TICHAONA REVESAI
versus
WINDMILL (PVT) LIMITED

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 28 January 2015 & 2 March 2016

**Opposed Matter**

*R Zigomo*, for the applicant
*R Magundani*, for the respondent

DUBE J: The applicant is a former employee of the respondent. The applicant claims that the respondent despoiled him of his vehicle on 17 June 2014. On 29 July 2014 the applicant filed a court application seeking a spoliation order against the respondent. The applicant asserts that he omitted to make certain averments in his founding and answering affidavits explaining the delay in filing the spoliation application. The applicant also avers that there have been further delays in setting this matter down for hearing .The applicant wishes to explain these delays by way of a supplementary affidavit and seeks leave of the court to file the affidavit.

The applicant avers that the facts sought to be introduced were omitted from his founding and answering affidavit and are material to the resolution of the dispute and go to show that the applicant is *bona fide* in prosecuting his claim. The applicant avers that he was unaware that inferences would be made against him if he failed to explain the delay in his application. He also wishes to explain the delay taken in setting the application for hearing. He states that it is in the interests of justice that the explanations be placed before the court and further that the respondent will not suffer any prejudice by the inclusion of these facts.

The respondent is opposed the application. It submitted that the applicant seeks to sneak in averments which he was aware of and chose not to make in either his founding or answering affidavit. The applicant cannot be allowed to bring in new averments to the court as these are prejudicial to the respondent who has already pleaded and filed heads of argument in the spoliation matter. The matter is now awaiting set down. Allowing the applicant to file a supplementary affidavit will amount to restarting the matter all over again

and might also result in a different notice of opposition being filed on behalf of the respondent.

The rules envisage the filing of three sets of affidavits. An exception to this setup is allowed in Order 32 r 235 which provides for the filing of additional affidavits. The rule allows a further affidavit to be filed only with the leave of the court. Rule 235 gives no further guidance on considerations to be taken into account by the court in deciding whether to allow an additional affidavit. Guidance to the approach to be taken in an application for leave to file an additional affidavit has been developed by precedent. Herbstein and Van Winsen, *The Civil Practice of the High Courts of South Africa* on p 433 states that precedent has tried to formulate rules or circumstances in which further affidavits may be permitted and state that "leave will be granted only in exceptional circumstances or in special circumstances or if the court considers such a course advisable…. ''

In *Associated Newspapers of Zimbabwe* v *Media Information Commission* 2006 (1) ZLR 128 (H), the court held that leave to file additional affidavits cannot be had for the asking, the courts will insist on the observance its rules regarding the sequence of filing affidavits unless to refuse such an application will result in a miscarriage of justice. Further that the court will not readily grant leave to file an additional affidavit, "to deal with facts that were available to the parties at the time affidavits were drawn up and deposed to" nor will the court grant leave to bring in a new cause of action. The court summarised the approach as follows,

> "It is only in exceptional circumstances that the court will allow the filing of an additional affidavit. There must be an affidavit. The party applying for leave must provide a satisfactory explanation for the failure to put the information or facts before a court at an earlier stage and for the late filing of the affidavit. The explanation must be one that negatives bad faith or culpable failure to act timeously. The court must also be satisfied that no prejudice will be caused to the opposing party which cannot be remedied by an appropriate order of costs."

The same approach was followed in *United Refineries Limited* v *Mining Industries Pension Fund and Others* HH 313/12 and SC 63/2014.

In considering whether special circumstances exist in an application, the court is reposed with discretion. In *James Brown & Hamer (Pty) Ltd* v *And Ors* v *Simmons* 1963 (4) SA 656 (A) at 660 D-F, the court said the following on the discretion that a court dealing with such an application has as follows,

> "It is in the interest of the administration of justice that the well- known and well established general rules regarding the number of sets and the proper sequence of

> affidavits in motion proceedings should ordinarily be observed. That is not to say that those general rules must not always be rigidly applied; some flexibility, controlled by the presiding judge exercising his discretion in relation to the facts of the case before him,must necessarily also be permitted."

What is clear from the authorities cited is that the rules allow only three sets of affidavits. There are exceptions when the court will allow the filing of further affidavits. The court in the exercise of its discretion will only allow an additional affidavit when exceptional or special circumstances have been shown to exist or if the court considers such a course advisable. Leave to file an additional affidavit is not there simply for the asking. Courts expect rules to be followed. A court dealing with an application to file an additional affidavit may not accede to a request to file an additional affidavit where, it raises wholly fresh issues, unless the new facts came to the litigant's knowledge after filing the affidavits. An applicant seeking to file an additional affidavit is required to give a proper and satisfactory explanation as to why the information was not placed before the court at the time the founding and answering affidavits were filed. The court will only be able to consider that the application is reasonable where all the relevant information surrounding the reasons justifying the admission of a further affidavit is placed before it is placed before it.

The court has wide discretionary powers over whether to allow an additional affidavit and in that way controls the number of affidavits to be filed in any application. The requirement to observe the rules should not undermine the interests of the administration of justice thereby depriving a litigant an opportunity to ventilate his case. The court dealing with such an application must consider the requirement that the dispute between the parties be adjudicated upon all the relevant facts surrounding the dispute and the need to allow some flexibility in order to balance the interest of justice. The court has a discretion which it must exercise judiciously after considering all the relevant and surrounding circumstances of the case. The court must be guided by principles of fairness.

The explanation proffered by the applicant must be proper and satisfactory and the affidavit should only be disallowed where there the respondent is likely to suffer prejudice and in circumstances where the prejudice likely to be suffered by the other side cannot be cured by a fitting order of costs. The applicant must provide an explanation that negatives *mala fides.* The court will look at the conduct of the applicant in relation to the application and the cause of the information not being provided in earlier affidavits. The applicant is required to show the court that it is in the interests of justice that the affidavit be allowed.

The applicant's explanation for the failure to explain the delay in filing the application for spoliation is as follows. He omitted to make certain averments in his founding affidavit explaining the delay in filing the spoliation application. He learnt after he had filed the application for spoliation and after the respondent had filed its opposing affidavit that these averments were necessary and could have been included in the answering affidavit. The reason for the delay in filing the application for spoliation was not of his own making. He fears that an inference may be made that he has not been diligent in pursuing his claim if he does not explain the delay and the court will not have sufficient facts before it to resolve the dispute. Furthermore, he wishes to explain the delays in bringing this matter to a hearing, which delays he avers were occasioned by his erstwhile legal practitioners.

He instructed Messrs Kamusasa and Musendo Legal Practitioners to file an application for spoliation on 29 July 2014, 12 days after the spoliation which took place on 17 June 2014. In the first couple of days, he hoped that the parties would discuss the issue and be able to resolve it. He failed to immediately instruct legal counsel because the respondent had withheld his salary and terminal benefits. On 3 July his legal practitioners wrote to the respondent and demanded the return of the vehicle. He was not aware that he was entitled to make an urgent application at this stage. His legal practitioners focussed on labour issues raised in the respondent's response to their letter and responded to these. The engagement did not yield any positive results resulting in him changing legal practitioners. He engaged Messrs Machuvaire and Associates on 20 July 2015.His new legal practitioners advised him that an urgent application should have been filed on his behalf for immediate return of the vehicle. A court application was filed on 29 July 2014.

He hired Mapfumo Mavese and Associates in September 2014 .They failed to set down the application .Not satisfied with their representation, he hired Mugiya and Macharaga Legal Practitioners on 26 October 2014 to try and expedite the case. These legal practitioners did not do well either. He hired his present legal practitioners on 11 June 2015. They advised him that the matter was never set down on 6 November 2014 as given and that the correct manner of setting down matters was not followed.

The applicant was always aware of the reasons for the delay in bringing the application for spoliation. The issue of the delay was raised in the respondents' opposing affidavit and he paid no heed. Having failed to include these in the founding affidavit, he could have included the averments in his answering affidavit. He blames his legal practitioners for the failure to include the information now sought to be introduced.

The numerous legal practitioners who handled this matter in the past have not filed any supporting affidavits in support of this application, to explain the failure and reasons to include information and facts now sought to be introduced. In the *Beitbridge Rural District Council* v *Russel Construction Co Pvt Ltd* 1998(2) ZLR190, the court made it clear that a litigant cannot blame an absent legal practitioner. This requirement is trite. I must reiterate what I said in *Industry Pension Fund* v *United Refineries Ltd & 2 Others* HH 313\12 where I said the following on p 9 of the cyclostyled judgment,

> "There is a plethora of cases where it was decided that in any case where a party seeks to redress or explain a procedural omission, irregularity or wrongful conduct which he attributes to the conduct of his legal practitioner, it is imperative to outline fully that position in its papers. The best way to achieve this is to request such legal practitioner to depose to a supporting affidavit outlining the role that he or she played in that matter. The court is not satisfied that applicant has advanced a full and satisfactory explanation for the failure to include this information in its opposing affidavit.''

In any situation where there is an issue arising involving a delay in filing pleadings or any failure to deal with a matter in any particular fashion and the fault is attributable to a legal practitioner, a statement is required to be obtained from such a legal practitioner explaining the part he played in that matter. The applicant has failed to file supporting affidavits to support his version. The applicant's explanation cannot be full, let alone reasonable in the absence of supporting affidavits from the legal practitioners whose conduct is put issue. The applicant's explanation for the failure to explain the delay lacks confirmation.

The applicant tries to take responsibility for the failure to include the reasons for the delay in filing the application and tries to leave his legal practitioners out of the equation. He asserts that he is a layperson and did not appreciate legal documents and further that he thought that the papers prepared for him were in order. A party who is represented by a legal practitioner, who fails to carry out his tasks as expected, holds his client responsible for his failure to act appropriately. See *Saloonjee & Anor NNO* v *Minister of Community Development 1965(2) SA 135*, See also *S* v *McNab*1986 (2) ZLR 280.

The applicant was represented by legal practitioners when the application was filed. These are legal practitioners of his own choice. He took a risk when he appointed them. He cannot cry foul when their work is not up to scratch. The applicant may be a layman in the sense that he is not specialised in law. He did not prepare the papers himself. The fact that the

applicant is himself not a lawyer and may not have understood the documents prepared and filed on his behalf or what was required of him as a litigant does not constitute good excuse entitling the applicant to escape the outcome of his legal practitioners lack of diligence. The applicant is liable for the sins of his legal practitioners. I am not satisfied that the explanation proffered by the applicant is reasonable in the circumstances of this case.

The fact that the applicant seeks to explain the delay in prosecuting the spoliation claim may go to show to show the *bona fides* of the applicant. He simply wants to put all information pertaining to the application before the court. He would be expected to explain the delay in the spoliation application.

There is no doubt that the respondent will be prejudiced by such a course. The information sought to be introduced now ought to have been introduced before closure of pleadings. The respondent has not shown that the granting of the application is likely to cause any prejudice to it that cannot be cured by an order of costs. The respondent would be entitled, if the additional affidavit were allowed, to file a supplementary answering affidavit and supplementary heads of argument in response. These developments would have cost implications. I do not agree with the respondent that the admission of the affidavit would necessarily take the application back to the beginning of the application. The prejudice likely to be suffered by a respondent in a case such as this, is capable of being be cured by an appropriate award of costs.

I have balanced all the requirements of the application. The requirement to provide a satisfactory explanation for the failure to include facts and information in the usual set of affidavits in an application for leave to file an additional affidavit is the most crucial requirement of the application. Where a litigant fails to advance a full, satisfactory and reasonable explanation for the failure to include information and facts before a court at the required stage, that failure cripples the application. The court is not persuaded that there are special or exceptional circumstances that call for the court to allow the filing of an additional affidavit. I have decided in the exercise of my discretion to disallow the affidavit.

In the result, it is ordered as follows.

1. The application is dismissed
2. Costs follow the event.

*Zigomo legal practitioners,* applicant's legal practitioners
*Scanlen & Holderness legal practitioners*, respondent's legal practitioners