STEFFEN HANS KAMMLER
versus
JOHN TENDAI MAPONDERA

HIGH COURT OF ZIMBABWE
DEME J
HARARE, 25 January and 9 February 2022

Opposed Application

Mr *N T Tsarwe*, for the applicant
Mr *M Ndlovu*, for the respondent

DEME J: This is an application for summary judgment. In particular, the draft order reads as follows:

> "1. Application for summary judgment be and is hereby granted.
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> 2. Respondent be and is hereby ordered to pay a
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> +pplicant the sum of US$200 000.00 together with interest thereon at the prescribed rate from 1 February 2020 to date of payment in full.
>
> 3. Costs of suit on legal practitioner and client scale."

The applicant instituted an action against the respondent claiming the sum of US$200 000,00 on 22 June 2021. According to the applicant the claim arose from an agreement of sale entered into between the applicant and the respondent in terms of which the applicant sold and transferred to the respondent 42,5 per cent of his shares in Nexon Energies South Africa (Pvt) Limited for an agreed price of US$350 000,000. The applicant further alleged that on 17 January 2020, the respondent signed a promissory note in favour of the applicant wherein he promised to pay the sum of US$200 000,00 to the applicant on 31 January 2020 as part payment of the purchase price. The respondent filed notice of appearance to defend. Whereupon, the applicant filed the present application. According to the applicant's belief, the respondent notice of appearance was purely meant to abuse court process as he has no defence against his claim.

On the other hand, the respondent's version of the same event is diametrically opposite to the applicant's averment. The respondent averred that the agreement referred to by the applicant was only a preliminary agreement. In terms of the preliminary agreement, the applicant offered to sell his shares to the respondent, according to the respondent's averment.

The respondent further alleged that he never proceeded to purchase the shares. The respondent also averred that he signed a promissory note as part and parcel of the requirements to access the loan.

Before issuing summons, On 14 February 2021, the applicant demanded, from the respondent, through his legal practitioners, payment of the loan in the sum of US$200 000. In the present application, the applicant's counsel, through the supporting affidavit, sought to explain the error made. He highlighted that the error was as a result of communication breakdown. He further highlighted that the correct position is that the debt was as a result of non-payment by the respondent of the purchase price for shares sold and transferred to the respondent and was not as a consequence of loan advanced to the respondent.

At the hearing, the respondent raised the three following points *in limine.*

(a) That the applicant's founding affidavit was not authenticated.

(b) That the applicant's claim does not have the option of payment in local currency.

(c) That the applicant's counsel, Mr *Tsarwe,* is conflicted and cannot appear on behalf of the applicant since he deposed to the affidavit explaining the irregularity of the applicant's letter of demand.

With respect to the authentication of the founding affidavit, Mr *Ndlovu* submitted that the purported authentication is not on the founding affidavit itself but rather the authentication is an annexure to the founding affidavit. He further submitted that in light of this, the founding affidavit is a nullity for want of compliance with the Rules. Mr *Ndlov*u drew the court's attention to the provisions of R 85(2) of the High Court Rules, 2021.

On the other hand, the applicant's counsel submitted that the authentication was in order and genuine. He insisted that there is no law requiring the notarial seal to be on the same page with the affidavit itself. Mr *Tsarwe* submitted that the authentication is in compliance with the rules.

Rule 85(2) of the High Court Rules, 2021 provides as follows:

> "(2) Any document executed in any place outside Zimbabwe shall be deemed to be sufficiently authenticated for the purpose of production or use in any court or tribunal in Zimbabwe or for the purpose of production or lodging in any public office in Zimbabwe if it is duly authenticated at such foreign place by the signature and seal of office—
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> (a) of a notary public, mayor or person holding judicial office; or
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> (b) in the case of countries or territories in which Zimbabwe, has its own diplomatic or consular representative, of the head of a Zimbabwean diplomatic mission, the deputy or acting head of such mission, a counsellor, first, second or third secretary, a consul-general or vice-consul; or
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> (c) of any Government authority of such foreign place charged with the authentication of documents under the law of that foreign country; or

(d) of any person in such foreign place who shall be shown by a certificate of any person referred to in paragraphs (a), (b) or (c) to be duly authorised to authenticate such document under the law of that foreign country; or

(e) of a commissioned officer of the Zimbabwe Defence Forces as defined in section 2 of the Defence Act [*Chapter 11:02*], in the case of a document executed by any person on active service."

It is common cause that the applicant was based in Germany at the time of deposing to the founding affidavit. Thus, it is compulsory that the applicant's founding affidavit be authenticated in terms of the rules. The seal appearing on page 10 of the application reads as follows:

> "I hereby certify the above signature of:
> Mr. Hans Steffen Kammler born on 13th of July 1955, residing at D-55252 Mainz-Kastel, Ludwigsplatz 18, Germany, identified himself by means of identity card. I have not drafted the document and was not charged with a substantive examination."

It is very difficult for me to believe the applicant's case. There is no explanation why the notarial seal failed to be on one of the pages of the founding affidavit sought to be authenticated. Rather, the applicant's counsel simply submitted that the notarial seal is in compliance with the rules.

Although r 85(2) of the High Court Rules, 2021 does not specify that the authentication must be on one of the pages of the document authenticated, having a seal authenticating the document as an annexure to the document sought to be authenticated is rather unusual and not a good practice. The words "sufficiently authenticated" in r 85(2) of the High Court Rules, 2021 provide a standard to be observed. Thus, the document in question must not only be authenticated but rather it must be sufficiently authenticated.

Accepting the notarial seal which is a supplement to the founding affidavit will set a bad precedent. This will have the effect of compromising the justice delivery system. I am of the opinion that the founding affidavit was not sufficiently authenticated. Rather, it was questionably authenticated. Thus, the notarial seal is a nullity. In the case of *Tawanda* v *Ndebele*[1], the court commented as follows:

> "It is my view, therefore, that there should be no compromise by seeking to accept a questionably authenticated document either for academic or expedience purposes. The rules of this court have listed certain officials who are authorised to authenticate documents and those rules should be applied in *toto*."

The court further made the following remarks In the case of *Tawand*a v *Ndebele* (supra):

[1] HB 27-06.

> "The office of a notary public is very important and his signature together with his seal of office is so important that it commands international recognition to an extent that the mere exhibition of a notarized document is absolutely acceptable for judicial purposes. For this reason, therefore, a notary public's office should be protected and recognised for what is worth."

Thus, the effect of this is that there is no application before me. The applicant does have an option of rectifying this irregularity. For this reason, the most appropriate decision is to have the matter struck from the roll for want of compliance with the rules. I will not deal with other points *in limine* for the simple reason that I consider that there is no application before me.

With respect to costs, both parties had prayed for an order of costs on an attorney and client scale. The cost must follow the outcome. However, I am not convinced that such costs must be on a higher scale. The costs must be on an ordinary scale. Such costs are reasonably sufficient.

Accordingly, it is ordered as follows:

(a) The application be and is hereby struck off the roll.
(b) The applicant be and is hereby ordered to bear the costs of this application on an ordinary scale.

Tadiwa and Associates, applicant's legal practitioners
Rubaya and Chatambudza, respondent's legal practitioners