

WILLIAM BARON

Versus

THERESA BARON

And

THOMAS WILLIAM BARON

And

REGISTRAR OF DEEDS

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 12 MAY 2021 AND 3 JUNE 2021

Court application

Ms A Nkomo, for the applicant
I Mupfiga, for the 1st respondent

DUBE-BANDA J: In this court application, applicant seeks an order to have a caveat registered against the title of Plot 17 and 18 of Greenvale, Bickford, Umsungwe Block, Gweru (Plot 17 and Plot 18), and costs against 1st and 2nd respondent on a legal practitioner and client scale. The application is opposed by the 1st respondent. 2nd respondent filed a consent to judgment. 3rd respondent did not participate in these proceedings, and I take the view that it has taken a position that it shall abide by the order this court. For ease of reference, the parties shall, where the context permits, be referred to by their names.

This application will be better understood against the background that follows. On the 1st July 2020, applicant (William Baron) caused to be issued out of this court a summons against 1st respondent (Theresa Baron) and 2nd respondent (Thomas William Baron). The summons matter is pending under cover of case No. HC 1025/20. In the summons applicant claims a sum of US\$26 700.00, it being alleged to represent monies he contributed towards the purchase of assets for the Thomas William Baron Family Trust (Trust). It is pleaded in the summons that 1st respondent and 2nd respondent have dissolved the Trust, and did not reimburse applicant his contributions. The record in HC 1025/20 shows that the matter is at the discovery stage.

Against this background, the applicant launched this application on the 19th March 2021, seeking an order to place a caveat against the title of Plot 17 and Plot 18. Plot 17 is registered in the name of the 1st respondent, and Plot 18 is registered in the name of 2nd respondent. Applicant's contention is that should the summons matter pending under cover of case No. HC 1025.20 be decided in his favour, the two, i.e. 1st respondent and 2nd respondent have no other known assets that can be liquidated to meet his claims except the two plots. It is on this basis that he seeks an order encumbering the two plots with a caveat.

The founding affidavit to this application was deposed to by one Nikiwe Ncube-Tshabalala. I will revert to this issue later in this judgment. 1st respondent filed a notice of opposition, and applicant *purported* to file an answering affidavit. The *purported* answering affidavit is not signed by the deponent. It was however signed by a commissioner of oaths – one Lerato Mguni. How such could happen, that a *purported* affidavit is not signed by the deponent but signed by a commissioner of oaths, leaves a lot of questions unanswered. However, the point is that there is no answering affidavit before court. This court cannot relate to an unsigned document masquerading as an affidavit.

Another issue that arises in this application, relates to the 1st respondent's failure to file heads of argument within the timeline allowed by the rules of court. Applicant filed his heads of argument on 18th November 2020, and 1st respondent *purported* to file her heads of argument on the 10th December 2020. When it became apparent to 1st respondent that her heads of argument were filed out of the timeline allowed by the rules of court, she filed a chamber application, under cover of case No. HC 2118/20, seeking an order uplifting the automatic bar imposed by rule 238 (2) (b) of the High Court Rules, 1971. At the commencement of the hearing of this application, I was informed of this chamber application, and that it was still pending. I stood down the hearing of this matter and directed that the chamber application be placed before me. Mr *Mupfiga*, counsel for the 1st respondent submitted that the order sought in the chamber application be granted. Ms *Nkomo*, counsel for applicant, indicated that the order sought was not opposed. In fact she asked that the order sought be granted by consent. On the facts of this chamber application, I was satisfied that the concession by Ms *Nkomo* was properly made, and the order sought was indeed merited. I then granted the order in terms of the amended draft. In the result, 1st respondent's heads of argument, a copy already in the court file, was now properly before court.

The applicant neither deposed to a founding affidavit nor supporting affidavit. The founding affidavit in support of the application was deposed to by one Nikiwe Ncube-Tshabalala. I asked Ms *Nkomo*, whether the evidence contained in the founding affidavit does not amount to inadmissible hearsay evidence. For completeness, I reproduce in full hereunder the affidavit of Nikiwe Ncube-Tshabalala in support of this application. It is this:

I, NIKIWE NCUBE-TSHABALALA, do hereby make oath and say;

1. I am a registered Legal Practitioner for the applicant in this matter and the facts I depose to herein are, to the best of my knowledge, true and correct. Where I have no personal knowledge of the facts I confirm having verified same. The applicant's address of service is Ncube –Tshabalala Attorneys, 113A Broadway House, 12th Avenue & Joshua M. N. Nkomo Street Bulawayo.
2. The 1st Respondent is Theresa Baron, a female adult whose address of service is Lot 17 of Greenvale of Bickford of the Umsungwe Block, Gweru.
3. The 2nd Respondent is Thomas William Baron, a male adult whose address of service is Lot 18 of Greenvale of Bickford of the Umsungwe Block, Gweru.
4. The third Respondent is cited in his official capacity as the Registrar of DEEDS & COMPANIES, whose address of service is Tredgold Building in Bulawayo.
5. The applicant caused Summons to be issued under Case No. H.C. 1025/20 claiming several sums of money that were sent to the 1st and 2nd Respondent in pursuance of the objectives of Thomas Baron Family Trust, registered under MA 961/2017. I refer to the pleadings therein by reference.
6. The Applicants claim against the 1st and 2nd Respondent amount to the equivalent of US\$26 700.00 (Twenty Six Thousand Seven Hundred United States Dollars) at bank rate at date of payment.
7. The 1st and 2nd Defendants are registered owners of Plot 17 and 18 of Greenvale of Bickford of the Umsungwe Block, Gweru respectively.
8. There are no other known assets belonging to the 1st and 2nd Defendants that can be liquidated to pay the applicants claims except the two plots. Annexed hereto are copies of the Title Deeds for both properties. I am therefore applying that Caveats be placed on Plot 17 of Greenvale of Bickford of the Umsungwe Block, Gweru, held under Deed of Transfer Number 5805/89 and Plot 18 of Greenvale of Bickford of the Umsungwe

Block, Gweru held under Deed of Transfer Number 1615/87 to secure the Applicants claims.

9. The plaintiff has no alternative other than to burden the said properties.

Ms *Nkomo*, argued that the founding affidavit does not contain inadmissible hearsay evidence, since the deponent, Nikiwe Ncube-Tshabalala is the legal practitioner of record of the applicant. It is contended that the founding affidavit was deposed on the basis of the instructions given by the applicant, to his legal practitioner of record, therefore the contents of the affidavit are admissible. It is important to observe at this point that the affidavit does not aver that it was drawn from the information given by the applicant. It merely says the deponent is the legal practitioner of the applicant.

For completeness, it is important that I give a general definition of hearsay evidence, it is defined as evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence. Put differently, it is a statement made otherwise than by a witness giving evidence. See: *R v Harz*, (1966) 3 All E.R. 433 at p. 449). Generally affidavits must be confined to such facts as the witness is able of his own knowledge to prove, except in interlocutory motions, and urgent applications, where hearsay evidence may be admitted. See: *Jean Hiltunen v Osmo Juhani Hiltunen* HH 99/08. In *Bubye Minerals (Private) Limited and Athlone Investments (Private) Limited v Rani International Limited* S.C. 60/06 the court said the evidence on the founding affidavit of the applicant should be based on personal knowledge and not hearsay. If it is not based on personal knowledge but on hearsay, the effect of this is that there is no founding affidavit in support of the application and therefore, no application before court. I take the view that Order 32 Rule 227 (4) (a) of the High Court Rules, 1971, which says an affidavit filed with a written application shall be made by the applicant or respondent, as the case may be, or by a person who can swear to the facts or averments set out in therein, re-enforces the inadmissibility of hearsay evidence in applications. Nikiwe Ncube-Tshabalala is not the applicant in this matter. She can only depose to the founding affidavit in support of the application if she can swear to the facts or averments set out in therein.

In *casu*, the deponent avers that she is the legal practitioner for the applicant in this matter and the facts deposed to are, to the best of her knowledge, true and correct. Where she has no personal knowledge of the facts, she confirms having verified same. What is

conspicuous about the averments made by the deponent is that she does not indicate the source of her information. She does not indicate the person from whom she verified the facts not in her personally knowledge. She does not say it is the applicant who provided her with such information, as contained in the founding affidavit. For instance, in *paragraph 8* of the founding affidavit, she avers that there are no other known assets belonging to the 1st and 2nd respondents that can be liquidated to pay the applicants claims except the two plots. She does not provide the source of this information. It is inadequate to merely aver that she is the legal practitioner of the applicant. The founding affidavit is laden with hearsay evidence. As a general rule, subject to the section 27 of the Civil Evidence Act [*Chapter 8:10*], and the rule relating to interlocutory and urgent applications, hearsay evidence is inadmissible in affidavits. This is neither an interlocutory nor urgent application.

I asked Ms *Nkomo*, to consider whether the founding affidavit may be saved by the provisions of section 27 (1) of the Civil Evidence Act [*Chapter 8:01*], which deals with the requirements for admissibility of first hand hearsay evidence. Ms *Nkomo*, neither had any meaningful submissions to make, nor was I able to find in favour of the application in this regard. It is inadequate for the deponent to merely aver that she is the legal practitioner of the applicant. More is required to meet the requirements of section 27(1) of the Civil Evidence Act. There is no evidence that her averments that: that there are no other known assets belonging to the 1st and 2nd respondents that can be liquidated to pay the applicants claims except the two plots; and that the applicant has no alternative remedy than to burden the said properties, would have been admissible from the mouth of the source. See: *Jean Hiltunen v Osmo Juhani Hiltunen (supra)*. The court does not know the source of this information. The deponent deposed to facts that are not within her personal knowledge, did not indicate the source of her information, save for her statement that she is a legal practitioner for the applicant. She does not say from whom she verified the facts not within her knowledge.

So important is this principle that in *Bubye Minerals (Pvt) Ltd and Anor v Rani International Limited* SC 60/06 the Supreme Court dismissed an appeal on the sole basis that the deponent to the founding affidavit had no personal knowledge of transactions alleged in the affidavit. This was despite the fact that the deponent had access to the company records and also consulted the company's employees. See: *Stalap Investments (Pvt) Ltd and Zimre Holdings Ltd and Douglas Mamvura and Ramsway (Pvt) Ltd versus Willoughby's Investments (Pvt) Ltd and Itai Valerie Pasi and CFI Holdings Ltd* HH 459/19. The learned authors

Herbstein and Van Winsen in *Civil Practice of the High Courts of South Africa* 5 ed, Vol. 1 of p 444 opine that where a deponent to an affidavit includes information that he does not have first-hand knowledge of, a verifying affidavit must be filed. There is no supporting affidavit in this application. All in all, I have not been able to isolate any facts that the deponent could have had personal knowledge of. I therefore, find that the entire founding affidavit contains inadmissible hearsay evidence.

In conclusion, rule 230 of the High Court Rules, 1971, says a court application shall be in Form No. 29 and shall be supported by one or more affidavits setting out the facts upon which the applicant relies. It is trite that in application proceedings, it is to the founding affidavit that the court will look to for the cause of action. Hence as has been said in numerous cases before, an application must stand or fall by its founding affidavit and the facts alleged therein because those are the facts which the respondent is called upon either affirm or deny. See: *Magwiza v Ziumbe NO and Another* 2000 (2) ZLR 489 (S) at 492 D-F. In this case, there is no founding affidavit recognizable at law.

In the circumstances, I come to the conclusion that the evidence in the founding affidavit before court is inadmissible. Thus there is no founding affidavit and therefore, no application before court to consider. In respect of costs, the applicant has failed to obtain the relief he sought from this court. There are no special reasons warranting a departure from the general rule that costs should follow the result.

Disposition

In the result: the application is struck off the roll with costs of suit.

Ncube-Tshabalala Attorneys, applicant's legal practitioners
Gundu, Dube & Pamacheche, 1st respondent's legal practitioners