

DISTRIBUTABLE (48)

UNITED REFINERIES LIMITED
v
(1) THE MINING INDUSTRY PENSION FUND, (2) THE
REGISTRAR OF DEEDS, (3) ERROL STUART
WOLHUTTER (4) AUSTIN JAMELA SIBANDA t/a JOEL
PINCUS KONSON AND WOLHUTTER.

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GWAUNZA JA & GOWORA JA
HARARE, SEPTEMBER 20, 2013 & SEPTEMBER 8, 2014

T Magwaliba, for the appellant

T Mpofo, for the first respondent

GOWORA JA: In February 2011, the first respondent, (hereinafter referred to as “the respondent”) filed a court application against the appellant, the second respondent and the third respondent wherein an order for specific performance was sought against the appellant. The application was opposed by the appellant and the third respondent. The second respondent did not respond.

The third respondent filed opposing papers in which it denied averments made against it. The third respondent however, did not comment on the merits or otherwise of the application and filed no further documents in relation to the application.

The appellant filed opposing papers on 24 February 2011 and the respondent filed an answering affidavit. On 11 May 2011 the respondent filed its heads of argument. On 17 May 2011 the appellant filed a chamber application for leave to file a supplementary opposing affidavit. It was opposed by the respondent. Ultimately, the application was dismissed by the High Court. The appellant was dissatisfied with the judgment and has noted an appeal to this Court.

In dismissing the application, the court *a quo* concluded that the appellant had made admissions in its opposing affidavit which it was seeking to withdraw through the averments contained in the supplementary affidavit that it was proposing to file. The court found in addition that the appellant had not advanced a full and satisfactory explanation for its failure to include the information in its opposing affidavit. It concluded that the application to file the supplementary opposing affidavit was not *bona fide*.

When considering an application by a party for leave to file a supplementary affidavit, the court is called upon to exercise a judicial discretion. In the exercise of this discretion, it is a fundamental consideration that the dispute between the parties be adjudicated upon all the relevant facts pertaining to the dispute. The court is therefore permitted a certain amount of flexibility in order to balance the interests of the parties to achieve fairness and justice. In this exercise the court has to take into account the following factors:

- a) A proper and satisfactory explanation as to why the information had not been placed before the court at an earlier stage;
- b) The absence of *mala fides* in relation to the application itself;

- c) That the filing of the supplementary affidavit will not cause prejudice which cannot be remedied by an order of costs.

The appellant has submitted that at the end of the day in its enquiry the court must endeavour to achieve fairness to all parties. The explanation for the failure to place the facts sought to be adduced through the supplementary affidavit is blamed on the appellant's erstwhile legal practitioner.

As the court had to consider, on the one hand, the explanation for the failure to include the information and determine therefrom the lack of *mala fides* on the part of the applicant and the attendant prejudice to the respondent on the other, the absence of an affidavit from the legal practitioner concerned meant that the failure had not been explained. The court *a quo* found that where a party seeks to redress or explain a procedural omission, irregularity or wrongful conduct attributed to his legal practitioner, it was imperative that the legal practitioner concerned be requested to depose to an affidavit to outline his or her role in the conduct of the matter. The court *a quo* found that the appellant had failed to file a supporting affidavit from the maligned legal practitioner and that this was fatal to its case as he was the only person who could explain the chronology of the events and his reasons for refusing to include the defence proposed in the initial opposing affidavit. The court found that there was no comprehensive inclusive explanation for the omission of the crucial information from the opposing affidavit.

The view of this Court is that the finding was correct. In *Diocesan Trustees, Diocese of Harare v Church of the Province of Central Africa* 2010 (1) ZLR 267 MALABA DCJ stated:

“Although in argument Mr Zhou suggested that the failure to comply with the relevant rules was wholly attributable to the respondent’s legal practitioners, there was no admission of negligence by the legal practitioner who deposed to the opposing affidavit on behalf of the respondent on 29 September. One cannot consider absolving the respondent from the consequences of lack of diligence committed by its legal practitioners when there is no suggestion in its papers that the “oversight” was that of the legal practitioner. It would have been after the responsible legal practitioner had filed an affidavit admitting fault and explaining in some detail what happened, that the judge would be in a position to decide whether the respondent should not be visited with the sins of its legal practitioners. Where no factual basis for making such a distinction of culpability has been provided, the judge would have no right to draw it. It must follow that without an affidavit from the person responsible for the “oversight” admitting fault and explaining the circumstances under which he or she overlooked the rules, one is at a loss for the reason why it found necessary to state in the opposing affidavit that an “oversight” on the part of the respondent was the cause of the non-compliance.”¹

As contended by Mr *Mpofu*, the court *a quo* was correct in its consideration of the facts and in its application of the principles to the facts. This Court finds no misdirection as on the record there is no explanation as to why the facts were not included in the opposing affidavit when it was prepared. It is not as if the appellant was unaware of the contents of the affidavit in question at the time it was filed. The affidavit was sworn to by the deponent to all the affidavits filed in connection with the dispute. He describes himself in all of them as a director of the appellant. A letter from the appellant to the respondent dated 25 January bears his name and signature. Quite clearly, when he signed the affidavit on 24 February 2011 he would have been alive to the fact that it contained erroneous information. He however proceeded to sign the affidavit and allowed it to be filed.

It is correct, as argued by Mr *Mpofu*, that the statements in that letter, which are consistent with the opposing affidavit, negate the averments made in the supplementary affidavit.

¹ At p 277F-278B

In addition to the lack of an explanation, the court *a quo* found that the application lacked *bona fides*. This was mainly in view of the fact that the parties had been corresponding on the issue since 2006 when the written agreements were executed and signed. The record does not indicate when exactly the dispute arose, but it is clear that by January 2011 the appellant was threatening to cancel the agreement of sale. The learned judge in the court *a quo* found that the appellant had taken long to assert its rights and that in making an application to file the supplementary affidavit and raise the issues therein the appellant was acting in bad faith.

It seems that the learned judge misdirected herself in that finding. The bad faith is in relation to the explanation and not to an apparent failure to assert a right. Once the court found that there was no explanation it was open to the court to find that the lack of a full and satisfactory explanation was sufficient for the court to find that there was *mala fides* in the application. This Court however, does not consider that the misdirection in this respect would warrant interference by the court.

Most pertinent to the application was the finding by the court that the appellant sought, through the supplementary affidavit, to withdraw admissions that had been made in the opposing affidavit. The court stated the following:

“.... The applicant seeks to introduce evidence by way of a supplementary affidavit to the effect that this arrangement was never a sale. The supplementary affidavit supposedly paints a completely different picture of the transaction. The applicant has not followed the correct procedure outlined in rule 189 which provides for the withdrawal of the admissions it made. No formal application for the withdrawal of admissions was made. There is no doubt in my mind that once the supplementary affidavit is admitted, the applicant will effectively be saying, yes we made admissions but that, that is not a correct reflection of the transaction as it was a loan agreement. The admissions made earlier are therefore being challenged and will fall away on the filing of the further affidavit. The applicant has not laid a basis for the filing of a further affidavit that has the effect of withdrawing admissions earlier made.”

I have not been convinced by the contention on behalf of the appellant that the supplementary affidavit, rather than withdrawing admissions, sought instead to place before the court the antecedent agreement concluded between the parties. The opposing affidavit filed by the appellant on 24 February 2011 is rather terse and to the point. In para 5 of the same the deponent averred:

“The letter in question does not suggest that first respondent has actually cancelled the sale, but rather asserts that first respondent will proceed to do so unless the transaction can be reviewed on an amicable basis and invites settlement overtures.”

Given the averments in para 11 of the founding affidavit to which the response was addressed the court could only conclude that the appellant in fact admitted certain facts. In a later paragraph, specifically para 9 the respondent discusses its inability to pay capital gains tax necessary to facilitate transfer to the respondent. Mention is also made in the same paragraph of negotiations of a sale of the property back to the appellant. To then suggest in a supplementary affidavit that in fact the real transaction between the parties was a loan and that the agreement of sale was merely to serve as security for the said loan would be to change the whole tenor of the relationship between the parties. It would introduce new facts which were not placed before the court in the papers filed before it. The court *a quo* came to the correct conclusion. The effect of allowing the supplementary affidavit would be to sanction the withdrawal of an admission under circumstances where no good cause had been shown. To admit the supplementary affidavit would also result in the admissions being withdrawn in the absence of a formal application.

The appellant has criticised the High Court for what it suggested was the court’s defence of the respondent’s claim in respect of the finding by the court *a quo* that the

admission of the supplementary affidavit would have the effect of defeating the respondent's claim against the appellant. This is what the court said:

“There is no doubt that the respondent will suffer an injustice if this affidavit is admitted at this stage. The court is of the view that the admission or filing of the affidavit would clearly prejudice the applicant which relied on these admissions in the main matter as it will not be able to maintain its position on the merits. The respondent will be placed in a worse off position if the affidavit is admitted than he would have been had the pleading in its amended form, been filed in the first instance, see *DD Transport (Pvt) Ltd (supra)* for the proposition. Once this happens the matter will change its course. The main matter will have a completely different outlook as the applicant is raising a defence as opposed to admissions it made in the opposing affidavit. The cause of action will fall away. If the further affidavit is allowed, this signals the end of the matter. The new averments sought to be admitted disposes of the respondent's claim to the property. This prejudicial outcome cannot be cured or compensated by a special award of costs.”

It was submitted by Mr *Mpofu* that over and above dealing with the question of *mala fides* the court had also addressed the question of prejudice and had found that an injustice would be caused to the respondent if the court exercised its discretion in favour of the appellant. It was contended further that the finding by the court had to be considered in the context of the fact that the main application and the application to file the supplementary affidavit had been consolidated.

There can be no doubt that in the circumstances of this case the adduction of new evidence would have caused prejudice to the respondent which could not be cured by an order of costs no matter how punitive such costs would have been. A court would not exercise its discretion for the filing of a further affidavit where the affidavits sought to be filed do not constitute a reply but raise wholly fresh issues, thus entailing the filing of further affidavits by the applicant.

It would seem that the appellant has misconstrued the reasoning of the learned judge in the passage quoted above. The tenor of the *ratio* is focused on the issue of prejudice and the guiding principles. Indeed, the learned judge mentioned the destruction of the respondent's cause of action through the admission of the supplementary affidavit being sought to be produced by the appellant. The contention by the appellant that the court *a quo* had upheld the respondent's weak cause of action to the disadvantage of the appellant is not borne out by the record. The learned judge did not determine the merits of the application. In commenting on the effect that the supplementary affidavit was likely to have on the respondent's case the court *a quo* was weighing the likelihood of prejudice that could be occasioned to the respondent. The court did not make a definitive finding on the strength or otherwise of the respondent's claim. I am unable to find any misdirection in the manner in which the court dealt with the issue of prejudice flowing from the admission of the supplementary affidavit.

The appellant did not, in its opposing papers to the main application, plead a strong defence. It pleaded a case which amounted to an admission. It then sought through the filing of the supplementary affidavit to withdraw the admission and to proffer a defence. The court did not deny the appellant the right to plead a defence. The court in the exercise of its discretion was unable to find that the appellant had established exceptional circumstances as would justify it granting leave to the appellant to file a supplementary affidavit after the respondent had filed an answering affidavit. In considering prejudice the court has to weigh the respective positions of the parties to the dispute and in any event, what the appellant sought was an indulgence, not a right and I am not convinced that the court is guilty of gross misdirection in the exercise of its discretion in this case.

The appellant is aggrieved by the order of the court a quo that it pays costs on a punitive scale, and submits that there was nothing exceptionally outrageous or frivolous and vexatious about the application. The court found that the conduct of the appellant had caused the respondent to incur unnecessary costs. The information sought to be adduced through the supplementary affidavit was in the possession of the appellant from the inception. There were no reasons advanced as to why it had not been included in the opposing affidavit. The court said that the manner in which the appellant had dealt with the application was sloppy. I agree. Costs are ordered at the discretion of the court. Having regard to the manner in which the application was dealt with, the detail in the supplementary affidavit, the lack of an explanation as to why the application became necessary I am unable to state that the court was wrong in the exercise of its discretion. Costs on a punitive scale were clearly warranted in the court *a quo*.

The appeal is without merit and it is dismissed with costs.

ZIYAMBI JA: I agree

GWAUNZA JA: I agree

Magwaliba & Kwirira, appellant's legal practitioners

Messrs Gill, Godlonton & Gerrans, 1st respondent's legal practitioners

The Chief Registrar of Deeds, 2nd respondent's legal practitioners

Joel Pincus, Konson & Wolhuter, 3rd respondent's legal practitioners