

PHILLIP CHIYANGWA
versus
CLIVE JOHNSTON
and
MINISTER OF LANDS AGRICULTURE WATER AND RURAL SETTLEMENT N.O
and
MINISTER OF LOCAL GOVERNMENT PUBLIC WORKS AND URBAN DEVELOPMENT
and
MUNICIPALITY OF CHINHOYI

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA J
HARARE, 27 February 2020 & 4 March 2020

Opposed matter

M. Ndlovu, for the applicant
A. Dracos, for the 1st respondent

MUNANGATI-MANONGWA J: The applicant herein approached court by way of application seeking several declaratory orders inter alia that it be declared that the offer letter issued by the second respondent in favour of the applicant dated 29 October 2002 is the sole and exclusive lawful authority for the use and occupation of Subdivision 1 of Sinoia Citrus Makonde.

A notice of opposition and an opposing affidavit was filed on behalf of the first respondent with the first respondent's wife deposing to the opposing affidavit. A document dated 30th April 2019 duly signed by the first respondent is on record as authorizing her to act on his behalf. In his answering affidavit the applicant raised issue with the opposition. The applicant contended that there is no opposition before the court as the purported special power of attorney filed was/is null and void as it had not be executed in accordance with the law.

The matter was set down on opposed roll and at the hearing the applicant raised the point *in limine* that there is no opposition before the court hence the matter is unopposed. Accordingly the application has to be granted. I requested parties to file heads of argument which they did. The

applicant's argument is premised on the document on p 48 of the record done and signed by the first respondent which reads:

“30th April 2019

TO WHOM IT MAY CONCERN

This is to certify that I, GORDON CLIVE JOHNSTON, Zimbabwean Passport Number DN 430223, resident at Farm 4436 MPONGWE, ZAMBIA, have, this 30th day of April TWO THOUSAND AND NINETEEN granted power and authority to my wife MRS PATRICIA MARGARET JOHNSTON holder of Zimbabwean Passport Number DN 229368 of 54 ORANGE GROVE DRIVE, CHINHOYI ZIMBABWE, to sign on my behalf, all documentation pertaining to case No. 3290/19 at the High Court of Zimbabwe, held in Harare

Signed

GORDON CLIVE JOHNSTON
PASSPORT NUMBER DN 430223”

The applicant argued that what appears at p 48 is a mere letter not a power of attorney as the document is not authenticated in accordance with the High Court (Authentication of Documents) Rules, 1971.

Rule 3 of the High Court (Authentication of Documents) Rules 1971 provides:

“Any document executed outside Zimbabwe shall be deemed to be sufficiently authenticated for the purpose of production or use in any court or tribunal in Zimbabwe or for the purpose of production or lodging in any public office in Zimbabwe if it is authenticated—

(a) by a notary public, mayor or person holding judicial office; or

(b) in the case of countries or territories in which Zimbabwe, has its own diplomatic or consular representative, by the head of a Zimbabwean diplomatic mission, the deputy or acting head of such mission, a counsellor, first, second or third secretary, a consul-general, consul or vice-consul.”

It was submitted that the purported power of attorney was not authenticated it is not valid and the deponent Patricia Margaret Johnston could not derive power therefrom hence the opposing affidavit is a nullity. That being so, it was argued that, there is no opposition to the application hence the relief sought should be granted. Mr Ndlovu further submitted that in motion proceedings an application or opposition falls or succeeds on the filed affidavits, thus there being no valid affidavit for want of compliance with the rules the application must be granted as a matter of course. He further prayed for costs on a higher scale on the basis that the opposition mounted by the 1st respondent is abuse of court process. Further despite being represented by a senior lawyer the 1st respondent had blatantly disregarded rules of court.

The first respondent conceded that the purported power of attorney was not compliant which was an irregularity. Mr Dracos for the first respondent argued that the irregularity does not vitiate the validity of the notice of opposition in that

- (a) The deponent does not necessarily need any special authority to depose to the affidavit in the circumstances, alternatively
- (b) a properly notarized special power of attorney can be tendered from the bar to cure the defect.

In support of the initial proposition, the first respondent's counsel submitted that, the deponent is the wife of the first respondent and is personally privy to the facts. Further it is not contested that she had read the application together with her husband and even commented upon same as shown in paragraphs 5 and 6 of the opposing affidavit. He argued that as per *Chiadzwa v Paulkner* 1991 (2) ZLR 33 SC at p 36G-H "where the affidavit is not of the plaintiff himself, the deponent while not requiring any special authority from the plaintiff to make the affidavit, must belong to a particular class of persons, namely, those who can swear positively to the facts."

Such was the deponent. Reference was further made to order 32 r 227 (4) (a) of the High Court Rules, 1971 which reads:

"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 therein."

Mr *Dracos* submitted that as the deponent professed to have intimate knowledge of the facts, she could depose to the affidavit and that is where her authority derives from. He referred the court to *Dobbie & Ors v ZB Bank Ltd & Anor* HH126/17 where ZHOU J opined

"A deponent to an affidavit is only a witness, and the competency of such a witness to depose to an affidavit must be assessed by reference to Order 32 r 227(4)(a) of the High Court Rules, 1971, which requires that such person must be a "person who can swear to the facts or averments" set out in the affidavit to which he or she deposes."

He disputed that the principle related to matters involving companies as had been argued by the applicant's counsel. The first respondent then applied to court to tender a special power of attorney duly authenticated for the purposes of clearing the dispute although he maintained that it was only for clinical purposes. He requested the court to exercise its discretion and accept the tendered properly notarized special power of attorney.

He also contended that the argument advanced by Mr *Ndlovu* that an application falls or succeeds on its affidavit does not apply as this refers to an evidentiary principle relating to making out a proper case. In *casu* the issue is not about the contents of the affidavit, it is not about the facts alleged but whether the affidavit is properly before the court. Mr Dracos further submitted that there was no abuse of court process warranting punitive costs.

The court finds that whilst the power of attorney is deficient the deponent belongs to the class of persons who can swear positively to the facts. This although coming belatedly in the affidavit (para 6), it appears *ex facie* the record when she states that she “intimately knows the facts and background to the use and occupation of the premises in issue.” Coupled to this, she averred that she “together with the husband read the application and were surprised and astonished by the averments therein as Mr Chiyangwa never owned, held possession of, controlled or used the shed and worker housing” etc. The manner the deponent makes the statement in paragraphs 5 and 6 of her affidavit points to knowledge of the facts and she even avers so.

These point to the fact that the facts are within her knowledge satisfying the requirements set out in *Chiadzwa v Paulkner* 1991 (2) ZLR 33.

Equally r 227 (4) (a) simply requires that an affidavit be filed by person who can swear to the facts or averments therein, meaning anyone with personal knowledge of the facts. No authority is required to aver to an affidavit. It must be borne in mind that issues of competency are distinct from capacity.

However, *in casu* the issue is not about her competence to swear to an affidavit but whether she is authorised to act on behalf of the first respondent. It is clear from her affidavit, which aspect has not been denied that she together with her husband went through the application.

Further there is on record on p 48 a document wherein the respondent indicates that he was granting power and authority to his wife to represent him in this case. This document although not compliant for want of notarisation points to the intention of the respondent to have his wife represent him. The totality of this evidence is that the court can conclude that the respondent is aware of his wife’s involvement in his court proceedings as representing his interests. The court is satisfied that it is indeed the first respondent opposing the application and not an unauthorised person. It is the court’s conviction that the mischief meant to be cured by the authentication rules is that there be certainty that the person signing and giving authority to a representative be

confirmed to be the very one by appearing and signing before designated office holders. Given the foregoing the court is left in no doubt that the 1st respondent intended his wife the deponent to oppose the proceedings on his behalf. It is therefore proper that the request by the first respondent that he be allowed to file a properly notarised power of attorney be allowed.

There is no prejudice to the applicant and given the fact that the matter pertains to land the allocation, description and existence of which is being challenged, it is just and proper and in the interests of justice that the dispute be resolved on merits. There is a genuine dispute which needs adjudication. The court is guided by the stance taken in *Madzivire & Ors v Zvarivadza & Ors* 2006(1)ZLR 514 (SC) which although relating to issues pertaining to a company considered the filing of a resolution authorizing institution of legal proceedings. That being so, the point *in limine* is dismissed.

Suffice that the argument that an application falls or succeeds on its founding affidavit is clearly misplaced. This principle applies when the alleged facts stated in an affidavit fail to disclose a cause of action which applicant relies on or to assert a defence which a respondent relies on. It is an evidentiary principle. This is not the case herein. The issue is about procedure, whether there is a valid opposition before the court.

In the result it is ordered as follows:

1. The point *in limine* is dismissed.
2. The 1st respondent is granted leave to file a duly notarized power of attorney authorizing Patricia Margret Jonhston to represent him in these proceedings.

Mutangamira and Associates, applicant's legal practitioners
Honey Blackenberg, 1st respondent's legal practitioners