

REPROTABLE (123)

EXTEMPORE

**ARISTON MANAGEMENT SERVICES
v
ECONET WIRELESS ZIMBABWE LIMITED**

**SUPREME COURT OF ZIMBABWE
GUVAVA JA, MAKONI JA & MATHONSI JA
HARARE: 19 OCTOBER 2023**

T. Magwaliba, for the appellant and first respondent in the court application

T. Mafukidze, for the first respondent and applicant in the court application

No appearance for the second respondent

MATHONSI JA: This is the unanimous judgment of this Court. This is an appeal against the judgement of the High Court handed down on 20 July 2023 dismissing the appellant's application to set aside an arbitral award and registering that award.

On 2 October 2023, the respondent filed a notice of objection in terms of r 51 of the Supreme Court Rules, 2018, that the appellant's founding affidavit filed in support of the application seeking to set aside the arbitral award in the court *a quo* was defective in that it was undated. The respondent submitted that for that reason there was no valid application before the court *a quo*. The respondent urged the court to dismiss the appeal with costs on that basis.

At the commencement of the hearing Mr *Mafukidze* who appeared for the respondent, relying on the authority of *Mandishaya v Sithole* HH 798/15, which is a judgment of two Judges of the High Court, submitted that the founding affidavit of the appellant in the court *a quo* was invalid as it was undated.

Per contra Mr *Magwaliba* who appeared for the appellant submitted that the *Mandishaya* judgment is wrong. He argued that s 8 of the Justices of the Peace and Commissioners of Oath Act [*Chapter 7:09*], which governs the administering of an oath, does not require the insertion of a date on an affidavit. Counsel further referred to s 2 of S.I. 183/98, which prohibits a commissioner of oaths from administering an oath in a matter in which he or she has an interest.

Mr *Magwaliba* also referred to the case of *Firstel Cellular (Pvt) Ltd v Net One Cellular (Pvt) Ltd* 2015 (1) ZLR 94 (S) which dealt with a matter where a wrong stamp had been appended by the Commissioner of Oaths. In our view that case is not useful for present purposes.

In the *Mandishaya* case the court remarked that the deponent of an affidavit must take the oath in the presence of the Commissioner. Equally, the Commissioner must append his or her signature on the statement in the presence of the deponent. The court went on to say that the Commissioner must also endorse the date on which the oath was administered and that those acts must occur contemporaneously.

The reason behind that requirement is for the court to be satisfied that the oath was administered at a given date in the presence of both the deponent and the Commissioner.

Without the date, the court may never be able to ascertain if the oath was properly administered in accordance with the law.

The court *a quo* was bound by the *Mandishaya* judgment being a judgment of the two Judges. Even though the issue was not argued *a quo*, it could be raised for the first time on appeal as it is a point of law. We do not agree with Mr *Magwaliba* for the appellant, with his argument that the judgment was wrongly decided.

There is merit in the preliminary objection. It ought to be upheld. It renders the application for setting aside the award a nullity.

In view of the fact that the court *a quo* rendered a composite judgment in respect of the two applications, the invalid application and its outcome are capable of severance. The application for registration, being a separate application, is not affected. It follows that, absent a valid application *a quo*, there can be no valid appeal before this Court.

We therefore, propose to proceed in terms of s 25 of the Supreme Court Act [*Chapter 7:09*], which allows this Court to review and set aside irregular proceedings.

Regarding costs, our view is that each party should bear its own costs because the respondent ought to have raised this defect to the application earlier.

In the result, it be and is hereby ordered as follows:

1. The matter be and is hereby struck off the roll with no order as to costs.

2. In terms of s 25 (2) of the Supreme Court Act [*Chapter 7:13*] the proceedings in the application to set aside the arbitral award are hereby set aside.

GUVAVA JA : I agree

MAKONI JA : I agree

Atherstone & Cook, appellant's legal practitioners

Mtewa & Nyambirai, 1st respondent's legal practitioners

Gill Godlonton & Gerrans, 2nd respondent's legal practitioners