits filed in applications must advert to facts in respect of which they have personal knowledge, and not hearsay.

[5] On that basis, there was no opposition before the court in the instant matter, it was argued on behalf of respondent. I was not moved by this point either. Firstly, the special power of attorney authorising *Advocate Mandinde* to act for respondent read, *inter alia*, as follows; -

> "….to manage <u>all the legal affairs</u> and <u>filing and defending any law suit</u> in connection with an immovable property known as a certain piece of land situate in the district of SALISBURY called Stand 720 Bannockbarn Township of Stand 1 of Bannockbarn Township in Mt Pleasant measuring 2800 square metres held under deed of transfer 4989/2008,and <u>to appear at the High Court of Zimbabwe or any other court, and to sign all necessary documents related to the defence of the said property</u>, and any other matter …." [emphasis added]

[6] This wording, bolstered by the usual all-embracing and conclusive sign-offs in powers of attorney stated therein, creates sufficient latitude for *Advocate Mandinde* to represent respondent`s interests in the wide array of matters associated with the immovable property forming the base of the dispute. The present proceedings are but a direct offshoot from the main matter in HC in respect of which applicant agrees the Advocate enjoys valid authority to represent the respondent. As such, I am satisfied that the special power of attorney validly empowers the deponent to the opposing affidavit.

[7] Secondly, a reading of *Advocate Mandinde`s* opposing affidavit reveals that he focused, therein, on the timeline of events surrounding the non-filing of the heads of argument on time. Clearly, these are matters within the purview of his knowledge. He was not, in the main, relating facts based on his instructions or documents, but matters to do with the failure by applicant to file heads of argument on time. It is common cause that *Advocate Mandinde* has

been exercise the mandate under such special power of attorney for a period of … For these reasons, I disallowed the two points raised *in limine*.

THE "HEN`S TEETH" OBSERVATION IN *VENGESAI AND OTHERS v ZIMBABWE GLASS INDISTRIES LIMITED, 1998 (2) ZLR 593 (H).*

[8] Having absolved both the deponent and his affidavit from blame, I comment on two aspects of *Advocate Mandinde`s* affidavit. Firstly, the affidavit oscillated between a litigant or witness`s sworn statement, and a punctilious lawyer`s heads of argument. One can imagine how difficult (or rare as hens` teeth[1]) it must be for lawyers to resist infusing legalities in affidavits they may be required to depose to from time to time. The point, nonetheless, is that lawyers and indeed, all other deponents must, by all means, strive to avoid legalese in sworn statements.

[9] On the same issue, CHITAPI J issued the following warning in *Central African Building Society v Patience Magodo HH 34-22 [* page 8]; -

> "The applicant and respondent as indeed any other deponent to an affidavit in application proceedings is required to depose the facts which support the cause of action or defence as the case maybe. The respondents' affidavit contains averments of both facts and largely law and to that extent is not r 58(4) complaint. I will however not strike it off but will take this opportunity to warn litigants and legal practitioners that r 58(4) must be strictly followed as it is couched in peremptory terms. The court will be acting within its jurisdiction if it strikes off an affidavit which does not comply with the requirements of r 58(4). Many a time parties make long and winding affidavits pregnant with legal arguments and contentions which are not always correct. It is not acceptable to do so. Applications tend to be bulky unnecessarily. They inconvenience the court since the judge must go through the affidavit and pick out the facts from the mixed grill of facts, arguments and contentions. The non-observance of the provisions of rule 58(4) by parties and legal practitioners must stop. The time is nigh for the court to penalize errant parties by striking out affidavits which offend r 58(4). Legal practitioners are offside when they draft affidavits which is not in strict compliance with rule 58 (4)."

[1] This expression was used by GILLESPIE J on a different subject in *Vengesai and Others v Zimbabwe Glass Industries Limited 1998 (2) ZLR 589 at 596 D-E*, where the court, after lamenting a general lack of diligence among legal practitioners, went on to encourage legal practitioners to do the needful. The learned Judge stressed that lawyers were an invaluable tool in the discharge of a court`s mandate -a message which remains relevant.

[10] Secondly, parties acting under the authority of a power of attorney face inevitable restrictions when they speak **for** and **as** the principal. In that respect, holders of powers of attorney need to recognise the limitations inherent in the source of their authority. The underlined phrases in the below excerpts from *Advocate Mandinde`s* opposing affidavit demonstrate this aspect; -

i. "Paragraph 17 -The respondent has already tendered costs. However, I need finality to this matter. I continue to suffer uncertainty over this issue. Who knows, applicant might even withdraw this application too to correct yet more mistakes I have highlighted above."
ii. "Paragraph 18-It is denied that there will be no prejudice to me if this application is granted. I have had to foot a bill of a largely unexpected application for the simple reason that the applicant did not file his heads of argument on time."

[11] I may state however, that whilst these points regarding the affidavit are worthy of mention, overally, the aberrations issuing from the affidavit cannot declared as lying in the extreme.

THE DIRTY HANDS COMPLAINT.

[12] Mr. *Maseko* for the respondent, raised an additional preliminary issue during argument; - that applicant had not paid the costs of suit which he tendered at the withdrawal on case number HC 7704/13. It was submitted that applicant ought, for that reason, be considered improperly before the court. Essentially, he had approached the court with dirty hands, a principle espoused, so argued counsel for respondent, in *Associated Newspapers of Zimbabwe (Pvt) Ltd v Minister of State for Information and Publicity & Ors 2005 (1) ZLR 222*.

[13] The response by *Advocate Musarurwa* for the applicant, was that this decision was distinguishable from the facts in the present matter. I agree with that submission. In the Associated Newspapers case, the court was faced with the issue of a party being required to purge its contempt before approaching the courts for relief. In any event, respondent's fears of a peregrine absconding with his costs can be cured by the procedure for securing one`s costs set out in rule 74.

THE PRAYER FOR CONDONATION

[14] Having disallowed the preliminary points, I will proceed to deal with the application for condonation. Whilst counsel focussed on the points *in limine*, they effectively addressed the

core issues to be decided in this application. In addition, the papers set out the basis of the application and its opposition to considerable detail.

[15] The law on condonation for non-adherence with the rules of court is well settled. PATEL JA (as he then was) set out the below list in *Adrian Paul Hoyland Read versus John Stewart Mathews Gardiner and Another, SC 70-19; -*

i. "The extent of the delay involved or non-compliance in question.
ii. The reasonableness of the explanation for the delay or non-compliance.
iii. The prospects of success should the application be granted.
iv. The possible prejudice to the other party.
v. The need for finality in litigation.
vi. The importance of the case.
vii. The convenience of the court."
viii. The avoidance of unnecessary delays in the administration of justice."

[16] Applying the above principles, the following becomes apparent; - the parties have travelled quite far in seeking to have the underlying dispute resolved to finality. It would, in my view, be desirous that the dispute, which has been raging for close to four (4) years, be buried. The policy on finality to litigation demands in part, that parties be guided into resolving disputes to conclusion. The applicant, as matters stand, is the holder of an extant judgment of court whose real import he seeks the court to pronounce on. I may refer to the averments by *Advocate Mandinde* in the opposing affidavit filed on behalf of respondent in this matter which demonstrates that the matter is ripe for resolution; -

> "19.5 The Respondent denies that he is trying to evade any hearing. He has filed all his papers in the main matter and even set the matter down for hearing only for the Applicant to delay the hearing for simple reason that he did not file his heads of argument on time."

[17] The delay involved in filing heads of argument, being less than seven (7) days, cannot under the circumstances, be considered as inordinate. Similarly, I have not found any facts suggesting gross dereliction on the part of applicant`s legal practitioners regarding the delay concerned. In fact, I note that there were frantic efforts by applicant`s legal practitioners to engage the respondent`s and seek indulgence over the delay.

[18] The core issue which then stands to be disposed of (by the court that will determine the primary dispute) is whether the amount involved constitutes a foreign loan and therefore payable in foreign currency in terms of the law. The circumstances surrounding the transaction between the parties suggest that this becomes a triable issue.

[19] I believe it would benefit the administration of justice in the circumstances, if the matter is argued and concluded. I detect no significant prejudice, that will befall respondent if a reprieve is extended to the applicant. Another order of costs should help address the inconvenience referred to by respondent. As a final word to applicant, other litigants and legal practitioners; -whenever the courts` condone a breach of the rules, such extension of clemency should never be construed as a relaxation of the standards which the same courts have stipulated over the years. The authorities have consistently reiterated this position and parties ought to be guided accordingly.

DISPOSITION

It is accordingly ordered that; -

1. The application for condonation for failure to file heads of argument in case number HC 5346/20 within the time prescribed by the rules, be and is hereby granted.
2. The bar operative against applicant be and is hereby uplifted and the heads of argument already filed of record be considered as properly before the court.
3. Applicant to pay the costs of suit.

M.C. Mukome-applicant`s legal practitioners,
Maseko Law Chambers-respondent`s legal practitioners.