

BEATRICE MAKANYARA (Nee TASARA)  
versus  
TAPIWA WAMAMBO  
and  
REGISTRAR OF DEEDS HARARE  
and  
REGISTRAR OF DEEDS BULAWAYO  
and  
KWEKWE CITY COUNCIL  
and  
MASVINGO CITY COUNCIL  
and  
NORTON TOWN COUNCIL  
and  
GWERU CITY COUNCIL

HIGH COURT OF ZIMBABWE  
MUNANGATI-MANONGWA J  
HARARE, 29 JUNE & 11 JULY 2022

**Urgent Chamber Application**

*C Damiso*, for the applicant  
*T Chakabuda*, for the 1<sup>st</sup> respondent

**MUNANGATI-MANONGWA J:** This is an urgent chamber application which is opposed. The first respondent has had an agent depose to an opposing affidavit on his behalf relying on a general power of attorney. The applicant has taken issue with the opposing affidavit as being irregular and not properly before the court. The first respondent's counsel having applied that the court utilizes r 7 of the High Court Rules 2021 to condone the anomaly, I find that rule inapplicable *in casu*. There are certain legal fundamentals which the court or a judge cannot ignore under the guise of exercising discretion. It is on that basis that I strike out the affidavit as irregular.

The applicant seeks the following order on an urgent basis:

## **TERMS OF THE FINAL ORDER SOUGHT**

That you show cause to this honourable court why a final order should not be made in the following terms.

1. The first respondent, his assignees and representatives be and are hereby permanently interdicted from disposing through a sale or any other way or attempting to dispose in or in any way encumbering or attempting to encumber the immovable property listed below pending the outcome of proceedings under case No HC 2517/22 where the applicant is claiming a share thereof;
  - a) Stand No lot 9 of 7A Chicago, Kwekwe
  - b) Stand No 7595 Section 4 Mbizo, Kwekwe
  - c) Stand No 6650, Newtown, Kwekwe
  - d) Stand No 6123 Ngwe Street Southview,
  - e) Stand No 7061 Chigwagwagwa Stret, Target Kopje, Masvingo
  - f) Stand No 3305 Mandera Close Rujeko Masvingo
  - g) Stand No5811, Knowe, Norton.
  - h) 1 bedroom flat at No 47 Calder Gardens 2<sup>nd</sup> Street/Cnr Josiah Tongogara, Harare
  - i) 97 Stanks Drive Leeds, LS14 5NS England, United Kingdom
2. The first respondent to pay costs of suit on an attorney and client scale.

## **INTERIM RELIEF GRANTED**

Pending the determination of this matter, the Applicant is granted the following interim relief:

1. That in the interim the first respondent, his assignees and representatives be and are hereby temporarily interdicted from disposing through a sale or any other way or attempting to dispose or in any way encumbering or attempting to incumber the immovable property listed below pending the outcome of proceedings under case No HC 2517/22 where the applicant is claiming a share thereof;
  - j) Stand No lot 9 of 7A Chicago, Kwekwe
  - k) Stand No 7595 Section 4 Mbizo, Kwekwe
  - l) Stand No 6650, Newtown, Kwekwe
  - m) Stand No 6123 Ngwe Street Southview,

- n) Stand No 7061 Chigwagwagwa Stret, Target Kopje, Masvingo
  - o) Stand No 3305 Manderera Close Rujeko Masvingo
  - p) Stand No5811, Knowe, Norton.
  - q) 1 bedroom flat at No 47 Calder Gardens 2<sup>nd</sup> Street/Cnr Josiah Tongogara, Harare
  - r) 97 Stanks Drive Leeds, LS14 5NS England, United Kingdom
2. The first respondent to pay costs of suit on an attorney and client scale

### **SERVICE OF THE PROVISIONAL ORDER**

That the applicant's legal practitioners be and are hereby given leave to serve by way of delivery to the offices of the Respondents or their legal Practitioners.

### **FACTS**

The applicant and first respondent are husband and wife. Both parties are not in Zimbabwe but reside in England and Finland respectively. The first respondent gave one Nyasha Mubaira a general power of attorney to represent him in these proceedings. A notice of opposition was filed on behalf of the first respondent and the said Nyasha Mubaira deposed to the opposing affidavit. It is the affidavit of Nyasha Mubaira which the applicant has attacked by raising a point *in limine* that there is no valid opposing affidavit before the court. The applicant challenged the admissibility of the affidavit given the averments contained therein. She raised issue with the fact that the affidavit was titled "Affidavit of Tapiwa Wamambo" when it was deposed to by Nyasha Mubaira. Further that the averments were not made on behalf of the first respondent. The applicant argued that the averments were being made by the deponent in his personal capacity yet he purported to make them on behalf of the first respondent. A typical example is when the deponent stated in para 2 as follows:

"The applicant fully knows the position that I do not own the property in question. The allegation that the property is matrimonial property is intentional....."

The applicant argued that the affidavit is incompetent in so far as the deponent acting on a power of attorney purported to assume the personality of the respondent and not making the averments on behalf of the respondent. Mrs Damiso for the applicant submitted that the deponent should have attributed the averments to the respondent and spoke as the third person. The applicant applied for the striking out of the affidavit and that the matter be treated as unopposed.

In response the first respondent's counsel Mr Chakabuda admitted that the affidavit is indeed written in the first person but argued that this was a semantical oversight. He urged the court to condone that oversight by invoking r 7 of the High Court Rules, 2021. He contended that there was good cause for the court to condone the oversight as this case was important and also the language had not changed the complexion of the issues. He further submitted that there is no prejudice caused to, nor suffered by the applicant as she had understood the material aspects of the opposition and had even been able to respond to each and every averment contained in the opposing affidavit. He maintained that this was a semantical error.

### **ANALYSIS**

It is apparent that throughout the affidavit the deponent responded to the applicant's averments as if he is the first respondent. The language and tenor makes it clear that the averments are coming from Nyasha Mubaira. The averments are characterized by the use of the word "I". In para 3 of the opposing affidavit the deponent states that:

"For the avoidance of doubt the property called lot 9 of 7A Chicago Kwekwe is owned by Competent Plumbers (Pvt) Ltd to which I am a director and I am not aware that the property is being sold. I am sure that if the property is being sold I will get to know it from my fellow company directors."

The deponent is not a director of that company but it is the first respondent who is a director. The worst part is when the deponent avers in para 8 that

"Indeed our marriage still subsists and I only got to know of the alleged divorce proceedings through this application."

It is clear that the facts that the deponent was attesting to are of a personal nature. This only the first respondent could attest to in direct speech particularly that his marriage subsists. The deponent committed the cardinal sin of assuming the personality of the first respondent. A deponent who relies on a power of attorney must in deposing to facts use the language which clearly shows that the statements are attributable to the principle. I hasten to state that matters of a personal nature like divorces and related applications often refer to intimate details pertaining to a marital relationship thus require the individual concerned to make averments rather than delegate that duty to a third party.

In *Hiltunen v Hiltunen* HH 99/08 MAKARAU JP (as she then was) extensively dealt with depositions by agents who rely on powers of attorney when making averments. She

emphasized the need for deponents to aver to facts which are in their personal knowledge otherwise the evidence would be inadmissible hearsay evidence. Citing several cases MAKARAU JP (as she then was) stated that hearsay evidence is acceptable in urgent and interlocutory proceedings where an acceptable explanation is given why direct evidence is not available and the basis of belief and information by the deponent is given in full. Suffice that *in casu* the manner in which the opposing affidavit is drafted does not conform nor can the contents be attributed to the deponent; it is a document characterized by confusion.

Equally in *Mkandhla v Dube & Ors* HB41/07 Cheda J stated that an affidavit is a “serious and material judicial statement in all judicial proceedings.” Rightly so, because the deponent takes oath as to the truthfulness of his statements or averments. This cannot be so *in casu* given that the deponent is making statements as if he is the respondent referring to “his marriage,” directorship and properties as if there are his. In my view the importance of an affidavit is immense in that in application proceedings the founding affidavit has to contain the cause of action and equally the opposing affidavit states the respondent’s defence. In the affidavit the deponent speaks to the court or to a judge in lieu of viva voce evidence and this he does under oath having sworn to the truthfulness of the statements. In this case it cannot be said it is the respondent defending his case in court but Nyasha Mubaira deposing to circumstances he purports to characterize his personal case when he should be putting across first respondent’s case. In essence this has muddled the first respondent’s case.

As alluded to earlier, the heading refers to the affidavit as that of the first respondent yet the averments are clearly made by Nyasha Mubaira and Nyasha Mubaira signed the affidavit. This is an irregularity which makes the affidavit fatally defective. The said Nyasha Mubaira refers to the marriage as his, he went on to state that “neither she (applicant) or I own the property” literary assuming the first respondent’s identity. It would have been acceptable if the deponent had made reference to the respondent in the third person properly using the personal pronouns “he” and ‘him” making the averments in a manner acceptable. It should be noted that an agent is not the principle’s alter ego neither is he or she imbued with the personality of the principal. As rightly put by the applicant, an agent gets into the shoes and not the skin of the principal.

The application by the first respondent's counsel that I invoke r 7 and condone the deficiency in the opposing affidavit is without basis and unsustainable. The said rule reads:

**“7. Departure from rules**

The court or a judge may, in relation to any particular case before it or him or her, as the case may be

(a) direct, authorise or condone a departure from any provision of these rules, including an extension of any period specified therein, where it or he or she, as the case may be, is satisfied that the departure is required in the interest of justice;

(b) give such directions as to procedure in respect of any matter not expressly provided for in these rules as appears to it or him or her, to be just and expedient.”

The rule is clear that a judge or a court has discretion to depart from the provisions of the rules. This pertains to how, when or what is provided for by the rules can be done. If therefore there has not been compliance and the judge is satisfied that a departure from the rules will ensure that the ends of justice will be met, then a judge or the court can utilize the provisions of the rule. The rule equally gives the court or a judge the discretion to give directions as to what in terms of procedure can then be done for the progression of a case. The rule is procedure oriented. In my view the rule has nothing to do with defective papers where an affidavit is irregular. Thus, the rule is not applicable in the circumstances.

Given the shortcomings of the affidavit, which could have been avoided had the legal practitioners involved in the drafting of the document been diligent, I find that the opposing affidavit is inadmissible. It is hopelessly defective and being an affidavit, it cannot be salvaged hence it is literally doomed and of no use either in a court of law or at any forum. Accordingly, the affidavit is struck out.

*Rubaya Chinuwo Legal Practitioners, for the applicant*  
*Masawi and Partners, for the respondents*