PAUL EDWIN TEASDALE

Versus

STANFORD GWANZURA N.O.
(In his capacity of a trustee in the
H.J. TEASDALE FAMILY TRUST)

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 27 & 29 February 2024 & 25 April 2024

Court application

B. Mandire for the applicant
V. Majoko for the respondent

DUBE-BANDA J:

[1] This is an opposed application in which the applicant Paul Edwin Teasdale, the defendant in the main action, seeks an order for the rescission of the judgment granted against him on 6 June 2019 in favour of the respondent. The applicant seeks an order couched in the following terms: (1) that the applicant for rescission of default judgment be granted; that the applicant be directed to file his opposing papers to case number HC 955/19 within ten days of the granting of this order; and that the respondent pays the costs of suit.

Factual background

[2] On 10 August 1988 Harold James Teasdale ("the Settlor") registered a Trust Deed of Donation, known as the H.J. Teasdale Family Trust ("Trust"). The applicant was a son of the Settlor and one of the beneficiaries of the Trust. The Settler donated certain immovable properties to the Trust. The respondent is a Trustee in the Trust. In case number HC 955/19 the respondent as the applicant sued out a court application against the applicant as the respondent then, and contended that the Settlor in his life time donated, ceded and transferred to the Trust certain immovable properties and cash. He further ceded his shares in Teasdale Holdings to the Trust. It was said the Settlor and the Trustees disposed of some of the properties donated to the Trust realizing an amount of $524 500.00. This amount was deposited in the bank accounts of H.J. Teasdale Pvt Ltd and the directors of this company were the Settlor and the applicant. This amount is said to have been unlawfully and wrongfully withdrawn and used by the applicant. The respondent then sought an order declaring that the applicant had been unjustly enriched in the sum of $401 982.00.

[3] No notice of opposition was filed, and on 6 June 2019 the respondent was granted a default judgment couched as follows: (i) the respondent was unjustly enriched in the amount of $401 982-00 at the expense of the H.J. Teasdale Family Trust. (ii) Accordingly, it is ordered that the Trustees of the H.J. Teasdale Family Trust are authorized to take the unjust enrichment into account in preparing the final distribution amounts upon the dissolution of the trust in terms of clause 15 of the Deed of Trust. (iii) The respondent should pay the costs of this application. It is against this background that the applicant filed this application seeking a rescission of judgment.

Preliminary objections

[4] Other than resisting the application on the merits, the respondent raised two points *in limine.* Firstly, the respondent contended that the application was filed out of time allowed by the rules of court. Secondly, that the respondent contended that the deponent to the applicant's affidavit has no personal knowledge of the matters he deposed to in the founding affidavit, i.e., the founding affidavit is premised on inadmissible hearsay evidence. On the merits the respondent contended that the applicant has failed to sufficiently explain the default and further that the application lacked merit as the applicant has not demonstrated that he has a *bona fide* defence with prospects of success.

[5] At the commencement of the hearing, I informed counsel that in this case I shall adopt a holistic approach. What this approach entails is that for the sake of making savings on the time of the court by avoiding piece-meal treatment of the matter, the preliminary objections are argued together with the merits, but when the court retires to consider the matter, it may dispose of the matter solely on preliminary objections despite the fact that they were argued together with the merits. But if the court dismisses the preliminary objections, it then proceeds to deal with the merits. The main consideration here is to make savings on the court's most precious resource - time - by avoiding unnecessary proliferation when the matter should have been argued all at once.

[6] I now turn to the preliminary objections and deal first with the issue whether the deponent to the founding affidavit has no personal knowledge of the matters he deposed therein. This is so because if I find that the founding affidavit is anchored on inadmissible hearsay evidence, the issue whether this application was filed out of time would not arise because there would be no application before court.

[6] The applicant's name is Paul Edwin Teasdale, but the founding affidavit was sworn to by one Albert Moyo who states that he is the applicant's agent and authorised by a Power of Attorney to depose to the affidavit. The deponent avers that the facts surrounding this case are within his personal knowledge and belief true and correct. The applicant annexed to this application a copy of a Special Power of Attorney nominating, constituting and appointing Albert Moyo, the deponent to the founding affidavit as his lawful representative and agent to manage, transact and represent him in legal proceedings in connection with his rights and interests in H.J. Teasdale Family Trust Teasdale (Pvt) Ltd.

[8] The respondent submitted that the founding affidavit contains inadmissible hearsay evidence because the deponent to the founding affidavit has no personal knowledge of the matters he deposed to. It was contended that it is insufficient for the deponent to say the facts surrounding the case are within his personal knowledge and stops there. To be sufficient, the deponent ought to have stated, in his founding affidavit the basis on which he says he has personal knowledge of the matter and from where that claimed knowledge was derived. Mr *Majoko* counsel for the respondent submitted that a power of attorney gives authority to institute proceedings, but does not give information. Counsel referred the court to a number of averments in the founding affidavit to show that the deponent has no personal knowledge of the matters he deposed to. Counsel submitted further that the point *in limine* must be up held and the application be dismissed with costs.

[9] Per *contra* the applicant submitted that the deponent has personal knowledge of the matters contained in the founding affidavit. In the answering affidavit the deponent says he is the mouth piece of the applicant by virtue of the power of attorney annexed to this application. He has known the applicant since 2011 and hence most of the facts surrounding this case are personally known to him. He was also employed by H.J. Teasdale Private Limited as operations manager and as acting managing director. Counsel's submissions mirrored the averments contained in the answering affidavit, and he sought that the preliminary objection be dismissed with costs.

The application of the law to the facts

[10] At issue in this matter is not the authority of the respondent to depose to the founding affidavit. Mr *Majoko* conceded that the deponent has the authority to depose to the affidavit, the issue is whether he has personal knowledge of the material deposed therein. Therefore, the

point *in limine* taken by the respondent can cannot be answered by the fact that the applicant signed a power of attorney in favour of the deponent to the affidavits filed in support of the application. As correctly submitted by Mr. *Majoko* a power of attorney gives authority and does not give information. The competence of the deponent, who is a witness must be assessed by reference to r 58 (4) of the High Court Rules, 2021 provides that: - "An affidavit filed with a written application (a) shall be made by the applicant or respondent who can swear to the facts or averments set out therein." See *Dobbie & Ors* v *ZB Bank Ltd & Anor* HH126/17.

[11] In *Hiltunen* v *Hiltunen* HH 99-08 MAKARAU JP (as she then was) had this to say:

> "Like KRAUSE J in *Pountas' Trustee* v *Lahanas* 1924 WLP 67, I find that the manner in which the evidence of the applicant has been placed before the court is eminently irregular and that the evidence is rendered inadmissible. In deciding the matter that was before him, the learned Judge relied on the earlier decision of the same division in *Grant – Dalton* v *Win & Ors* 1923 WLP 180 in which it had been held, following the English practice on the admissibility of statements of belief and information, that generally speaking affidavits must be confined to such facts as the witness is able of his own knowledge to prove, except in interlocutory motions, in which statements as to belief with the grounds thereof may be admitted." (My emphasis)

[12] The learned authors Herbstein and Van Winsen in *Civil Practice of the High Courts of South Africa* 5 ed, Vol. 1 of p 444 opine that where a deponent to an affidavit includes information that he does not have first-hand knowledge of, a verifying affidavit must be filed.

[13] The deponent says most of the facts surrounding this application are known to him. It is not sufficient for the deponent to say the facts are known to him; it must be clear *ex facie* the affidavit that the material which he deposes to is personally known to him. Dealing with the subject of the default, the deponent avers that the applicant was not in willful default and did not intend to disregard the rules of court. He avers that he perused the record and noted that the legal practitioners discovered that the main application was served on applicant's mother on 25 April 2019, when the applicant was no longer residing at the given address. He contends further that at the time the main application was issued in 2019, the applicant had already moved to the United Kingdom. He avers further that had the main application been brought to the applicant's attention, he would have defended the claim as he has a *bona fide* defence. The

deponent has no personal knowledge of the facts. Coming from the deponent this is inadmissible hearsay evidence. There is neither an affidavit nor an explanation from the applicant regarding these averments.

[14] The deponent avers that the applicant has a *bona fide* defence to the claim. He contends that the applicant strongly denies that he misappropriated the Trust funds. On the allegation that the applicant misappropriated $401 982.00 realised from the sale of Trust assets, he says one of the Trust properties listed is the disposal of Denham Court which was sold for $250 000, he says this property was never owned by the Trust. He says it was owned by H.J. Teasdale Pvt Limited. He says the agreement of sale and the deed of transfer proves that it was not Trust property. He avers further that the total amount realised from the sale of Trust properties was $274 500 and not $524 500 as alleged by the respondent. He says from the $274 500, part of it was used to pay capital gains tax to ZIMRA and part used to pay legal fees for replacement of title deeds of the listed properties which were lost. And part of it was used to pay rates and commissions.

[15] The deponent contends further that in terms of clause 14(a) of the Trust Deed, the Thorngrove property i.e., 13 Wicklow Road and the Suburbs property i.e., 36 Townsend Road were supposed to devolve to the applicant's mother. Therefore, the proceeds in the sum of $150 000 from the sale of these properties were used to buy a townhouse for her. From the balance of $124 000, $18 000 was used by the Settlor to buy a motor vehicle for the applicant's mother and $10 000 to buy a vehicle for the applicant.

[16] The deponent has no personal knowledge of these facts. He does not say he was present when these sales he is testifying to were executed, and he does not say how he acquired such information. Even if it can be said he acquired this information from the records in his capacity as operations director and acting managing director of H.J. Teasdale Private Limited such would be insufficient to locate him within the ambit of one with personal knowledge of the matter as required by the law. In *Newman Chiadzwa v Herbert Paulerer* SC 116/91 the Court held that a relative of the applicant, who was not present at the negotiations of the sale of property but gained knowledge of facts from an agreement of sale and letters written by the parties and what he was told by the plaintiff, was not shown to be a person who had personal knowledge of the facts. It was pointed out also that a useful test would be to ask whether the

deponent to the affidavit would be a competent *viva voce* witness to the facts were he to be called to testify.

[17] So important is this principle that in *Bubye Minerals (Pvt) Ltd and Anor* v *Rani International Limited* SC 60/06 the court dismissed an appeal on the sole basis that the deponent to the founding affidavit had no personal knowledge of transactions alleged in the affidavit. This was despite the fact that the deponent had access to the company records and also consulted the company's employees. *In casu* the deponent deposed to facts that were not within his personal knowledge, and could not have been within his personal knowledge as required by the law. See *Ncube (herein represented by Ezra Sibanda by virtue of a Special Power of Attorney) & Ors v Qoki Zidlovukazi Investments (Pvt) Ltd & Ors* HB 45/24.

[18] The founding affidavit is anchored on material that the deponent has no personal knowledge of, which amounts to hearsay evidence. The question that arises is whether this evidence may be rescued by s 27 (1) of the Civil Evidence Act [Chapter 8:01]. In *Glenwood Heavy Equipment (Pvt) Ltd* v *Hwange Colliery Company Limited & 2 Ors* HH 664-16 DUBE J (as she then was) articulated circumstances where first hand hearsay is admissible in terms of section 27 (1) of the Civil Evidence Act [Chapter 8:01]. The learned Judge makes the point that the source of such information must be disclosed, the reason why that source is unable to depose to the affidavit and the basis of the belief by the deponent of the given information. In *casu* the applicant appeared before a Notary Public and gave the Special Power of Attorney to the deponent. There is no explanation as to why he did not depose to the founding affidavit instead of a power of attorney. The deponent did not disclose the source of his information. Therefore, the hearsay evidence cannot be rescued by s 27 of the Civil Evidence Act. See *Baron v Baron* HB 92/21.

[19] It is trite that in application proceedings, it is to the founding affidavit that the court will look to for the cause of action. Hence as has been said in numerous cases before, an application must stand or fall by its founding affidavit and the facts alleged therein because those are the facts which the respondent is called upon either affirm or deny. See *Magwiza* v *Ziumbe NO and Another* 2000 (2) ZLR 489 (S) at 492 D-F. All in all, I have not been able to isolate any facts that the deponent could have had personal knowledge of. I therefore, find that the entire founding affidavit contains inadmissible hearsay evidence. Thus, in this case there is no founding affidavit recognizable at law, and therefore there is no application before court. Just

for completeness, the answering affidavit is also replete with inadmissible hearsay evidence. It is for these reasons that the objection that the deponent has no personal knowledge of the facts deposed herein must succeed. With the finding that there is no application before court, the appropriate order is to strike the matter off the roll.

[20] Having found that the objection that the deponent to the founding affidavit has no personal knowledge of the material that he deposed to, there is no useful purpose for me to deal with the other objection taken by the respondent.

Costs

[21] In respect of costs, the applicant has failed to obtain the relief he sought from this court. There are no special reasons warranting a departure from the general rule that costs should follow the result. The applicant must pay the costs of suit.

Disposition

In the result, I make the following order:

i. The point *in limine* that that the deponent to the founding affidavit has no personal knowledge of the matters he deposed to is upheld.

ii. The application be and is hereby struck off the roll with costs.

Masawi & Partners, applicant's legal practitioners
Majoko & Majoko, respondent's legal practitioners