JOSEPHINE VONGAI MHISHI
versus
TAFADZWA SHAW MABUTO

HIGH COURT OF ZIMBABWE
MAXWELL J
HARARE, 1 October & 10 October 2024

Preliminary Point

B Mtetwa with *R Sitotombe* for the applicant
D Ochieng, for the respondent

MAXWELL J: Applicant filed an application for leave to amend Defendant's Pleadings in HCH 4670/22, in terms of r 41(4) of the High Court Rules 2021. The application was issued on 19 April 2024.

On 30 April 2024 Respondent's Legal Practitioners wrote to the Registrar of this court advising that Respondent's Opposing Affidavit would be filed later that week. On 2 May 2024 the Notice of Opposition was filed together with the Opposing Affidavit and an annexure labelled SM1 Case Conference endorsement. Applicant filed an answering affidavit and subsequently heads of arguments were filed by the parties. The matter was set down for hearing on 1 October 2024.

Ms *Mtetwa* raised a preliminary point to the effect that the opposing affidavit is fatally defective to a point that the matter should be treated as an unopposed application. She highlighted that the requirements of a valid affidavit are that it must have a date indicating when the deponent signed it, and that that date must not be machine generated. Secondly, an affidavit must have a date when the Commissioner of Oaths would have commissioned it and that date must not be machine generated as well. She argued that the Commissioner of Oaths must endorse the date on which the oath was administered and the deponent must affix his signature and date in the presence of the Commissioner of Oaths. She submitted that *in casu* there is a machine generated date for the deponent's signature and there is no date indicating when the Commissioner of Oaths administered the oath to the deponent. She argued that the purported opposing affidavit does not meet the requirements of the law. She referred to the following cases:

Mandishayika v *Sithole* HH 798/15;

Sarpo v *Williams & Ors* HH 493/23; and

Ariston Management Services v *Econet Wireless Zimbabwe Limited* SC 123/23

She urged the court to uphold the point *in limine* and grant the relief sought on an unopposed basis.

Mr *Ochieng* argued that the cited cases were distinguishable and that there was no allegation that the requirements of the Justices of the Peace and Commissioners of Oaths Act [*Chapter 7:09*] were not followed. He argued that the printed date is presumed to be the date on which the deponent appeared before the Commissioner of Oaths. He argued that in any event, even if the point raised had merit, the remedy would be to allow a party leave to remedy the defect. He referred to the case of *Ndoro* & *Anor* v *Conjugal Enterprises (Pvt) Ltd & Anor* HH 814/22. He further submitted that the opposition to the application is registered by the filing of the notice and that the affidavit is motivation and evidence of the opposition. He submitted that if the affidavit is defective, the notice is still there.

I am not persuaded that the notice can stand separate from the affidavit. The wording of the notice justifies my position. The Notice of Opposition filed by the Respondent is in the following terms:

> "**TAKE NOTICE** that the Respondent intends to oppose this Application <u>on the grounds set out in the affidavit annexed to this notice, and the annexures thereto</u>, and that his address for service is care of his undersigned legal practitioners." (underlining for emphasis)

My reading of that notice gives me the impression that the basis of the opposition is found in the affidavit and annexures thereto. If you remove the affidavit, the result will be that there is no opposition.

After a perusal of the case law cited by the Applicant's counsel, I am persuaded to dismiss the point raised *in limine*. It is a fact that Legal Practitioners often exhibit different styles in drafting legal documents. The concluding words in an affidavit are always stated differently. In this case the opposing affidavit ends in the following words:

"**THUS SWORN TO AT HARARE** this 2nd day of May 2024."

It is then signed by the deponent and the words:

"Before me."

appear before the Commissioner of Oath's signature.

The words "sworn to" in the ordinary grammatical meaning reveal that an oath was taken. The day of the oath was the 2nd day of May 2024. The person administering the oath

confirmed that the swearing was done before him on what day. I am satisfied that there is a valid affidavit before me.

All the cases cited for the Applicant are distinguishable. In *Mandishayika* v *Sithole* (*supra*) the deponent signed the affidavit on a date different to that on which the Commissioner of Oaths signed. In those circumstances, there was no contemporaneousness in the date of the signature by the deponent, the date on which the oath was administered by the Commissioner of Oaths, and the date on which the Commissioner of Oaths confirmed administering the oath.

In *Sarpo* v *Williams & Ors* (*supra*) the court stated that it was difficult to know whether the deponent appeared before the Commissioner of Oaths on the same date printed on the affidavit. In my view such an inquiry is not necessary *in casu* where the document says the deponent swore before the Commissioner of Oaths.

In *Ariston Management Services* v *Econet Wireless Zimbabwe Limited* (*supra*) the issue was the absence of a date and the Supreme Court stated that without the date, the court may never be able to ascertain if the oath was properly administered in accordance with the law.

Much reliance was placed on cases in which "machine generated" or "computer generated" dates were condemned. I am of the view that the fact that a date was typed or computer/machine generated is neither here nor there. What matters is the context in which it was generated.

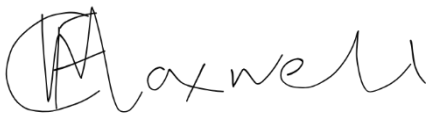
Counsel for Applicant ought to have examined their own papers before raising this point. The Founding Affidavit to this application was concluded in the same format as the opposing affidavit. If the Opposing Affidavit is defective by virtue of how it was concluded, then the Applicant's Affidavit is also defective on the same basis. This is clearly a point *in limine* that ought not to have been raised in the first place. It only served to delay the proceedings. I reiterate MATHONSI J's (as he then was) caution in *Telecel Zimbabwe (Pvt) Ltd* v *POTRAZ* HH 446/15 that:

> "Legal practitioners should be reminded that it is an exercise in futility to raise points *in limine* simply as a matter of fashion."

I can do better that state what was pointed out in *Afrochine Smelting (Pvt) Ltd* v *N.R. Barker (Pvt Ltd* 2020 (1) ZLR 260.

> "In my view, time has come that this warning be taken seriously. Otherwise courts will continue spending valuable time on tangents and detours, instead of dealing with the substantive merits of the dispute. Courts should ensure that matters and disputes between parties be finalised rather than delayed due to technicalities that do not deal with the real issues between the parties."

In *casu* time was lost dealing with a challenge that ought not to have been raised at all. The preliminary point is accordingly dismissed.



Mtetwa & Nyambirai, Applicant's Legal Practitioners
Messrs Coghlan, Welsh & Guest, Respondent's Legal Practitioners