MINISTER OF DEFENCE, SECURITY & WAR VETERANS AFFAIRS (N.O)
versus
ANDY MANYERUKE

MINISTER OF DEFENCE, SECURITY & WAR VETERANS AFFAIRS (N.O)
versus
DZIKAMAI CHIVHANGA

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 9 July 2021 & 28 July 2021

Opposed Applications

T.Chinyoka, for the applicant
W.P Mandinde, for the respondents

MUREMBA J: The applicant was sued by the two respondents in HC 5141/19 and HC 5140/19 respectively. The two respondents are claiming damages in the sum of US$23 000.00 and US$17 000.00 respectively arising from the injuries they allegedly sustained after having been shot by members of the Zimbabwe National Army who were acting in the course and scope of their employment. The applicant is being sued on the basis of vicarious liability since she is the minister responsible for the Zimbabwe National Army.

The two matters were consolidated and heard together since they raised the same issues and the parties in the matters were being legally represented by the same legal practitioners.

It is common cause that the applicant having been served with the summonses in both matters on 24 July 2020, appearances to defend were only filed on her behalf by her legal practitioners on 1 September 2020. Thereafter the applicant went on to file exceptions and special pleas to the respondents' summonses. It is in the replications that the respondents averred that the exceptions and special pleas were improperly before the court as the applicant was barred for having entered appearances to defend out of time. It is on this basis that the applicant filed the present applications for upliftment of the bar in terms of Rule 84 of the High Court Rules, 1971. The respondents opposed the applications.

At the hearing I raised an issue with regards to the founding Affidavits which were in both cases deposed to by one Abigail Mushayabasa a legal practitioner with *Messrs Mutumbwa Mugabe and Partners*, the legal practitioners of the applicant in both matters. Relying on the cases of *Ibbo Mandaza t/a Induna Development Projects* v *Mzilikazi Investments (Pvt) Ltd* HB 23/07 and *Zimplastics (Pvt) Ltd* v *Rolly Corbet* HH 32-14 Mr *Chinyoka* submitted that the founding affidavit was proper because legal practitioners often depose to founding affidavits on behalf of their clients in procedural matters. Mr Mandinde submitted that the founding affidavit was improper.

Whilst it is not uncommon for legal practitioners to depose to affidavits on behalf of clients in procedural matters, this can only be done in cases where the facts of the case are within the legal practitioner's knowledge. See Rule 227 (4) (a) of the High Court Rules, 1971. It provides that,

> "An affidavit filed with a written application shall be made by the applicant or respondent, as the case may be, or by a person who can swear to the facts or averments set out in therein."

See also *Ibbo Mandaza t/a Induna Development Projects* v *Mzilikazi Investments (Pvt) Ltd* HB 23/07 and *Zimplastics (Pvt) Ltd* v *Rolly Corbet* HH 32-14.

In *casu* Abigail Mushayabasa, the legal practitioner sought to explain in the founding affidavits what happened at the Defence Forces offices from the 24th July 2020 when the summonses were served by the sheriff. She explained what happened at the reception and how the summonses were dispatched to and received by the Defence Forces Legal Services on the 18th of august 2020. Clearly all these facts were not within her personal knowledge as she does not work for the Defence Forces Legal Services. On that basis she would not know what transpired there between 24 July 2020 and 18 August 2020. Annexure 'B' to the applicant's applications show that her law firm only got instructions from the Defence Forces Legal Services to represent the applicant in the two matters on 31 august 2020 and on 1 September 2020, that is when they filed appearances to defend on behalf of the applicant.

An affidavit is a sworn statement that takes the place of oral evidence. The person who deposes to an affidavit asserts that the information they have given is true and they have personal knowledge of it. The person will also be saying that they are competent to testify if called into court about the information provided in the affidavit. If the present matter was a trial, Abigail Mushayabasa would not have certainly taken the witness stand to tell the court

what happened at the Defence forces offices when the summonses were served because she was not there. All that she said is hearsay evidence.

In the case of *Zimplastics (Pvt) Ltd* that Mr *Chinyoka* sought to rely on, the court accepted the founding affidavit that was prepared by the legal practitioner in an application for condonation for late filing of heads of argument. Considering that it is the legal practitioner who had failed to file the heads of argument on time, she was certainly the right person to depose to the founding affidavit explaining her failure to act on time. The facts are clearly distinguishable from the facts in the present matter. In the present matter the legal practitioner had no duty to explain anything since the summonses were not served at her law firm. It was the client's duty to explain because the summonses were served at her offices.

Mr *Chinyoka* then advanced the argument that the supporting affidavit that was deposed to by the Director of Legal Advisory Services and Litigation in the Defence Forces, one Vote Albert Murove in support of the application has the effect of curing the hearsay evidence in the founding affidavit as the averments made therein were based on the averments made in the supporting affidavit.

Mr *Mandinde* argued that an application stands or falls on the founding papers to which Mr *Chinyoka* responded by saying that a supporting affidavit forms part of the founding papers of the application. Rule 230 of the High Court Rules provides that "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." So, there can be one or more affidavits to support an application. These affidavits form the basis of the application and constitute the founding papers. However, despite the fact that both the founding affidavit and the supporting affidavit(s) constitute the founding papers of the application, there is a distinction between a founding affidavit and a supporting affidavit. The founding affidavit lays out all the facts and basis of seeking relief. See *Austerlands (Pvt) Ltd* v *Trade and Investment Bank and 2 others SC92/05* and *Titty Bar and Bottle Store (Pty) Ltd* v *ABC Garare (Pty) Ltd and Ors* 1974 (4) SA 362 (T). In *Austerlands* case at p 8 CHIDYAUSIKU CJ (as he then was) held that;

> "The general rule that has been laid down in this regard is that an application stands or falls on the founding affidavit and the facts alleged therein. This is how it should be, because the founding affidavit informs the respondent of the case against the respondent that the respondent must meet. The founding affidavit sets out the facts which the respondent is called upon to affirm or deny. See *Pountas' Trustee* v *Lahamas* 1924 WLD 67 at 68."

In explaining what a supporting affidavit is, MATANDA-MOYO J in the case of *Chiparaushe & 0rs* v *Triangle Limited & Ors* HH 504-16 at page 3 said,

> "The supporting affidavits as the word "supporting" meaning; entails buttressing a founding affidavit properly before the court. Once the founding affidavit cannot stand so do the supporting affidavits."

In *casu* the founding affidavits by Abigail Mushayabasa are based on hearsay which in the circumstances of these cases is inadmissible. If this was a trial, Abigail Mushayabasa would not have taken the witness stand to tell the court what happened at the defence forces offices. This clearly demonstrates that her founding affidavits are invalid. Since they are invalid, the supporting affidavits by Vote Albert Murove have no founding affidavits to support or buttress. Put differently, in the absence of a founding affidavit, a supporting affidavit has nothing to support. It also cannot stand on its own and be the foundation or basis of the application. Put differently, once a founding affidavit is found to be invalid the supporting affidavit cannot take the place of the founding affidavit. However, even if it could, the supporting affidavit in the present matter is too shallow to stand on its own and take the place of the founding affidavit. It is 6 paragraphs long whereas the founding affidavit is 30 paragraphs long. It does not have the required detail for the application. It does not explain the misfiling of the summonses that happened. The details thereof are missing. It does not explain the importance of the case and the prospects of success of the applicant. It reads:

> "I, the undersigned **VOTE ALBERT MUROVE**, do hereby make oath and state the following:
> 1. 1 am the Director Legal Advisory Services & Litigation in the Defence Forces of Zimbabwe.
> 2. The Summons in this matter were brought to the attention of Defence Forces Legal Services on **18th August 2020**.
> 3. I proceeded to instruct Applicant's attorneys of record to defend this matter through correspondence of **31st August 2020**. The letter is attached in the founding papers as "**Annexure B**".
> 4. At all material times, I was not aware that the summons had been served **on 24th July 2020** and that the *dies induciae* had lapsed.
> 5. It only came to my attention that Applicant was barred when I was advised by Applicant's legal practitioners of Respondent's replication to the exception and special plea.
> 6. The delay was not wilful, it was due to misfiling by personnel within Applicant's offices.
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> **WHEREFORE**, I pray for an order in terms of the Draft Order attached."

The court's power to grant the reliefs the applicant is seeking is not exercised arbitrarily and upon the mere asking. It is exercised with proper judicial discretion and upon sufficient

and satisfactory grounds being shown by the applicant.[1] For the court to exercise its discretion judiciously an adequate affidavit ought to be placed before it.

This court has said that in procedural matters legal practitioners can depose to founding affidavits on behalf of clients. However, this does not mean that legal practitioners can do so indiscriminately. The rider is that the legal practitioner should have knowledge of the facts of the matter. Where the legal practitioner does not have knowledge of the facts and the knowledge is in the purview of the client or some other person, it is the client or that other person who should depose to the founding affidavit. Legal practitioners should know that the general rule is that they should not depose to founding affidavits on behalf of clients. They can only do so as an exception to this general rule. See *Samkange & Anor v The Master & Anor* HH-63-93. In the *Dr Ibbo Mandaza* case at p 3 NDOU J even remarked that even in such exceptional cases, the route should be sparingly resorted to.

In view of the foregoing, I make the finding that the founding affidavits deposed to by Abigail Mushayabasa in the two matters are invalid. As such there are no applications before the court. There being no applications, I will thus strike off the matters from the roll. As was correctly submitted by both counsels, I will order that each party bears its own costs since it is the court which *mero motu* raised the legal point of the founding affidavit being invalid.

In the result, it be and is hereby ordered that: -

1. The two matters are struck off the roll.
2. Each party shall bear its own costs.

Mutumbwa Mugabe & Partners, applicant's legal practitioners
Zimbabwe Human Rights NGO Forum, respondents' legal practitioners

[1] Herbestein & van Winsen's *The Civil Practice of the Superior Courts of South Africa* 4 ed at p 897-8.