GERALD MPOFU

AND

SIMILO CHIRADZA

VERSUS

QHAKAZA INVESTMENTS (PVT) LTD
T/A THE BABY SHOP

AND

THE DEPUTY SHERIFF

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
BULAWAYO 6 SEPTEMBER 2010 AND 9 SEPTEMBER 2010

Mr. J. Sibanda for applicants
Mr S. Mazibisa for 1st respondent

CHEDA J: This is an urgent chamber application. Applicants filed the above application seeking to stay execution of ejectment and warrant of execution issued by this court in case number HC 3057/09, Xref Number 1994/09.

This matter is based on a catalogue of numerous applications and counter-applications which have been filed with this court. In brief, the parties are all related and this includes the directors.

First respondent is holding an eviction order issued by this court, albeit applicants instance that such order was erroneously granted.

The matter was set down for hearing. On the day of the hearing, *Mr Mazibisa* for first respondent raised a point in limine. He attacked the legality of the "affidavit(s)" of the two applicants. Applicants' affidavit was deposed to by both of them with both names appearing on the same page(s) and signed on the same date by both of them and before the same commissioner of oaths, a Mr Lison Ncube. It is *Mr. Mazibisa's* argument that in essence there is no application before the court because the affidavit was irregularly deposed to and signed by applicants.

Mr Sibanda argued that there is no law which prohibits two deponents from signing one affidavit as long as they are deposing to the same facts. He went further and argued that this was done for both their convenience and that of the court/Judge. It is for the above reason, he argued, that the court should not attach any importance on *Mr Mazibisa's* objection. The rules of this court provide as follows:-

> "B - *General provisions for all applications*
> 227- **Written applications, notices and affidavits.**
> (1) ---
> (2) ---
> (3) ---
> (4) An affidavit filed with a written application—
> (a) shall be made b y the applicant or respondent, as the case may be, or by a person who can swear to the facts or averments set out therein; and
> (b) ---

In addition

> "Rule 230 reads:-
> 230. **Form of Court application.**
> A court application shall be in Form 29 and shall be supported by one or more affidavits setting out the facts upon which the applicant relies."

The rules are peremptory that there should be one or more affidavits. There is, therefore, a provision for more affidavits which should support the founding affidavit should it be necessary to do so. I wonder how the commissioner of oaths administered the oath on two people, at the same time. This, I have no doubt in my mind that if indeed this was the position, he must have done it with some difficulty.

Suppose, there were ten deponents how was he going to deal with this clearly surmountable task? In any event what was wrong with the second applicant deposing to a supporting affidavit? In fact, it has always been the practice of the courts internationaly to deal with one affidavit at a time. It is clear to me that the commissioner of oaths did not properly administer the oath in this matter.

What should also be borne in mind is that an affidavit filed of record takes the place of oral evidence and in that regard it is practically impossible for two deponents to take a witness stand, take oath and give evidence at the sametime. This, in my opinion, is one of the reasons why applicants can not be allowed to invent a new procedure for themselves and themselves alone.

I agree with *Mr Mazibisa* that the founding affidavit is unprecedented and a novel to our legal system. The question then is, is there an application for me to determine?

In my opinion there is absolutely none, as the rules strictly require that an application shall be established by one or more affidavits.

In light of the above, I find that there is no application before me to consider. The famous quotation by Lord Denning, that doyan of English Law, to the effect "that you can not put something on nothing and expect it to stand, it will fall", is in all fours in this matter.

The point in limine raised by respondent has merit. Respondent has asked for costs at a higher scale. I have considered this application in that regard. The general rule with regards to costs is that these courts are slow in awarding such costs. They can only do so where among other factors, a party has been obdurate in his handling of a matter before the courts. Applicants together with their "commissioner of oaths" engaged into some illegality.

They persisted with their wrong procedure even at the time when it was pointed out to them during the hearing.

I hold the view that this is a case where I must exhibit my displeasure by awarding costs on a punitive scale. Accordingly this application is dismissed with costs on an attorney-client scale.

Cheda J.....

Messrs Job Sibanda and Associates' applicants' legal practitioners
Cheda and partners, 1st respondent's legal practitioners