

DAIRIBORD ZIMBABWE (RIVATE) LIMITED
and
COMFORT HR STRATEGIES

HIGH COURT OF ZIMBABWE
MANZUNZU J
HARARE, 15 March & 6 October 2021

COURT APPLICATION – POINTS IN LIMINE

Z T Zvobvo, for the applicant
M Moyo, for the respondent

MANZUNZU J The applicant instituted these proceedings by way of application in terms of r 75 (1) of the High Court Rules which provides that;

“(1) Where a defendant has filed his plea, he may make a court application for the dismissal of the action on the ground that it is frivolous or vexatious.”

The applicant prays for the dismissal of the respondent’s action in case number HC 2591/20 on the grounds that the claim is frivolous and vexatious.

The application was filed on 15 September 2020 and served on the respondent on 16 September 2020. A notice of opposition supported with an opposing affidavit was filed by the respondent on 30 September 2020. On 13 October 2020 the applicant filed an answering affidavit in which over and above responding to the merits, raised certain preliminary points which are subject of this judgment.

On 28 October 2020 respondent filed a supplementary opposing affidavit to address the preliminary point raised in the answering affidavit. The notice of filing intimated the intention, at the hearing, to apply for the admission of the supplementary opposing affidavit. This was before the respondent filed a notice of withdrawal of the notice of filing of supplementary affidavit on 5 November 2020.

The first point *in limine* raised by the applicant in the answering affidavit is that respondent’s affidavit is invalid in that it was commissioned by Mr *Trust Manjengwah* of

Wintertons who is alleged to have an interest in the matter by virtue of him being a correspondent attorney for the respondent. The second preliminary point raised by the applicant, this time in the supplementary heads of argument, is that the filing of the supplementary affidavit without leave of the court by the respondent violates r 235 of the High Court Rules which provides that;

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

The third preliminary point was raised by the respondent challenging the filing of the answering affidavit as unprocedural.

The second preliminary point was easily disposed of when the respondent withdrew the offending affidavit.

What remains to be determined is the issue of the validity or otherwise of the opposing affidavit and whether the answering affidavit is properly before the court.

Mr *Zvobgo* who argued the matter for the applicant said the opposing affidavit was fatally defective because it was attested by a commissioner of oaths who has an interest in the matter. He relied upon s 2 (1) of the Justices of Peace and Commissioners of Oaths General Regulations, 1998, SI 183/89), s 2 (1) reads;

“No justice of peace or commissioner of oaths shall attest any affidavit relating to a matter in which he has any interest.”

The fact that the affidavit was attested by Mr *Trust Manjengwah* who is a partner and legal practitioner at Wintertons Legal Practitioners is common cause. The respondent is represented by Messrs Dube-Banda, Nzarayapenga and Partners. The respondent’s address for service has been given as Dube-Banda, Nzarayapenga and Partners, 19 Windsor Close, Mt Pleasant, Harare c/o Wintertons, Beverly corner, 11 Selous Ave, Harare.

The applicant alleged that Mr *Trust Manjengwah* was a correspondent lawyer for the respondent. This was more so, it was argued, given his initials “TM” inscribed at the end of the respondent’s address for service in the summons and declaration in case number HC 2591/20. By virtue of that role, he is alleged to have an interest in the matter. Reference was made to the case of *S v Rolomane* 1971 (4) SA 100 where the court stated;

“no doubt the courts require for the admissibility of affidavits tendered in evidence that they be attested by a commissioner of oaths who is impartial, unbiased and independent in relation to the subject – matter of those affidavits.”

As a correspondent attorney, it was submitted, Mr *Trust Manjengwa* was answerable to the respondent and its legal practitioners. As such he cannot escape the fact that he has an interest in the matter.

Mr *Moyo* for the respondent argued that Wintertons was only used as an address for service and Mr *Trust Manjengwa* has no interest as he does not receive fees in the case. That was certainly introducing evidence in the heads. He further said Wintertons were not corresponding lawyers. There was an attempt to dissociate the initials “TM” from that of Mr *Trust Manjengwah*. It was alleged Mr *Trust Manjengwah*’s initials were “TSM”. That argument is lame because we are then not told who carries the initials “TM” at Wintertons. Mr *Moyo* admitted correspondent attorney in the strict sense cannot commission an affidavit deposed to by a party on whose behalf they act.

The respondent’s lawyers are resident in Harare outside the 5 km radius required of an address for service by the rules. Wintertons legal practitioners’ address is within the 5 km radius. The respondent has used Wintertons as the address for service. The applicant says Mr *Trust Manjengwah* has an interest in the matter derived from being a correspondent lawyer for the respondent.

The applicant alleged interest on the part of Mr *Trust Manjengwah*. The *onus* is on the applicant to prove such interest. Apart from the link of initials “TM” to *Trust Manjengwah*, the applicant has not shown any evidence to prove that *Mr Manjengwa* indeed acts as a correspondent lawyer in the case. Such evidence was necessary given the circumstances of this case that the respondent’s lawyers are actually based in Harare where they have easy access to this court in the event of such need arising. The applicant failed to prove the element of interest and the point *in limine* must fail.

Mr *Moyo* in the oral submissions said there was no room for the filing of an answering affidavit by the applicant in respect to an application brought under r 75. He said it being an application for summary judgment it need not have a replication. He urged the court to expunge the answering affidavit from the record. He accused the same answering affidavit for raising the point *in limine* challenging the opposing affidavit as invalid.

I do not find any merit in the challenge for filing an answering affidavit. This is so because r 76 provides that;

“Subject to this Order, Order 32 shall apply to an application under rule 75 and to any opposition thereto.”

Rule 75 does not say an answering affidavit shall not be filed. Rule 234 under order 32 provides that;

“(1) Subject to sub r (3) and (4) of r 236, where the respondent has filed a notice of opposition and an opposing affidavit, the applicant may file an answering affidavit with the registrar, which may be accompanied by supporting affidavits.

Provided that no answering affidavit may be filed less than ten days before the hearing of the application.

(2) As soon as possible after filing an answering affidavit in terms of sub r (1), the applicant shall serve a copy of it upon the respondent and, as soon as possible thereafter, shall file with the registrar proof of such service in accordance with r 41.”

This means there is nothing irregular in the filing of the answering affidavit, the point is dismissed.

Disposition

1. The preliminary points raised by the parties are hereby dismissed.
2. Costs shall be in the cause.

Dube, Manikai and Hwacha, Applicant’s legal practitioners

Dube-Banda, Nzarayapenga and Partners, respondent’s legal practitioners.