

ARROLA TAKUDZWA IDEHEN
and
OMOSOGIE RUDO IDEHEN
and
OSARETIN TANAKA FEMI IDEHEN
and
MAVIES SHORAYI NZARA
versus
JOEL MAMBARA N.O ESTATE OF THE
LATE WILSON MADZIVA
(In his capacity as the Executor Dative in the Estate Late Wilson Madziva)
and
PLOTMART TRADING (PRIVATE) LIMITED
and
PEDDY HILLARIUS CHIGUNDURU
and
REGISTRAR OF DEEDS
and
MASTER OF HIGH COURT
and
THE SHERIFF OF THE HIGH COURT OF ZIMBABWE

HIGH COURT OF ZIMBABWE
WAMAMBO J
HARARE, 8 May 2024 & 8 November 2024

Opposed Application

G Giya, for the applicants
G Madzoka, for the 3rd respondents
No appearance for the 1st, 2nd, 4th, 5th and 6th respondents

WAMAMBO J: In this matter applicants seeks leave to file a supplementary affidavit in Case No HC 3261/23 in terms of Rule 59(12) of the High Court Rules, 2021.

The founding affidavit was deposed to by the fourth applicant who is the mother to the first to third applicants.

Fourth applicant is proceeding on her own behalf and on behalf of the other applicants through a special power of attorney granted to her by applicants.

I should point out at this juncture that the founding affidavit does not adequately cover the background of the matter. The founding affidavit jumps straight to the reasons why leave to file a supplementary affidavit in HC 3261/23 is sought.

The reasons given are that the supplementary affidavit will provide additional and crucial evidence to demonstrate that the late Wilson Madziva was arraigned before the Magistrate Court facing charges of perjury for unlawfully misrepresenting that he had bought stand 551 Subdivision A of Subdivision F of Quinnington of Borrowdale Estate from her. Further that applicant seeks to file part of the record of proceedings in the matter where Wilson Madziva was prosecuted for fraud.

Reference is made to third respondents opposing affidavit, in particular para 19 where third respondents states that applicants did not provide the court with relevant evidence to show that the late Wilson Madziva was once arrested in relation to the matter in question.

Fourth applicant avers further as follows:

The record of proceedings could not be located at the time when the founding affidavit and answering affidavit were filed. The criminal matter in question is a 2010 matter and was transferred to Archives. She only managed to retrieve the relevant record in December 2023 after what she describes as a painstaking search.

Further that the supplementary affidavit and the record of proceedings will assist the Court to properly ventilate the issues. It is also pointed out by fourth applicant that the issue before the Court in HC 3261/23 involves an immovable property of very high value. It is averred that none of the parties will be prejudiced. In oral argument this averment was expanded. It was averred that third respondent can file his supplementary answering affidavit and documents to counter the supplementary affidavit, if the Court grants leave for its filing. Fourth respondent averred that there is no *mala fides* in the application.

Although it was intoned during oral submissions that third respondent would be given a chance to respond to the supplementary affidavit this does not appear on the draft order nor was there any application made to amend the filed drafted order to reflect the additional proposals as averred in oral submissions.

The third respondent, among the respondents is the only one who filed an opposing affidavit. That explains why he appeared through counsel at the hearing while the other respondents did not appear.

Third respondent in the opposing affidavit avers as follows:

Under case number 10094/11 applicants applied for the same relief as that sought under HC 3261/23 which is referred to as the main matter. In 10094/11 applicants filed documents pertaining to criminal proceedings against Wilson Madziva. Three documents are annexed thereto, namely Annexure 1 to 3, the founding affidavit, Wilson Madziva's warned and cautioned statement and Shane Kubonena's statement.

In HC 3261/23 applicants filed their application on 16 May 2023. Both second and third respondents opposed it.

On 4 July 2023 applicants filed their answering affidavit. On 11 July 2023 applicants filed their heads of argument while third respondent filed his heads of argument on 25 July 2023. Applicants did not take any steps to have the main matter set down for hearing. It was third respondent who applied for the matter to be set down – See Annexure "4". On 5 January applicants filed this application. Third respondent takes issue with second applicant's *locus standi*. His argument is that there is no power of attorney appended in relation to the second applicant and that nothing turns on whether Wilson Madziva was arraigned before the court, for those proceeding were never brought to completion.

The information sought to be introduced through the supplementary affidavit has always been available. To prove this applicants provided information from the record as part of their case in HC 10094/11 as pointed out earlier. Applicants can not rebut respondent's case through a supplementary affidavit. They should have done so through the answering affidavit. There is no evidence of the record of proceedings being lost. The dispute between the parties has been ongoing for the past thirteen years and there is need for a speedy resolution. Third respondent seeks for the dismissal of the application with costs on a higher scale. I will deal with the issue of there being no authority granted to fourth applicant to represent the second applicant. In the answering affidavit at paragraph 6, fourth applicant deals with this issue as follows:

“Ad paragraph 3

6. This is denied. My authority to represent second respondent derives from second respondent’s power of attorney which is already part of the record in the main matter and attached hereto as Annexure..... ”

It is surprising that fourth applicant erroneously refers to second applicant as a respondent. It is further surprising that she chose to append to the founding affidavit powers of attorney for the other applicants but for second applicant she refers to the main matter. The other applicants have powers of attorney attached to this application, while second applicant does not. She thus is not a party to these proceedings. The third respondent is correct to say second applicant should be excluded from these proceedings. Second applicant’s exclusion does not change much. It however reflects that the applicant’s application was not filed with the necessary attention to detail. Among other notable examples of lack of attention to detail is the fact that fourth applicant’s name is given as Mavies Shorai Nzara in the founding affidavit while she appears as Shorai Mavis Nzara on the special power of attorney attached to the founding affidavit. I refer to these instances to encourage attention to detail and consistency on the part of legal practitioners filing documents on behalf of their clients. It is a point worth noting and is an aside from the merits of the application.”

Rule 59(12) of the High Court Rules, 2021 provides as follows: -

“(12) After an answering affidavit has been filed, no further affidavits may be filed without leave of the court or a judge.”

In *Fransisca Zinyemba v Reformed Church of Zimbabwe* HH 160/21 at p 2. MUSAKWA J

(as he then was) said:

“The law on filing of additional affidavit is well settled. In *Silver Trucks (Pvt) Ltd and Another v Director of Customs and Excise* 1999(1) ZLR 490 it was held that a court will allow the filing of an additional affidavit in exceptional circumstances. It was further held that a party seeking to file an additional affidavit must provide a satisfactory explanation for failing to place the information before the court at the appropriate time. The explanation must negative bad faith or culpable failure to act timeously. In addition, the court must be satisfied that there is no prejudice to the respondent. See also *Transvaal Racing Club v Jockey Club of South Africa* 1958 (3) SA 599.”

In *Central Africa Building Society v Finormac Consultancy Pvt Ltd and Retired Justice L.G Smith* HH 693/16. CHITAPI J stated as follows at p 4.

“The approach of the court in dealing with an application for leave to file a further affidavit after filing of the answering affidavit was set out by the learned GOWORA JA firstly in the High Court and later as Appeal court Judge respectively in the cases *Associated Newspapers of Zimbabwe v Media and information Commission and the Minister of information and Publicity* HH 29 /07 and

in *United Refineries Ltd v Mining Industries Pension Fund and Ors* SC 63/14. The cases have been cited by the applicant and first respondents' counsel. I will quote from the latter case where the Learned Judge stated:

“When considering an application by a party for I leave to file a supplementary affidavit, the court is called upon to exercise a judicial discretion. In the exercise of this discretion, it is a fundamental consideration that the dispute between the parties be adjudicated upon all the relevant facts pertaining to the dispute. The court is therefore permitted a certain amount of flexibility in order to balance the interests of the parties to achieve fairness and justice. In this exercise the court has to take into account the following factors:

1. A proper and satisfactory explanation as to why the information has not been placed before the court at an earlier stage.
2. The absence of *mala fide* in relation to the application itself.
3. The filing of the supplementary affidavit will not cause prejudice which cannot be remedied by an order of costs”

Applicants herein are also the applicants in HC 3216/23. They instituted the application knowing very well what relief they sought and what evidence they required to achieve the relief as sought. The explanation that the record of proceedings had been transferred to Archives is but that, an explanation. There is no documentary proof from the Clerk of Court, Magistrates Court and or an official of the Archives supporting the assertion by applicants. Applicants produced excerpts from the same record sought to be produced in an earlier case. The application has been sprung by third respondent's averment in the founding affidavit that there is no proof that Wilson Madziva was once arrested in relation to the matter in question.

It becomes clear that applicants are responding to third respondent's assertions. By themselves they did not consider the record of proceedings as important.

The heads of argument have already been filed for the parties. The matter spans over thirteen years and the filing of supplementary affidavit and further opening the way for the other party to file affidavits in rebuttal will see no end to the matter. There will be prejudice occasioned to the third respondent because of the undue delay and protracted reopening of pleadings.

I am not satisfied that applicants have proven on a balance of probabilities a proper and satisfactory explanation on why the supplementary affidavit was not tendered earlier.

A delay up to after the filing of heads of arguments by parties and the set down of the matter for this application is not *bona fide*.

In the circumstances I find the application unmeritorious. On costs I find, the applicants have not been vigilant but not to the extent of attracting higher costs.

I order as follows:

The Application be and is hereby dismissed with costs.

Machingura Legal Practitioners, applicant's legal practitioners
Madatsa and Parties third respondent's legal practitioners