

PHILIP ZINYAMA
versus
GOODNESS KATIVHU
and
INNOCENT KATIVHU

HIGH COURT OF ZIMBABWE
TAKUVA J
HARARE; 11 November 2024 and 14 March 2025

Court Application for Condonation of Late Filing

Advocate *Chinwawadzimba, A Masawi*, for the applicant
C Mahlangu, for the respondents

TAKUVA J: This is a court application for condonation of late filing of an appeal. The application is made in terms of r 59(9) of the High Court Rules 2021.

BACKGROUND FACTS

On 30 June 2023, a judgment was granted in favour of the respondents in this matter by the Magistrates Court. This judgement dismissed the applicant's entire claim for defamation under case 376/22. It is this judgement that the applicant wishes to appeal against. Following delivery of the judgement, applicant filed its appeal under CIV "A" 199/23 against the judgment in its entirety timeously. However, this appeal was struck off the roll due to the court finding it defective as it did not contain a request for the success of the appeal. Consequently, after the striking off of the appeal on 9 January 2024, the applicant proceeded to file this current application for condonation of late filing of their appeal. However, the respondents oppose this application basing on the fact that the time of delay cannot be justified enough to condone the applicant. Further, the respondents are also of the view that the applicant's founding affidavit is defective as its stamp is computer generated which should lead to the dismissal of the matter. Respondents also challenge the soundness of the claimed prospects of success by the applicant.

POINT IN LIMINE AND ANALYSIS

The respondents raise a point *in limine* in regards with the validity of the applicant's Founding Affidavit which renders the application defective. It is trite that a case stands or falls

on its Founding Affidavit. The founding affidavit is a crucial document and it sets out the basis for the application and presents the facts and evidence upon which the case relies. The applicant in its answering affidavit argues that by stamping the affidavit after the applicant had signed, it serves as a valid confirmation before this court that the applicant signed before him and this also occurred on the same day after taking oath. I however strongly disagree with this view. In a recent judgment by MHURI J, the judge dealt with similar facts wherein she addressed this issue which I will also emphasise. MHURI J in *Sarpo v Williams and 2 Others (493 of 2023) [2023] ZWHHC 591* stated that;

“A computer-generated date in my view makes it difficult to know whether the deponent appeared before the commissioner of oaths on the same date printed on the affidavit. As submitted by applicant, correctly so in my view, what is key is that the oath, signing and date should happen contemporaneously. The date portion must be blank so that the Commissioner of Oaths endorses the date.”

In that case she lay stress on the fact that a commissioner ought to write in the date himself in order for courts to undeniably accept the affidavit to be valid as this will prove that the events took place at the same time without doubt. In this case surely “...one wonders whether the oath was administered on the date specified by the computer or on a future date...” as DEME J rightfully stated in *Bruce Ndoro & Fungayi Ndoro v Conjugal Enterprises (Private) Limited supra*, a similar matter. Proper commissioning of the founding affidavit is crucial and parties are expected to follow the necessary requirements regarding this.

The respondents go at length to convince the court regarding the defective nature of the Founding Affidavit while the applicant, the person whose interest will be impacted if this matter is dismissed fails to defend their Founding Affidavit using even at least a single legal authority to back their averment. The applicant only barely addresses this issue through its Answering Affidavit but I am convinced that even the applicant itself is not convinced by its own argument thus tiptoeing around the issue. Some doubt being cast on one’s Founding Affidavit should not be treated lightly as shown by the applicant as it is an attack on the very thing that the case stands on.

I am therefore persuaded by the judgement by MHURI J and find that this point *in limine* holds merit and a commissioner failing to write in the date the oath was taken cannot be loosely overlooked as the applicants would believe. See *Twin Castle Resources (Pvt) Ltd v Paari Mining Syndicate & 3 Ors (supra)*.

Following the considerations, I find that the founding affidavit is fatally defective as the commissioner failed to endorse the date on which the oath was administered as required from the above-mentioned case.

DISPOSITION

There is no need for this court to proceed into the merits of this matter. Due to the defective nature of the Founding Affidavit, I uphold the point *in limine* raised by respondents,

In the result, it is ordered that the matter be and is hereby struck off the roll.

TAKUVA J:.....

Mufuka and Associates, applicants' legal practitioners
Maposa Mahlangu Attorneys, respondents' legal practitioners