ZEALOUS NYABADZA
versus
NATIONAL PHARMACEUTICAL COMPANY OF ZIMBABWE

HIGH COURT OF ZIMBABWE
DUBE-BANDA J
HARARE 18 October 2024 & 27 January 2025

Registration of a deed of resettlement

S.T. Mutema for the applicant
O. Kadongwe for the respondent

DUBE-BANDA J:

[1] This is an opposed chamber application for the registration of a deed of settlement. For purposes of this judgement, and in order to avoid confusion, I will refer to the parties, were the context permits by their names i.e. the applicant as "Nyabadza" and the respondent as "the company."

BACKGROUND FACTS

[2] This application will be better understood against the background that follows. On 6 April 2022 the company filed a court application in HC 2306/22 for *rei vindicatio* seeking the recovery of a motor vehicle from Nyabadza. The basis of the application was alleged to be that in September 2017 Nyabadza entered into a contract of employment with the company, which contract was terminated on 31 August 2020. In terms of the conditions of employment the company alleged that it provided him with a vehicle returnable upon termination of the contract. Upon termination of the contract Nyabadza was alleged to have declined to return the vehicle to the company. Nyabadza filed a notice of opposition and served it on the company on 5 May 2022. The company did not prosecute the court application within the time allowed by the rules of court, prompting Nyabadza to file an application for dismissal for want of prosecution. The company opposed the dismissal application.

[3] In the interim, while the *rei vindicatio* application was subject to an application for dismissal, the company filed heads of argument and caused the matter to be set down. This development caused the parties, in respect of the dismissal application to sign a deed of

settlement subject to this application. In terms of the deed of settlement, Nyabadza was to withdraw the application for dismissal, and the company to pay the wasted costs of suit on an attorney client scale. On 14 December 2022 Nyabadza formally withdrew the application for dismissal. However, a day after the dismissal, i.e., on 15 December 2022 the court removed the dismissal application from the roll.

[4] Nyabadza contends that despite having withdrawn the dismissal application, the company has not met its side of the bargain in that it has not paid the costs of suit in terms of the deed of settlement. It is against this background that applicant has launched this application seeking the registration of the parties' deed of settlement.

APPLICANT'S POSITION

[5] In summary, in the founding affidavit, Nyabadza averred that the deed of settlement is not illegal, its terms are not contrary to the laws of this country, they have neither been varied nor rescinded and are capable of being incorporated into a court order. It was averred further that interest on a judgment debt is statutorily provided at the rate of 5% per annum, and therefore such interests is claimed from 19 July 2022 being the date on which legal proceedings in the dismissal application (HC 4771/22) were concluded by way of the deed of settlement. It was averred further that at the time the deed of settlement was signed the inflation rate was 255% per *annum*. The same rate is sought to be applied to the costs in HC 4771/ 22 from 19 July 2022 to date of final payment. In the answering affidavit, Nyabadza disputed the averments contained in opposing affidavit, he particularly disputed that there was a compromise. He averred that where the parties decided to have a written agreement, the terms thereof must be found within the four conners of the written agreement.

[6] In the heads of argument and in oral submissions Nyabadza took the preliminary point that there is no valid notice of opposition before court. It was contended that the respondent being a company, and as such Mr *Kondongwe* could have deposed to a notice of opposition on the basis of authorisation through a board resolution. It was submitted further that in the absence of a resolution, he had no *locus standi* to oppose the application on behalf of the company. It was argued that in the absence of a resolution, the notice of opposition is invalid and must be expunged and default judgment be granted as prayed for in the draft order.

[7] On the merits, it was argued that the deed of settlement signed by the parties is capable of being incorporated as an order of court. It was argued that there was no compromise,

because a written agreement could only be altered by another written agreement. It was argued further that for there to be a compromise there must be a meeting of the minds between the parties, and in this case, there was no meeting of the minds, and therefore no compromise.

[8] It was further argued that the court order on 15 December 2022 removing the dismissal application from the roll is a nullity in that the matter had already been withdrawn on 14 December 2022. It was submitted that even if the removal from the roll was valid, it could not alter the deed of settlement signed by the parties. It was argued that a case has been made for the relief sought in this application.

RESPONDENT'S POSITION

[9] Mr *Kondongwe* counsel for the company deposed to the opposing affidavit averring that the deed of settlement that Nyabadza seeks to register was compromised through a verbal agreement between the parties. The agreement was alleged to have been entered into between Mr *Kondongwe* and Mr *Mutema* counsel for Nyabadza. It was averred that the company agreed to waive the requirement that Nyabadza pay security for costs in an appeal in SC 90/24, on condition that he waives the costs provided for in the deed of settlement. It was alleged that the parties agreed to waive the need for the parties to pay costs in relation to all the matters that were in the courts between them.

[10] The company further averred that the deed of settlement was also compromised by the order of this court removing the matter from the roll. Which meant that the withdrawal tendered by Nyabadza was not granted by the court. The matter remains removed from the roll and should Nyabadza wish to claim costs, he must re-set it down for a hearing. The claim for interests is disputed on the basis that there is no ascertainable amount claimed by Nyabadza. Again, the claim that the amount ought to be granted at an inflation rate is said to be not supported as the parties did not agree to it.

[11] In the heads of argument and oral submissions the company contended that the parties represented by their counsel of record i.e. Mutema and Kondongwe subsequently entered into a verbal agreement in terms of which the company agreed to waive the requirement for Nyabadza to pay security for costs in an appeal that he filed in case number SC 90/24. In return, the Nyabadza undertook to waive his entitlement to costs of suit on an attorney client scale as established in the aforementioned deed of settlement. It was argued that now that Nyabadza is disputing ever entering in such an agreement, such creates a material dispute of fact which cannot be resolved on the papers. Regarding the contention that there

is no valid opposition before court, the company contends that the notice of opposition is valid and the matter is thus opposed.

[12] On the merits, the company argued that the verbal agreement entered between the parties compromised the deed of settlement. It was argued further that there was no agreement between the parties regarding the inflation rate as claimed by Nyabadza and that in the circumstances the relevant prescribed interest rate of 5% should apply. It was submitted that any finding to the contrary would amount to the court making a contract for the parties, which is proscribed at law by the doctrine of freedom of contract. The company sought that the application be dismissed.

WHETHER THERE IS A VALID NOTICE OF OPPOSITION

[13] The applicant contends that there is no valid notice of opposition. The contention stems from the premise that the opposing affidavit was deposed to by Mr *Kondongwe* counsel for the company. The argument is that counsel could only depose to the notice of opposition on the basis of authorization through a board resolution. Without a resolution, it was submitted that he had no *locus standi* to oppose the application on behalf of the company. The argument is that without a valid opposing affidavit there is no valid notice of opposition, hence the application is unopposed and must be considered as such.

[14] Per *contra,* the respondent contends that there is a valid notice of opposition in this matter. It was argued that Mr *Kondongwe* is competent to depose to the opposing affidavit, in that the facts of the matter are within his personal knowledge.

[15] As a general rule, it is undesirable and, in some instances impermissible for a legal practitioner to depose to an affidavit on behalf of his/her client. This is particularly so in instances where the legal practitioner deposes to the merits of the matter based on inadmissible hearsay evidence. See *Baron v Baron And 2 others* (HB 92 of 2021; HC 1665 of 2020) [2021] ZWBHC 92 (3 June 2021). In *Mandaza t/a Induna Development Projects v Mzilikazi Investments (Pvt) Ltd* (HB 23 of 2007) [2007] ZWBHC 23 (7 February 2007) the court held that:

> "Before I conclude I would like to deal with the point *in limine* raised by Mr *Ndove* on the applicant's legal practitioner deposing to the founding affidavit under a power of attorney. Generally, I agree with *Mr Ndove,* that a legal practitioner should not depose to a founding affidavit on behalf of a client. This court has previously stated why it is undesirable for legal practitioners to do so. But there is an exception to this general rule if the facts are within the knowledge of a legal practitioner (he may swear an affidavit on behalf of the client) – *Samkange & Anor* v *The Master & Anor* HH-63-93. Even in such exceptional cases, the route should be, in my view, be sparingly resorted to. The facts of this application are within the knowledge of

> the applicant's legal practitioner. He is in fact, in better position to highlight the applicant's case as the application is about procedural matters. In the circumstances the legal practitioner was justified in deposing to the affidavit."

[16] The facts of this case fall on the exception discussed in the *Mandaza* case. I say so because Mr *Kondongwe's* affidavit is admissible in terms of r 58 (4) (a) of the High Court Rules, 2021 which says:

> (4) An affidavit filed with a written application—
> (a) 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

[17] Mr *Kondongwe* can swear positively to the averments set out in the opposing affidavit given that he personally represented the company in all the matters having a bearing on this case, and he signed the deed of settlement on behalf of the company. In addition, he alleges that he entered into a verbal agreement with Mr *Mutema* which the company contends compromised the deed of settlement. He is privy to what he and Mr *Mutema* discussed. In addition, the facts of this case are distinguishable from *Baron* case *(supra)* were the legal practitioner peddled inadmissible evidence. I take the view that Mr *Kondongwe* is a witness in terms of r 58 (4)(a) and in this capacity he does not require a board resolution to authorise him to testify. In the circumstances, the preliminary point taken by Nyabadza has no merit and is refused. The application is opposed.

[18] I now turn to the preliminary point taken by the company.

MATERIAL DISPUTES OF FACT

[19] The company contends that in this matter there are material disputes of fact which cannot be resolved on the papers without adducing oral evidence. This arises from the contention that the company alleges that the parties entered into a verbal agreement in terms of which it waived its entitlement to security for costs on appeal in case number SC 90/24 and in turn Nyabadza agreed to forego his entitlement to the befits in the deed of settlement. On the other hand, in the affidavits and heads of argument Nyabadza denied ever entering into a verbal agreement with the company. In oral submissions, Mr *Mutema* disputed that a waiver of the deed of settlement was ever discussed between him and Mr *Kondongwe.* Counsel submitted that Mr *Kondongwe* was not telling the truth, and that in any event, the entire agreement between the parties is contained in the written deed of settlement and that no verbal revocation is admissible. It was on this basis that Mr *Kondongwe* further

submitted that the matter must be referred to trial for a determination whether the parties entered into a verbal agreement which compromised the deed of settlement.

[20] The first enquiry is to ascertain whether or not there is a real dispute of fact. As was observed by MAKARAU JP (as she then was) in *Supa Plant Investments (Pvt) Ltd* v *Chidavaenzi* 2009 (2) ZLR 132 (H) at 136F-G:

> "A material dispute of facts arises when material facts alleged by the applicant are disputed and traversed by the respondent in such a manner as to leave the court with no ready answer to the dispute between the parties in the absence of further evidence."

[21] In *Muzanenhamo v Officer In Charge CID Law and Order* CCZ 3/13 the court said as a general rule in motion proceedings, the courts are enjoined to take a robust and common sense approach to disputes of fact and to resolve the issues at hand despite the apparent conflict. The prime consideration is the possibility of deciding the matter on the papers without causing injustice to either party. See *Room Hire CC (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) 11633 -11634.

[22] I am of the considered view that the conflicting positions of the parties *in casu* are irreconcilable on the papers in a critical respect. The critical question is whether Nyabadza waived his entitlement as per the deed of settlement or he did not. There are two mutually destructive versions before court. The argument by Mr *Mutema* that even if such a verbal agreement was indeed entered into, it is of no consequence because it was not reduced to writing, is not an answer to the issue whether there are material disputes of fact before court. On the facts of this case the court must first resolve the factual issue whether indeed the parties, represented by their legal practitioners entered into a verbal agreement as contended by the company or not. This issue cannot be resolved on the papers, and any attempt to do so will cause an injustice to either of the parties. This is particular so in this case in that a factual resolution of this dispute might mean one of the legal practitioners is not being candid with the court. Such would be a serious finding and must be arrived at only after hearing oral evidence adduced by the parties and their witnesses.

[23] I take the view that there is a *bona fide* dispute of fact incapable of resolution without *viva voce* evidence having been heard. I accordingly conclude that there is a material and significant dispute of fact that can only be resolved by the calling of oral evidence in trial proceedings.

[24] There remains to be considered the question of costs. No good grounds exist for a departure from the general rule that costs follow the event. The respondent has succeeded in its preliminary point and is clearly entitled to its costs.

In the result, I order that:

i. The preliminary point that there are material disputes of fact which cannot be resolved on the papers is upheld.
ii. This application be and is hereby referred for trial.
iii. For the purposes of trial, the notice of application and notice of opposition filed of record herein shall respectively stand as the summons and notice of appearance to defend.
iv. The plaintiff (the applicant herein) shall file his declaration within 10 days from the date of this order.
v. The matter shall thereafter proceed in accordance with the High Court Rules, 2021.
vi. The applicant to pay the respondent's costs.

DUBE – BANDA J: …….

Stansilous and Associates Law Firm, applicant's legal practitioners
Dube, Manikai & Hwacha, respondent's legal practitioners