

REPORTABLE (39)

(1) **CHIWOMBERERWA PATRICK MAPFUMO** (2) **ESTHER
MAPFUMO**
v
(1) **DIVVYLAND INVESTMENTS (PRIVATE) LIMITED**
(2) **THE MINISTER OF JUSTICE LEGAL AND PARLIAMENTARY
AFFAIRS** (3) **DAVID CHIWEZA**

**SUPREME COURT OF ZIMBABWE
HARARE: 15 APRIL 2024**

T. Chinyoka, for the applicant

S.M. Hashiti, for the first respondent

Ms T. Tembo, for the second respondent

No appearance for the third respondent

IN CHAMBERS

MAVANGIRA JA

1. This is a chamber application for condonation and extension of time within which to file an appeal against a judgment of the High Court. It is brought in terms of r 43 of the Supreme Court Rules, 2018. The application is opposed.

FACTUAL BACKGROUND

2. In its judgment under SC 250/19, this Court, in overturning the decision of the High Court (the court *a quo*) dated 10 April, 2019 under case number HC 6567/17, issued an order in favour of the first respondent for the eviction of the third respondent and all those claiming occupation through him, from house number 12 Le Roux Drive, Hillside, Harare. The applicants were in occupation of the said property by virtue of a Deed of Donation of the property granted to them by the third respondent.
3. The eviction of “all persons claiming through him” that is, the third respondent, without citing the specific occupants, is the basis of the applicants’ ultimate bone of contention. They contend that despite being aware of the existence of their rights and interests in the property, the first respondent did not join them as parties to the summons proceedings that eventually led to their ejection. Aggrieved by their ejection in these circumstances, the applicants instituted proceedings in the court *a quo* seeking a *declaratur* and consequential relief, on the basis that the order for their eviction, a product or culmination of proceedings to which they were not party, was a violation of their right to be heard under s 74 of the Constitution of Zimbabwe. At the hearing of the matter by the court *a quo*, the first respondent raised a preliminary objection to the effect that the court *a quo* had no jurisdiction to deal with the matter as it had already been concluded by this court. It was the first respondent’s contention that, as the proceedings between the first and third respondents were concluded in the Supreme Court, the High Court had no jurisdiction under s 85 of the Constitution, to hear their application, despite the fact that they were not parties to the Supreme Court matter.
4. The court *a quo* upheld the preliminary point and held that it could not sit as a court of first instance in constitutional matters, where the decision of a superior court was being challenged.

It found that the matter had already been determined by this court, which is the final court of appeal in non-constitutional matters. It opined that the court imbued with such inherent jurisdiction was the Constitutional Court. Having made such findings, the court *a quo* dismissed the applicants' claim with costs.

5. The applicants claim that they subsequently filed an application for direct access to the Constitutional Court where the matter was struck off the roll, allegedly on the basis that the correctness of the court *a quo*'s decision ought to have been tested in this court first before an approach could be made to the Constitutional Court.
6. The applicants thereafter successfully sought from the court *a quo*, in an unopposed application, leave to appeal to this Court against its judgment. The order of the court *a quo* granting leave to appeal to the applicants also stipulated that the appeal was to be filed within the time-lines set out in the Supreme Court Rules, 2018, as reckoned from the date of the order. The applicable timeline having lapsed on 18 May, 2023, the applicants claim that they only became aware of the existence of the order on 30 January, 2024, some eight months later. As they were already out of time to appeal, the applicants filed in this Court, on 2 February, 2024, an application for condonation and extension of time within which to appeal. The application was, by consent, struck off the roll with costs on 29 February, 2024 for being fatally defective.
7. On 4 March, 2024, under SC 117/24 another application was filed with this court for the same relief. Another Notice of Opposition was filed raising various objections. The application was thereafter withdrawn on 18 March, 2024.

THIS APPLICATION

8. The instant application was thereafter filed on 20 March, 2024. It is opposed.
9. At the hearing of the application on 15 April, 2024, Mr *Hashiti*, for the first respondent raised a number of preliminary objections on account of which he urged the court to find that the application is fatally defective and to therefore strike it off the roll.

First respondent's preliminary points

10. The first preliminary point raised is that the document purporting to be the affidavit of Hilary Tererai Gunje is neither dated nor signed nor commissioned and that there is therefore no application before the court. In this regard he referred the court to *Diocesan Trustees for the Diocese of Harare v The Church of the Province of Central Africa*, 2010 (1) ZLR 267 (S). In support of his contention, he submitted that in its judgments, this Court has stated that where negligence is attributed to a legal practitioner, the said legal practitioner must file an affidavit on the alleged issues and that there would otherwise be no application before the court if this is not done. In *casu*, the first application filed by the applicants was struck off the roll due to defective pleadings for which Mr Gunje was at fault. The second application also had to be withdrawn because of faulty pleadings prepared by Mr Gunje. He argued that in the absence of an affidavit by Mr Gunje, there is no application for the court to relate to.
11. The second preliminary point raised was that in the absence of a proper affidavit from Mr Gunje, the contents of the applicants' affidavits would constitute inadmissible hearsay. Consequently, in terms of s 27 of the Civil Evidence Act, [*Chapter 8:01*], and on account of *Hiltunen v Hiltunen* HH 99/08, the applicants' affidavits are inadmissible. For this further reason, counsel submitted that there is no application before the court.

12. Counsel's third preliminary point related to the first application which was struck off the roll with costs as well as the second application which was withdrawn with a tender of costs. He submitted that despite the first respondent having written to the applicants indicating the *quantum* of its costs, the applicants had neither protested the amounts, meaning that they accepted them, nor made any payments. This was contended to be a further cause justifying the court finding that the application was not properly before it.
13. The fourth preliminary point raised was said to arise from the High Court order granting the applicants leave to appeal to this Court. Counsel contended that the leave to appeal superannuated or lapsed or expired on account of their failure to abide by the peremptory condition in the order which bound them to appeal within the time frames prescribed in the Supreme Court Rules. He argued that the applicants must seek leave afresh from the court *a quo*.
14. It was counsel's submission that on account of these preliminary points, individually and cumulatively, the application is fatally defective and must be struck off the roll.

Applicants' Preliminary Points

15. Mr *Chinyoka*, for the applicants, indicated that before responding to the first respondent's preliminary points, the applicants had in the answering affidavit raised their own, regarding the opposing affidavit. The result of it would be that this court should find that the application is unopposed and the first respondent should not be heard at all. Therefore, all the submissions made by Mr *Hashiti* ought not to be related to. This was said to arise from the fact that the first respondent's notice of opposition is dated 25 March 2024 whereas the opposing affidavit

is dated 26 March 2024. In addition, the penultimate page of the affidavit ends at para 28 whereas the final page starts at a supposed subpara “h” with the next and final para being para 25. Up to para 28 on the penultimate page, the paras follow each other in clear sequence. The final page on which the deponent and the commissioner of oaths signed, inexplicably and irrationally breaks the previously flowing sequence.

16. Counsel contended that what this shows is that besides the final page, the rest of the affidavit filed of record is not the same affidavit that was signed by and before the commissioner of oaths.
17. Counsel further submitted that the applicants’ second preliminary point is to the effect that the deponent to the opposing affidavit did not therein indicate his authority from the first respondent to depose to the document. Although the parties have been involved in litigation for some time, this was the first time that he has deposed to an affidavit. There is nothing on record to show that he was so authorized. The affidavit is therefore of questionable authenticity. This factor is also pertinent because his stance and attitude to this application is at variance with the first respondent’s previous position where it did not oppose the applicants’ application in the court *a quo*, for leave to appeal. Counsel argued that for this reason too, neither the opposing papers nor the first respondent’s counsel’s submissions should be related to by this Court.

Applicants’ response to the first respondent’s preliminary points

18. In response to the first respondent’s first and second preliminary points regarding the non-signature and the non-commissioning of Mr Gunje’s affidavit, Mr *Chinyoka* submitted that

he was in possession of the physical document and that it was signed and commissioned. Furthermore, there was no negligence alleged on the part of the legal practitioner with regard to the failure to file an appeal within ten days, in accordance with para 2 of the order of the court *a quo* granting the applicants leave to appeal. The reasons for such failure are made out in the founding affidavit. The applicants gave instructions to Mr Gunje and the characterization of their narration of such instructions as hearsay by the first respondent's counsel is thus misplaced and cannot be correct.

19. On the third preliminary point regarding the non-payment of the first respondent's costs, counsel submitted that the first respondent's legal practitioners have not prepared bills of costs, upon which the applicants would be able to decide whether to pay or to have the bills taxed first. He submitted that the applicants are waiting for a bill or bills of costs to see whether they will make a tender of costs or ask for taxation. He also submitted that a liquidated costs claim is what stops a litigant from filing further proceedings, citing *Makoni v Makoni* SC 7/18. He further submitted that it was not necessary to respond to the letter in which costs were claimed because soon thereafter the applicants filed the answering affidavit in which they made clear their position regarding the same. The claim in the letter was, in any event, outrageous and it included a claim for heads of argument that were never filed or received by the applicants. The letter also claimed costs based on a different and inapplicable tariff.
20. Counsel referred to *Bonde v National Foods Limited* SC 9/24 as presenting similar facts to the facts in this matter. He may have meant to refer to *Bonde v National Foods Limited* SC 9/24. The period of delay therein was said to be 32 months during which five defective

applications were made and the excuses were found to be patently intolerable. Despite that finding, the court granted the application. Counsel submitted that while points of law can be raised from the bar at any time, doing so must not cause prejudice to the other party. On this point, he referred to *El Elion Investments (Pvt) Ltd v Auction City (Pvt) Ltd* SC 29/16, *Muchakata v Netherburn Mine*, 1996 (1) ZLR 153 at 157A and *Muskwe v Nyajina & Ors* SC 17/12.

21. It was counsel's contention that there was no notice of opposition filed by the first respondent and that it was therefore unnecessary for the court to relate to the purported opposing papers filed of record.
22. In answer to a query by the court, counsel submitted that the third paragraph of the preamble to the notice of appeal attached to the application should not be there. The paragraph reads:

“TAKE FURTHER NOTICE THAT the appellants having only become aware of the judgment on 30 January 2024, this application for condonation and late noting of appeal has become necessary.”

In answering another query by the court, his response was that the founding affidavit gives a full and adequate explanation and does not state that what happened is explained in Mr Gunje's affidavit. Consequently, the application can be related to, to the exclusion of Mr Gunje's affidavit.

23. In response to the last of the first respondent's preliminary points, to the effect that the appeal not having been filed within the stipulated timelines the leave that had been granted to the applicants had expired and they had to go back to the court *a quo* to seek leave to appeal afresh, counsel submitted that the point was being raised for the first time without notification

to the applicants and that it was without merit. This application, made in terms of the Rules, was meant to address the very situation that the applicants found themselves in and that would be the position regardless of whether leave to appeal had been granted by the court *a quo* or by this Court.

First respondent's response to the applicants' preliminary points.

24. In response to the applicants' preliminary points, Mr *Hashiti* submitted that all the points raised have no merit. He argued that a notice of opposition is a separate document from an opposing affidavit and that the different dates on the two documents are therefore not anomalous. He also argued that the non-sequential numbering of the paragraphs in the opposing affidavit does not invalidate the document. He urged the court not to be drawn to consider the postulations made by Mr *Chinyoka* on the issue as the court ought not to go into conjecture. It was also counsel's submission that the applicants cannot succeed and be granted a default judgment in an application filed in terms of the Rules unless they have complied with the Rules. Without an affidavit by Mr *Gunje*, their application remains defective. He further submitted that objections of a preliminary nature do not have to be raised in an affidavit.

25. Mr *Hashiti* submitted that in addition to the first respondent's preliminary points, the queries raised by the court with Mr *Chinyoka* and his responses thereto, the application is patently defective. Counsel also persisted with the argument that for the non-compliance with the peremptory para 2 of the High Court order granting leave, condonation could not be sought from this court. Furthermore, that the applicants, not having responded and contested the figures demanded as costs, must be taken to have accepted the same. Their failure to pay

must therefore have the effect of invalidating their application which must be struck off the roll.

Second respondent's submissions

26. Ms *Tembo*, for the second respondent, submitted that the second respondent will abide by the court's decision in this matter.

ANALYSIS

27. Due to the defects allegedly afflicting both the applicants' and the first respondent's papers, the image is conjured of the proverbial pot calling the kettle "names." With the issues raised in the respective preliminary points in mind, either side could fit into the description of either the pot or the kettle. It is appropriate, in my view, to first ascertain whether the applicants' papers are in order before it becomes necessary to examine or pronounce upon the first respondent's preliminary points.
28. Pertinently, this application, as the earlier two, has been necessitated by the applicants' failure to abide by the timelines prescribed by the Rules of this court subsequent to the granting of leave to appeal by the court *a quo*. It is claimed that this failure was caused by the fact that through no fault of their own, they only became aware of the granting of the said leave and the need to abide by the Rules of this Court long after the expiry of the time frame for filing their notice of appeal. It is evident from a reading of the founding affidavit that the allegations as to what transpired in this regard are within the knowledge of their legal practitioner, Mr Gunje. This is despite the first applicant stating therein that the facts that he deposes to are within his personal knowledge. This will be demonstrated below.
29. In para 1.6 of the founding affidavit, the first applicant states, *inter alia*, as follows:

“As is clear from Mr Gunje’s affidavit attached here to My legal practitioners made physical follow-ups by attending at the registry to inquire on the matter to no avail. ... Then ... they were invited during one of those check-ups to send a letter asking for ... Perhaps as a result of this action, an Assistant Registrar waylaid our legal practitioner’s messenger at the Judge President’s office and attempted, unsuccessfully, to prevent delivery of the hard copy of the letter to the Judge President’s offices. ... On 29 January 2024, our legal practitioners again called the Registrar to follow up And the Registrar was adamant that ... On 30 January 2024, ... our legal practitioners then drafted a second letter of complaint ... As confirmed in the affidavit of Tererai Hilary Gunje attached to this application, it was only after these interventions that the law firm was finally linked to the case. The explanation for why our legal practitioners had not been linked even after 25 January 2024 was that the Assistant Registrar simply “forgot”, see letter attached as **Annexure 7** hereto. It turned out that the court granted the application on 4 May 2023, at Chinhoyi, but no communication of this fact was made to the parties. The order was not on record when the follow-ups were made. Applicant’s (sic) legal practitioner of record, Mr Gunje, testifies to this in the supporting affidavit.”

30. Amongst other things, very serious allegations are made about the conduct of court staff in the court *a quo*. The impression created is that there was a concerted effort to keep the applicants in the dark and to frustrate them in any attempt they made to exercise their rights. Such allegations ought not to be glossed over. However, the maker of the allegations does not have personal knowledge of the alleged happenings. In some aspects the founding affidavit refers to Mr Gunje’s affidavit for confirmation or verification. In other aspects, Mr Gunje’s messenger would presumably have made reports to his or her principal, that is Mr Gunje, from whom the deponent would then have received the information. This is in circumstances where there is, in effect, no affidavit by Mr Gunje. Despite being made aware of the state of Mr Gunje’s affidavit, the applicants chose to proceed with the application in the state that it is. In fact, counsel’s view was that even without the said affidavit, the application is in order and capable of a positive resolution in the applicants’ favour.

31. The matter is not that simple, in my view. It is trite that an applicant stands or falls on his or her founding affidavit. The founding affidavit *in casu* points the reader to the supporting affidavit of Mr Gunje. Such an affidavit does not exist. The effect is that all that was meant to be verified, confirmed or covered by the non-existent affidavit cannot be related to as part of the applicants' averments. Importantly, the aspects affected by this relate to the reasons for the failure to, and the delay in filing an appeal timeously, subsequent to the granting of leave to appeal, this being the biggest hurdle that the applicants have to overcome in the particular circumstances of this case.

32. It is also pertinent that the founding affidavit states in para 3.5 b that the papers for the second application, which had to be withdrawn due to defects pointed out by the first respondent in its opposing papers, were drawn by Mr Gunje because the issues that needed to be rectified were not substantial as the issues were merely typographical. Despite this, the application was met with opposing papers pointing to a fatal defect because the founding affidavit stated on the face of it that it had been attested to at Harare whereas in its body, it stated that the deponent was in Malawi at the time and that it was notarized in that country as well. The deponent to the founding affidavit in the instant application further states that the initial view taken was that the objection had no merit because "*regard being had to the context and the entire founding affidavit, the reference to 'Harare' was clearly a typographical error. We initially advised our lawyers to persist with the application in that state.*" (the underlining is added)

33. The first applicant further states that counsel advised that the precedent set before the court in the first application that was struck off the roll, was that "*defects emanating from patent*

typographical errors had the effect of invalidating the application. He further stressed that unlike the previous incident where the typographical error afflicted only the draft appeal, in this instance the typographical error afflicted the founding affidavit. That pleading having been deposed under oath by us, it could neither be amended nor contradicted by the lawyers or the court. He advised us to withdraw the application before set down to avoid further complications.” (the underlining is added)

34. In *casu*, regarding the state of Mr Gunje’s purported affidavit, applicants’ counsel initially took the stance that he seemed to have a different set of papers to what the court and the other parties had. He claimed that he was in possession of a signed and commissioned copy of Mr Gunje’s affidavit. However, the fact remained that the application filed of record and uploaded onto the IECMS platform had attached to it an unsigned and uncommissioned affidavit. Despite becoming aware of this, it was decided to persist with the application. It was at that stage that counsel submitted that even without that affidavit, the applicants’ case was established by the founding affidavit. According to counsel, the founding affidavit did not state that what had transpired was explained in Mr Gunje’s affidavit. Furthermore, everything related to in the purported supporting affidavit is also related to in the founding affidavit. In any event, Mr Gunje was relating to actions that he took on the applicants’ instructions, as their agent.
35. As stated earlier, a reading of the founding affidavit shows an interdependence between the two affidavits. This is understandably so, because there are pertinent aspects where personal knowledge of what happened would, in the circumstances of the case, only reside in the legal practitioner and or his messenger. The applicants would not be in a position to give a first-

hand knowledge account of what happened during the period from the granting of leave to appeal to the date of the expiry of the prescribed time lines and also up to the filing of the instant application. A satisfactory explanation of what transpired during this period has to be proffered.

36. It seems that because of the history of defective applications filed before this Court, in *casu*, the applicants decided to take a chance and persist with the application in the hope that the court will overlook the issues raised by the first respondent and discussed above. Alternatively, that the court will grant their application and issue a judgment in default of the respondents, on the basis of their success in urging it to find that the opposing papers are not in order and ought to be disregarded and that the application be dealt with as unopposed. This would be on the basis that the deponent to the opposing affidavit did not have the first respondent's authority to depose to it. They probably lost sight of the fact that even in an unopposed application, the basis for the relief sought must be established in the founding affidavit.
37. Without Mr Gunje's affidavit, and with only the applicants' averments which are largely based on hearsay evidence, the applicants have, in effect, not placed before the court an application that it can relate to. In addition, fault having been laid at Mr Gunje's door for the filing of the defective second application, his affidavit ought to have been attached.
38. The application is not relatable to in its present state. It therefore follows that it must be struck off the roll. Having made this finding, it therefore becomes unnecessary to relate to the first respondent's preliminary points. The first respondent having been served with the applicants' papers, was obliged to respond thereto. As it turns out, the first respondent was

put to unnecessary expense and is entitled to its costs. The first respondent seeks costs on the higher scale. No clear and specific submission was made to controvert this. Costs are in the court's discretion. In *casu*, the level of costs sought is justified by the apparent propensity of the applicants of not attending to their applications with the necessary meticulousness which caused the respondents to incur unnecessary costs. They deserve to be mulcted with such costs for continuing to drag the respondents to court on defective papers.

39. In the result, it is ordered as follows:

“The matter be and is hereby struck off the roll with costs on the legal practitioner and client scale.”

Gunje Legal Practice, applicants' legal practitioners

Mushoriwa Pasi Corporate Attorneys, 1st respondent's legal practitioners

Civil Division of the Attorney General's Office, 2nd respondent's legal practitioners

Moyo Chikono Gumiro, 3rd respondent's legal practitioners