

GODFREY CHIPARAUSHE
and
60 OTHERS
versus
TRIANGLE LIMITED
and
TRIANGLE SENIOR STAFF PENSION FUNDS
and
MR S MTSAMBIWA

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 10 May 2016 & 31 August 2016

Opposed matter

F Mahere, for applicant
A P De Bourbon, for the 1st & 3rd respondent
T Moyo, for the 2nd respondent

MATANDA-MOYO J: This is an opposed application where the applicant seeks that the first respondent be declared to be in contempt of High Court Order in HC 10776/13. The applicant also seeks that should the first respondent fail to comply with paragraphs (e) and (f) of the judgment in HC 10776/13 within seven days of the granting of this order, then its managing director be committed to Harare Remand Prison for an indefinite term until the first respondent complies. In terms of paragraphs (e) and (f) of HC 10776/13 this court ordered the following;

“(e) IT IS HEREBY DECLARED THAT TRIANGLE LIMITED has an obligation to cause the determination of the applicants’ basic annual salary for purposes of the calculation of applicants pensionable emoluments, from the date of this judgment onwards, in accordance with the TSSPF Rules, and that, this obligation shall be discharged, in full, within (90) ninety days of the date of this order.

(f) CONSEQUENT TO THE ABOVE DECLARATION TO THE ABOVE DECLARATIONS, TRIANGLE is hereby directed, within (90) ninety days of this order, to recommence making its contributions, and to deduct the applicants’ contribution for award transmission to the TSSPF, towards the costs of providing benefits towards the applicants in terms of the TSSPF’s rules as determined by the TSSPF’s actuary, and approved by the TSPFF Trustees, EXCLUDING any arrears which arose between January 2009 and the date

of this order until such time as the TSSPF has been terminated in accordance with the TSSPF Fund Rules.”

Counsel for the first and third respondents raised points *in limine*. Firstly he attacked the validity of the founding affidavit. It was his submission that such affidavit was the same affidavit filed in HC 11975/15 and as such cannot be admitted before these proceedings. Such point was raised for the first time in the first and third respondents’ heads of argument. The applicant took issue with that. It is the applicant’s contention that such challenges should have been initially taken in the opposing affidavits. This, the applicant’s counsel argued should have been done so as to accord the applicants an opportunity to deal with the issue in their answering affidavits.

The question of validity of a founding affidavit is a legal point and not a factual one. Factually the affidavit speaks for itself. The court can simply look at the founding affidavit and ascertain the facts. It’s validity becomes a legal point. It is trite that legal points can be raised at any time during the proceedings. The issue of the validity of the founding affidavit was raised in the first and third respondents’ heads of argument affording the applicant to deal with the issue in their own heads. See *Barkhuizen v Napier* (CCT 72105) (2007) ZACC 5 or 2007 (5) SA 323 (CC). On p 8 of the proceedings is the signature page of the affidavit. It is apparent the affidavit was sworn to in Triangle on 30 November 2015. That affidavit was the one used in the application in HC 11975/15 which application was withdrawn on 18 December 2015. The affidavit of the 30th November 2015 did not include the third respondent. The third respondent was then added after the 30th of November 2015 in the present case. It follows that the founding affidavit was never commissioned. No case was however made against the third respondent. It is trite that an application stands or falls on its founding affidavit. No case was made against the third respondent in applicants’ founding affidavit. See *Bowman N.O. v De Souza Roldao* 1988 (4) SA 326 T at 327 where the court said:

“*In limine* Mr Zeiss who appears for the respondent, argued that he has not made out a case in the founding affidavit to entitle him to any relief in terms of the notice of motion; he submits that there is a material and fatal *lacuna* in the founding affidavit which cannot be cured.”

Generally speaking, an applicant must stand or fall by his founding affidavits, he is not allowed to make out his case or rely upon new grounds in the replying. See for example, *Director of Hospital Services v Ministry* 1979 (1) SA 626 (A) at 635 in Fin – 636 where DIEMANT JA said the following:

“When as in this case, the proceedings are launched by way of notice of motion, it is to the founding affidavit which a Judge will look to determine what the complaint is”.

The founding affidavit should contain all facts upon which an applicant relies in seeking relief. Courts will not normally allow or permit a mere skeleton of a case, sought to be supplemented in an answering affidavit. It is trite that all facts and the basis of seeking a relief must be established in the founding affidavit. See also *Titty Bar and Bottle Store (Pty) Ltd v ABC Garare (Pty) Ltd and Ors* 1974 (4) SA 362 (T), *Pountas’ Trustees v Lahanas* 1924 WLD 67, *Austerlands (Pvt) Ltd v Trade and Investment Bank & 2 Ors* SC 92/05.

The applicants’ founding affidavit fails to allege any conduct by the third respondent warranting the relief sought. Of major concern is that certain additions were made to the founding affidavit but it is clear that such changes were not countersigned by the applicants. When introduction of the third respondent as a party to these proceedings was done, such affidavit with those changes was not commissioned by a Commissioner of Oaths. Such founding affidavit fails to meet the requirements of a valid affidavit. I am satisfied this matter cannot proceed on the basis of an invalid founding affidavit and on the basis of an affidavit which fails to disclose the facts relied upon to obtain the relief sought.

The supporting affidavits as the word “supporting” meaning; entails buttressing a founding affidavit properly before the court. Once the founding affidavit cannot stand so do the supporting affidavits. I have not called the lawyer who prepared the papers to account and therefore I shall not deal with allegations raised against such lawyer.

In the result the applicants’ founding affidavit is invalid and the point *in limine* taken by Mr *De Bourbon* is well taken.

In the result the application is dismissed with costs.

Chinawa Law Chambers, applicant’s legal practitioners
Gill, Godlton & Gerran, 1st & 3rd respondent’s legal practitioners
Scanlen & Holderness, 2nd respondent’s legal practitioners