ZVIMBA RURAL
DISTRICT COUNCIL
versus
GERALD MUNETSI

HIGH COURT OF ZIMBABWE
MUCHAWA and MANYANGADZE JJ
HARARE, 13 January and 10 February 2022

Civil Appeal

J Zuze for the Appellant
T K Chamutsa for the Respondent

MANYANGADZE J: This is an appeal against the judgment of the Magistrates' Court sitting at Chinhoyi, handed down on 3 May 2021. The judgment granted the respondent (then applicant) an interdict prohibiting the applicant (then respondent) from allocating or selling stand number 996 Kuwadzana Township, Banket, to any person as it was registered in the name of the late Enock Dandajena.

In granting the interdict, the Magistrates' Court did not go into the merits of the matter. It did so after upholding a point *in limine* raised by the respondent. The point *in limine* was to the effect that there was no opposition to the application, as the opposing affidavit was fatally defective. It was fatally defective in that it was not properly commissioned. The person who signed the affidavit was not identified, or described or designated as commissioner of oaths.

After upholding the preliminary point, the Magistrates' Court treated the matter as unopposed, and granted the interdict sought by the respondent.

Aggrieved by this decision, the appellant noted an appeal with this court. Its grounds of appeal are stated as follows:

> 1. "The Court aquo erred and misdirected itself in its interpretation of Order 22 Rule 2(1) of the Magistrates' Court (Civil) Rules, 2019 thereby coming to a wrongful conclusion that the matter was unopposed.
> 2. The Court acquo erred and misdirected itself in coming to a conclusion that a defective opposing affidavit results in an order being granted against a Respondent party.

3. The Court aquo erred and seriously misdirected itself in its failure to condon partial compliance with the rules of the Magistrates' Court.
4. The Court aquo erred and misdirected itself in fact and law by its failure to properly apply Order 34 Rule 1(2) of the Magistrates Court (Civil) Rules, 2019 under the circumstances."

I will deal with the grounds of appeal *seriatim.*

Ground 1

The appellant avers that a written response to an application is not mandatory. The respondent has an option to file a written notice of opposition or give *viva voce* evidence on the date of the hearing.

The appellant contends that this is the interpretation that should be given to Order 22 rule 2(1) of the Magistrates' Court (Civil) Rules, 2019, as read with Order 22 rule 9 (1). The use of the word "may" in these provisions gives the respondent the option to file a written response or oppose the matter by way of oral submissions when the matter is heard.

In countering the appellant's submissions, the respondent contended that the word "may" in the provisions referred to relates to the option to consent to the application or file a notice of opposition. Where the respondent opts to file a notice of opposition, then he/she is obliged to attach an opposing affidavit to the notice of opposition.

In my view, a reading of the applicable rules supports the respondent's contention. Order 22 rule 2(1) provides as follows:

"2 (1) The respondent may, not less than 48 hours before the time stated in such application , deliver a response in writing in which he or she either-
a) consents to the order mentioned in the application, or
b) files a notice of opposition supported by an opposing affidavit."

Order 22 rule 2 (3) reads;

"(3) Where the respondent opposes the order, his or her opposing affidavit
Shall -
a) set out the grounds on which he or she opposes the order,
b) if he or she denies the facts set out in the application or seeks to place additional facts before the court, such denial or additional facts shall be stated in the opposing affidavit."

Clearly, these provisions show that the option allowed by the word "may" relates to whether to consent to the application or oppose it. Once the respondent chooses to oppose, there is an obligation to file a notice of opposition, which is supported by an opposing affidavit.
In light of this, the court *a quo* did not misdirect itself in finding that the appellant was obliged to file a valid affidavit in support of its opposition to the application.

The appellant's interpretation of the cited rules is erroneous. Consequently, this ground of appeal lacks merit and cannot be upheld.

Ground 2

This ground of appeal deals with the question of the defective opposing affidavit, on which the point *in limine* is based.

The opposing affidavit was deposed to by Shelter Ngozo-Chipata, in her capacity as the appellant's administrator. It then bears a signature, purporting to be that of a Commissioner of Oaths, and a date stamp for the law firm Matarutse & Partners. The person who signed is not named, described or identified in any specific manner. The impression created is that the law firm *Matarutse & Partners* signed as Commissioner of Oaths.

In contrast, the founding affidavit shows that it was signed by one Michael Chakandida, designated as a Legal Practitioner, Conveyancer, Notary Public and Commissioner of Oaths. It identifies the person who signed as Commissioner of Oaths, leaving no doubt that it was commissioned by a person with the requisite credentials to do so.

The Magistrates' Court, having upheld the respondent's contention that the opposing affidavit was defective, went on to hold that there was no valid opposition to the application, and granted it as prayed for. The court relied on the case of *Muzanenhamo* v *Estate Late Kainos Gadaga and Others* HH 65/06, where GOWORA J (as she then was) made the following remarks;

> " An affidavit must be sworn before a person competent to administer an oath. The applicant in his affidavit makes the averment that the document was sworn before a magistrate. The document bears the stamp of the magistrate court. The person who signed as commissioner of oaths is not identified, nor is he described as commissioner of oaths. There is, in fact no indication that the document was signed by a commissioner of oaths. In the circumstances the document is not an affidavit. What it is in effect a written statement not made on oath. As a consequence I have no evidence before me that the stand in question belongs to none other than the estate of the late Kainos Gadaga."

A reading of the appellant's heads of argument, paragraphs 2. 1- 2.9, shows that no issue is being raised about the defectiveness of the said affidavit. It seems to me what is put in issue is the vitiation of the notice of opposition on the basis of such affidavit.

The appellant contends that Order 22 rule 2 (1) is silent on the consequences of failure to file an opposing affidavit. It further contends that in dealing with such a situation, the court must look to other provisions in the rules. The appellant then refers to Order 34 rule 1(1)(2), which reads:

Order 34 rule 1(1):

> "Except as is otherwise provided in these rules, failure to comply with these rules or with any request made in pursuance thereof shall not be a ground for judgment against the party in default"

Order 34 rule 1(2):

> " where any provision of these rules or any request made in pursuance of any such provision has not been fully complied with, the court may on application order compliance therewith within a stated time"

The essence of this provision is that non compliance with the rules does not, *pe se*, render the defaulting party non-suited. The court has a discretion to condone the defect complained of, and order rectification thereof.

In this regard, the appellant asserts that it orally applied for extension of time to file a proper opposing affidavit, relying on Order 34 rule (1) cited above. The appellant avers that the court *a quo* did not pronounce itself on its oral application. This assertion was not controverted by the respondent.

In its ruling, the Magistrates' Court acknowledges the fact that the appellant asked the court to condone its defective notice of opposition and allow it to file a proper one in terms of Order 34(1).

This is reflected on page 4 of the trial record of proceedings. (p 7 of the appeal record), wherein the magistrate remarks:

> "He asked the court to apply the provisions of Order 34 and condone them by allowing him to remedy the affidavit so that the matter can be heard on the merits."

The court *a quo,* in its assessment of the parties' submissions, did not advert to this aspect. It did not pronounce itself on the applicability of Order 34 rule 1. It simply ignored the point, upheld the point *in limine* and went on to grant the relief sought by the respondent. This was irregular. See *Grain Marketing Board v M. Muchero* SC 59/07. The court should not have disregarded submissions made by a party appearing before it, especially when such submissions had a material bearing on the outcome of the matter. Had the submissions been considered and upheld, the matter would not have been disposed of on a procedural irregularity. It would have been agued on the merits, after the irregularity was rectified. This in fact is the relief the appellant seeks in its notice of appeal.

In my view, there is no prejudice to the respondent if such a relief is granted. It means the parties will obtain judgment after the merits of the matter are fully ventilated. There is therefore merit in this ground of appeal.

Ground 3

This ground deals with the same question under ground of appeal 2. This is the question of the condonation of applicant's inadequate compliance with the court's rules. The remarks made under ground 2 equally apply under this ground.

Ground 4

Again, this ground of appeal is dealing with the same issue canvassed in ground of appeal 2. No further analysis is therefore required.

Thus, grounds 2, 3 and 4 are essentially dealing with the same issues, which have been analysed under ground of appeal 2. In the circumstances, I find that the appeal has merit, and should be allowed, on the basis of grounds of appeal 2, 3 and 4.

In the result, it is ordered that:

1. The appeal be and is hereby allowed.
2. The judgment of the Magistrates' Court under Case No. CHN 6/21 be and is hereby set aside.
3. The matter be and is hereby remitted to the Chinhoyi Magistrates' Court for a hearing *de novo* before a different magistrate, after the appellant files the requisite notice of opposition in terms of the Magistrates' Court (Civil) Rules, 2019.
4. The respondent bears the appellant's costs.

MUCHAWA J, agrees…….

Mangwana & Partners, appellant's legal practitioners
Chamutsa & Partners, respondent's legal practitioners