

RAYMOND MUNYAKA
versus
BERT PROPERTIES (PVT) LTD

HIGH COURT OF ZIMBABWE
MANZUNZU J
HARARE, 22 October 2021 & 9 September 2022

COURT APPLICATION

T Chiwuta, for the applicant
R Goba, for the respondent

MANZUNZU J:

INTRODUCTION

The court is called upon to consider an application for leave to file a further affidavit within the main court application. For convenience I shall refer to the two applications as “the main court application” and “the application for leave.” The order of the parties as applicant and respondent shall be maintained in both applications.

THE MAIN COURT APPLICATION

a) Applicant’s Case

The applicant’s case is that the parties entered into a sale agreement of Lot 80 of the remaining extent of Lydiate situate in the district of Hartley for a purchase price of USD\$85 400. He said he paid the full purchase price in instalments under the agreement otherwise styled as a lease agreement to purchase. On 26 May 2020 he received a letter from the respondent which purports to cancel the agreement. The applicant has brought an application seeking an order to declare the purported cancellation of the agreement by the respondent to be invalid, null and void. The applicant further seeks an order to compel respondent to transfer the property to him.

b) Respondent’s Case

The respondent opposed the application and raised a point *in limine* that there are material disputes of fact a position contested by the applicant in the answering affidavit.

The respondent denies that they entered into an agreement of sale but rather a lease agreement to purchase. It is alleged the applicant did not exercise the option to buy. Further, the respondent alleges, the applicant did not make payments as per agreement as some of the payments were in RTGS to the extent that a balance of US\$5 273.73 was still owing as in October 2020. The respondent denies applicant paid UD\$85 400 but acknowledged a payment of USD\$14 726.27. The respondent prays for the dismissal of the application with costs.

The applicant filed heads of argument on 3 March 2021 followed by the respondent on 17 March 2021. The matter was initially set down for hearing on 11 October 2021 when it was postponed to 22 October 2021.

THE APPLICATION FOR LEAVE

On 20 October 2021 the respondent gave notice to file a further affidavit in terms of rule 59 (12) of the High Court Rules 2021 which prohibits the filing of further affidavits after the answering affidavit without leave of the court. It states that, “*(12) After an answering affidavit has been filed, no further affidavits may be filed without the leave of the court or a judge.*” Upon receipt of the notice the applicant has filed a notice of opposition.

The reason why the respondent wants to file additional affidavit is because the information in the additional affidavit is relevant and will assist in the determination of the dispute between the parties. Why such information was not contained in the opposing affidavit, the respondent says it was mere inadvertency on its part. The omission came to light upon brief of the advocate.

The information intended to be introduced in the additional affidavit is that the property which is subject of the dispute is still registered in the names of Michael and Faustina Mboma from whom the respondent purchased it under an agreement of sale.

In opposing the filing of an additional affidavit, the applicant said the information intended to be introduced was available to the respondent when it filed its opposing affidavit. Further that respondent has not proffered a proper and reasonable explanation

as to why the information was not included in the opposing affidavit. The application was labelled *mala fide* bent on delaying the finality of the matter.

THE LAW

It is within the discretion of the court to admit or deny the filing of any additional affidavits. There are three considerations the court must take into account; the first being the reason why the information was not included in the opposing affidavit, the second is the prejudice likely to be suffered by the other party and thirdly the *bona fides* of the request.

In *United Refineries Limited v The Mining Industry Pension Fund and Others SC 63/14* the court had this to say:

“When considering an application by a party for leave to file a supplementary affidavit, the court is called upon to exercise a judicial discretion. In the exercise of this discretion, it is a fundamental consideration that the dispute between the parties be adjudicated upon all the relevant facts pertaining to the dispute. The court is therefore permitted a certain amount of flexibility in order to balance the interests of the parties to achieve fairness and justice. In this exercise the court has to take into account the following factors:

- a) A proper and satisfactory explanation as to why the information had not been placed before the court at an earlier stage;
- b) The absence of *mala fides* in relation to the application itself;
- c) That the filing of the supplementary affidavit will not cause prejudice which cannot be remedied by an order of costs.”

EXPLANATION:

The explanation by the respondent for the omission is one of inadvertency. Mr *Goba's* submissions were lengthy in which he demonstrated that different legal practitioners can possess different skills. He referred to two South African cases in which the courts in that jurisdiction recognized the different skills by legal practitioners. When he was briefed in this case he realised the need to include information which is now intended to be introduced as an additional affidavit.

In order to afford the parties a fair hearing, it was argued, the additional information must be allowed bearing in mind that the court is there for the truth and justice.

Mr *Chiwuta* for the applicant remained adamant that the explanation, “I forgot” is not a satisfactory explanation. In my view a satisfactory explanation is one which must not be taken in isolation of other factors, that of prejudice and *bona fides* of the request.

While it is important for the courts to ensure that parties strictly comply with the rules and a party who fails to comply does so at his/her own peril; technicalities must not defeat the object of the court to do justice. An application to file an additional affidavit is akin to one for amendment of pleadings where the general and broad approach by the courts was enunciated by WESSELS J in *Whittaker v Roos & Anor* 1911 TPD 1092 at 1102-1103 thus:

"This Court has the greatest latitude in granting amendments, and it is very necessary that it should have. The object of the Court is to do justice between the parties. It is not a game we are playing, in which, if some mistake is made, the forfeit is claimed. We are here for the purpose of seeing that we have a true account of what actually took place, and we are not going to give a decision upon what we know to be wrong facts. It is presumed that when a defendant pleads to a declaration he knows what he is doing, and that, when there is a certain allegation in the declaration, he knows that he ought to deny it, and that, if he does not do so, he is taken to admit it. But we all know, at the same time, that mistakes are made in pleadings, and it would be a very grave injustice, if for a slip of the pen, or error of judgment, or the misreading of a paragraph in pleadings by counsel, litigants were to be mulcted in heavy costs. That would be a gross scandal. Therefore, the Court will not look to technicalities, but will see what the real position is between the parties." *See DD Transport (Pvt) Ltd v Abbot* 1988 (2) ZLR 92

The nature of the information intended to be introduced is one which is not only relevant but promotes a fair hearing.

PREJUDICE

While the applicant says he will suffer prejudice, he did not demonstrate the kind of prejudice he will suffer and whether the same cannot be cured by an order of costs. In the event the additional affidavit is allowed, it is only fair and just that the applicant be allowed to replicate the additional information.

BONA FIDES

The request to file additional information is *bona fide* as can be discerned from the explanation given by the respondent. The respondent was frank to say it inadvertently omitted to include the information in the opposing affidavit despite its significance to the relief being sought by the applicant. There was no attempt to cook the explanation. It was a frank and honest explanation which does not call for censorship.

DISPOSITION

IT IS HEREBY ORDERED THAT:

1. Leave be and is hereby granted to the respondent to file an additional opposing affidavit.

2. The affidavit annexed to the respondent's notice of intention to file further affidavit be and is hereby admitted as part of respondent's opposing papers.
3. The applicant may file an answering affidavit to the additional opposing affidavit within 10 days of the date of this order.
4. Costs shall be in the cause.

Ziumbe and Partners, applicant's legal practitioners

C Mpame and Associates, respondent's legal practitioners