

THE CENTRAL INTELLIGENCE ORGANISATION  
and  
THE DIRECTOR ADMINISTRATION  
CENTRAL INTELLIGENCE ORGANISATION  
and  
THE MINISTER OF STATE AND NATIONAL SECURITY  
versus  
RICKY NELSON MAWERE  
and  
DAVID NYABANDO

HIGH COURT OF ZIMBABWE  
MAVANGIRA J  
HARARE, 21 July and 26 October 2011

**Opposed application**

*C J Chawafambira*, for the applicants  
*J Wood*, for the respondents

MAVANGIRA J: This is an application for condonation of late filing of a notice of opposition in HC 7577/10 wherein the respondents seek the nullification of their suspension from employment as well as their reinstatement to their posts without loss of salary or benefits.

The applicants were served with the court application in HC 7577/10 on 27 October 2010. They had until 8 November 2010 to file their notice of opposition and opposing affidavits. On 8 November 2010 a notice of opposition and an opposing affidavit were filed. On 19 November 2010 an answering affidavit deposed to by the first respondent herein was filed.

In his answering affidavit the first respondent challenged the authenticity of the signature purporting to be that of the deponent to the opposing affidavit. On 14 January 2011 another notice of opposition and opposing affidavit were filed on behalf of the applicants herein. No condonation was sought and obtained by the applicants for such filing.

On 15 March 2011 the applicants filed the instant application in which they seek an order in the following terms:

“IT IS ORDERED THAT:

1. THE CONDONATION in the main matter HC 7577 be and is hereby granted. (sic)
2. The respondents in the main matter file their Notice of Opposition within 24 hours of the granting of this order.
3. There be no order as to costs.”

In the applicants’ founding affidavit, the deponent states that the opposing affidavit in the main matter was signed on his behalf by his deputy as he was out of the office. He states that in error, the name of the deponent was not altered to reflect that of his deputy who swore to it. In paragraphs 6 and 7 he states:

- “6. I am advised that because the affidavit was not properly signed, the Notice of Opposition submitted was of no force or effect, and a submission of another notice of opposition now would be one done out of time. Consequently, condonation is hereby sought.
7. Had the original affidavit been properly signed, it had been filed on time and the delay was thus not deliberate and is sincerely regretted.”

In his answering affidavit the same deponent states that it is no longer possible for his deputy to depose to any affidavit to explain how he came to sign the opposing affidavit on 8 November 2010 as he died on 11 April 2011.

The supporting affidavit by a Chief Law Officer in the Civil Division of the Attorney General’s office states, amongst other things, that when issue was raised with the signature on the opposing affidavit she was on leave and during her absence from office another Notice of Opposition was filed on 17 January 2011 without condonation having been sought. She states that when she resumed work in February she realised the anomaly and sought clarification from the applicants resulting in the filing of this application. She mistakenly gives the date of filing of the second set of opposing papers as 17 January 2011. The correct date is 14 January 2011.

The applicants contend that their application ought to be granted as the delay was not deliberate and also because they have very high prospects of success in the main matter. They contend that the court ought also to consider that there was never any intention on their part to deceive or mislead the court or any of the parties.

The first respondent in his opposing affidavit dismisses as unworthy of belief the explanations given in the applicants’ founding and supporting affidavit. He states that both the deponent to the founding affidavit and his deputy are commissioners of oath who know the procedures for the signing of affidavits. This, he states is further compounded by the lack

of an explanation by the commissioner who presumably administered the oath on the deputy who allegedly signed the founding affidavit on 8 November 2010. The commissioner would have explained how a person who presumably did not identify himself as the purported deponent would nevertheless be allowed to proceed to sign the affidavit.

The first respondent also states that the applicants were not alerted to the irregularity regarding signature on the opposing affidavit, in the answering affidavit only. He states that after the answering affidavit was filed on 19 November 2010, in HC 7577/10, the applicants' legal practitioners were also on 30 November 2010 formally advised by way of a letter from the respondents' legal practitioners, of the defect in the opposing affidavit. Yet it was only on 13 December 2010 that the applicants' legal practitioners wrote to the applicants about this issue and copied their letter to the respondents' legal practitioners. Thereafter, and on 11 January 2011, a second set of opposing papers were filed on behalf of the applicants herein. This time the opposing affidavit purported to be deposed to and signed by the Deputy Director General; the same person who it was alleged had erroneously signed the earlier opposing affidavit.

The first respondent further alleges in his opposing affidavit herein that the signature on the second affidavit of 8 November 2010 bears no resemblance to that of the original opposing affidavit yet both are said to have been made by the same person. The first respondent concludes and contends that if the Deputy Director General did indeed sign the original opposing affidavit before a Commissioner of Oaths, then he must have held himself out as the Director General above whose name he affixed his signature. The first respondent also contends that the purported signature by the Deputy Director General appearing on the opposing affidavit filed on 14 January 2011 suffers the same defect as that on the original opposing affidavit. He further states that on 25, January 2011 the respondents' legal practitioners wrote yet another letter to the applicants' legal practitioners raising therein, *inter alia*, the fact that the signature on this second opposing affidavit appeared to have "every appearance of being a poor attempt to copy a genuine signature."

There is no attempt in the applicants' answering affidavit to address or answer these and other allegations raised by the respondents. The answering affidavit is about as brief as the founding and supporting affidavits are. Besides indicating that the Deputy General is now late, it merely makes bald the assertions. Firstly, that the application for condonation is not an abuse of court process as the explanations why it is being made at this late stage are given in the supporting affidavit by the Chief Law Officer in the Civil Division. Secondly, that should

they be granted an opportunity to defend the main application the applicants have very good prospects of success as the respondents cannot simply be reinstated by the court without proper disciplinary proceedings being held.

The respondents thus contend that there is no justification for the granting of condonation to the applicants.

It is common cause that the signature on the first opposing affidavit was not that of the purported deponent. This appears to be the reason for the filing of the second set of opposing papers. Yet the applicants have not denied the allegation made that the signature on the second affidavit is also a forged signature. Sight must also not be lost that the first set of opposing papers was not withdrawn. Neither was any application for condonation made in respect of the second set of opposing papers. It appears that this application is in fact for condonation of yet another, a third set of opposing papers that the applicants intend to file. This appears to be confirmed by the lack of denial of the allegation that the signature in the second opposing affidavit is also forged.

I agree with Mrs *Wood* that the explanation that the Deputy Director General's death has made it impossible for the applicants to give a full explanation of how and in what circumstances the affidavits were signed does not hold water. The allegation of forgery of signature was first made on 19 November 2010. It was raised again in letters dated 25 January 2011 and 9 February 2011. The Deputy Director died more than four months after the allegation was first raised. No explanation has been given as to why nothing was done to place his explanation before the court during that whole period which in fact is a period of almost five months.

The undisputed allegation that the Director General and the Deputy Director General are themselves Commissioners of Oath further compounds the applicants' case. Neither does the lack of candour by the Chief Law Officer assist the applicants nor indeed the court. The fact of her having been on leave does not suffice as an explanation. It is clear that in her absence, the matter was being attended to by another officer(s) in the Civil Division. An explanation(s) by the officer(s) would be an obvious necessity to explain what happened during the Chief Law Officers absence, especially as it is during this period that the second set of opposing papers were filed. The paucity of detail in the affidavits filed by the applicants only goes to exhibit in my view, a calculated decision by the applicants not to take the court into their confidence. Sight is not lost of the fact that the Chief Law Officer who deposed to the supporting affidavit is seized with the conduct of the main matter as advised to

this court by Miss *Chawafambira*. The Chief Law Officer cannot therefore be distanced from the applicant's decision not to be candid with the court. The officers who dealt with the matter in her absence would only fill in for the period while she was on leave. Yet in all fairness to her in her letter of 13 December 2010 to the applicants she did advise and write to them in the following terms:

“...We are in receipt of applicants' Answering Affidavit wherein they allege that the signature on the opposing affidavit is not authentic as it does not belong to the deponent.

If the position is as stated it therefore means that there is no opposition before the court...”

Where the applicants' legal practitioners fall short in my view, is when they allow or cause to be filed papers which patently do not place the full facts before the court. The tendency to gloss over the issue of the forged signatures and quickly go on to claim that the applicants have high prospects of success runs through both the Director General's and the Chief Law Officer's affidavit.

The applicants and or their legal practitioners could have, but did not, obtained and filed an affidavit from the Commissioner of Oaths before whom the now late Deputy Director General signed the affidavit purporting to be an affidavit deposed to by the Director General. They did not offer any explanation why they did not do so,

As matters stand the court is faced with applicants who appear to have adopted the attitude that condonation is for the asking and they need not give a full explanation why they should be granted such condonation. Such an application cannot succeed. That is the fate of this application. The respondents' legal practitioners urged the court to make an award of costs against the deponent to the founding affidavit to this application *de bonis propriis*. Much as that submission was persuasive,, it is my considered view that as the applicants are legally represented, a more appropriate or proper way to record the court's displeasure in this case would be to award costs in favour of the respondents on an attorney and client scale.

For the reasons discussed above it is ordered as follows:

The application is dismissed with costs on an attorney and client scale.

*Nyikadzino, Kworera & Associates*, applicants' legal practitioners  
*The Civil Division of the Attorney-General's Office*, respondents' legal practitioners