CENTRAL AFRICA BUILDING SOCIETY
versus
FINORMACG CONSULTANCY (PVT) LTD
and
RETIRED JUSTICE L. G. SMITH

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 1, 4, 15 December 2015 and 9 November 2016

Interlocutory Opposed Application for Condonation of Late Filing of Heads of Argument and for Leave to File Supplementary Affidavit

L Uriri, for the applicant
T Magwaliba, for the respondent

CHITAPI J: On 2 December, 2014 Finormacg Consultancy (Private) Limited as the applicant filed a court application citing Central Africa Building Society (CABS) as the first respondent and Retired Justice L.G. Smith N.O as the second respondent. The court application was filed pursuant to Article 34 (2) and (3) of the "Ancitral Model Law on Arbitratrion." The application described in simple terms was for the setting aside of an arbitral award as provided for under art 34 of the Arbitration Act [*Chapter 7:15*]. The applicant and first respondent were respondent and claimant respectively in arbitration proceedings presided over by the second respondent. The applicant and first respondent had claims against each other which were both dismissed by the second respondent with no order as to costs on 12 November, 2014. The application for the setting aside of the arbitral award as aforesaid was set down on the opposed motion roll on 4 June, 2015. The hearing was postponed sine die by consent with costs in the cause. The reason for the postponement was to allow for the hearing and determination of a combined application filed on 1 June, 2015 by the first respondent (applicant herein) for condonation of late filing of heads of argument and for leave to file an additional affidavit to the

opposing affidavit. It is the intervening application which was argued before me and to which this judgment relates.

The application was set down before me on 4 December, 2015. The applicant's counsel *Advocate Uriri* was reported to be attending on his indisposed father at a hospital. *Advocate Zhuwarara* appeared on his behalf to apply for a postponement which the first respondent's counsel *Advocate Magwaliba* consented to. Applicants' stand in counsel advised the court that the applicant was withdrawing the point *in limine* relating to the late filing of the heads of argument by the first respondent's counsel in CaseNo. HC 10681/14. Counsel were agreed that there had been a miscalculation of dates due to counsels inadvertently taking into account the period that the court was on vacation. In terms of the proviso to r 238 (2a) of the High Court Rules 197, in calculating the 10 days within which a respondent should file heads of argument following the filing of the applicants' heads of argument, "no period during which the court is on vacation shall be counted as part of the 10 day period." The effect of the withdrawal of the application for condonation of the late filing of heads of argument meant that the court was only left to deal with the application for leave by the applicant to file the additional affidavit of Kevin Terry in the main matter HC 10681/14. With the agreement of counsel, I postponed the hearing of the application to 12 December, 2015.

At the outset I should acknowledge that there has been some delay on my part in delivering this judgment. The dispute between the parties remains undecided and in no man's land for as long a reserved judgment remains undelivered. This judgment is being delivered a little over 10 months from the date that I heard argument on the application on 12 December, 2015. I do acknowledge a follow up letter of enquiry dated 12 September, 2016 enquiring as to when judgment would be delivered. The letter was well received and was written by the applicants' legal practitioners. It alerted me to the outstanding judgment. The letter however, wrongly recorded that I heard the matter on 1 December, 2015. The matter was only argued on 12 December, 2015. A litigant has a right to expect that judgment in a matter wherein he is involved is delivered with reasonable promptitude. In this case the delay in delivering my judgment arose from my deployment to the Criminal Division of the High Court in January, 2016 before I had prepared my judgments in opposed matters which I had presided over between 17 November 2015 and 12 December 2015. It will be noted that I had to hear some of the

matters during vacation and this included this application. I presided over 20 opposed applications during this period. I do not purport to justify that the delay is acceptable but it should nonetheless be brought to the parties' attention that the volume of work which Judges have to contend with sometimes make it impossible to timeously deliver judgments. The deployment to the Criminal Division whose court roll is equally demanding had the effect of further delaying my processing of this and other reserved judgments within the time frame which I would have been happy to meet being 3 to 4 months. It is my view that where a judgment has delayed and a follow up enquiry or complaint has been made and forms part of the record, it is good practice on the part of the judicial officer concerned to acknowledge and where appropriate explain the delay. In this way, a litigant does not then seek to impute improper motives on the part of the Judge in not handing down judgment timeously. Unfortunately the country is going through a phase where allegations of corruption are made daily against institutions and public officials included. Some complaints have substance and others do not have substance. I believe then that it is not untoward for a Judge where he or she considers that indeed there has been a delay in handing down a reserved judgment to allude to this fact in the reasons for judgment. In *R.C Sharma* v *UDI* (1976) 3 SCC 574, it is stated:

> "Nevertheless an unreasonable delay between hearing of argument and delivery of judgment, unless explained by exceptional or extra-ordinary circumstances is highly undesirable even when written arguments are submitted. It is not unlikely that some points which the litigant considers important may have escaped notice. But, what is more important is that litigants must have complete confidence in the results of litigation. The confidence tends to be shaken if there is excessive delay between the hearing of arguments and delivery of judgments."

In this jurisdiction the Constitution in s 115 (1)(b) obliges the judiciary to carry out its duties with efficiency, reasonable promptitude and not to delay justice. I am also mindful that the judiciary in pursuance of answering to the responsibilities reposed upon it by the Constitution has sought to regulate itself through the enactment of Judicial Service (Code of Ethics) Regulations 2012. As a Judge one always strives to meet the standards laid down in the regulations. Having digressed to address the issue of the delay in the handing down of my judgment I return to address the merits of the application.

The applicant seeks to adduce further evidence in the form of an additional affidavit to supplement its opposing affidavit. The parties are agreed on the procedural aspects relating to

the filing of affidavits in application proceedings. Rule 235 of the High Court Rules provides as follows:-

> "235 **Further affidavits**
> After the answering affidavit has been filed, no further affidavits may be filed without the leave of the court or a judge."

The approach of the court in dealing with an application for leave to file a further affidavit after filing of the answering affidavit was set out by the learned Gowora JA firstly as High Court Judge and later as Appeal Court Judge respectively in the cases *Associated Newspapers of Zimbabwe* v *Media and Information Commission and the Minister of Information and Publicity* HH 29/2007 and in *United Refineries Ltd* v *Mining Industries Pension Fund and Ors* SC 63/14. The cases have been cited by the applicant and first respondent's counsels. I will quote from the latter case where the learned Judge stated:-

> "When considering an application by a party for leave to file a supplementary affidavit, the court is called upon to exercise a judicial discretion. In the exercise of this discretion, it is a fundamental consideration that the dispute between the parties be adjudicated upon all the relevant facts pertaining to the dispute. The court is therefore permitted a certain amount of flexibility in order to balance the interests of the parties to achieve fairness and justice. In this exercise the court has to take into account the following factors:-
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> 1. A proper and satisfactory explanation as to why the information had not been placed before the court at an earlier stage.
> 2. The absence of *mala fides* in relation to the application itself.
> 3. The filing of the supplementary affidavit will not cause prejudice which cannot be remedied by an order for costs."

In South Africa, the High Court civil procedure is guided by the Uniform Rules of Court and r 6(5) (e) of the rules is similar to r 235 of the High Court Rules 1971 in this jurisdiction. The approach of the court in considering applications for filing of additional affidavits is not dissimilar to the one followed here see *Hano Trading CC* v *JR 209 Investments (Pty) Ltd* (2012) ZASCA where Eresmus AJA stated as follows in para 12 of his judgment:-

> "This court stated in James Brown & Hamer (Pty) Ltd (previously named Gilbert Hamer & Co. Ltd) v Simmons NO 1963 (4) SA 656 A at 660 D-H, that:
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> 'It is in the interests of the administration of justice that the well known and well established general rules regarding the number of sets and the proper sequence of affidavits in motion proceedings should ordinarily be observed. That is not to say that those general rules must always be rigidly applied; some flexibility, controlled by the presiding judge exercising his discretion in relation to the facts of the case before him, must necessarily also be permitted. Where, as in the present case, an affidavit is tendered in motion proceedings both late and out of

> its ordinary sequence, the party rendering it is seeking not a right, but an indulgence from the court: he must both advance his explanation of why the affidavit is out of time and satisfy the court that, although the affidavit is late, it should, having regard to all the circumstances of the case, nevertheless be received. Attempted definition of the ambit of a discretion is neither easy nor desirable. In any event, I do not find it necessary to enter upon any recital or evaluation of the various considerations which have guided Provincial Court in exercising a discretion to admit or reject a late tendered (see e.g authorities collated in *Zarug* v *Parvathie*, 1962 (3) SA 872 (N). It is sufficient for the purposes of this appeal to say that, on any approach to the problem, the adequacy or otherwise of the explanation for the late tendering of the affidavit will always be an important factor in the enquiry."

In my view, a distinction may be made in the approach of a court in the exercise of its discretion to allow the filing of an additional affidavit, depending on whether the litigant seeking such leave is the applicant or the respondent in the main case. In terms of procedure, the applicant who chooses to commence proceedings through application procedure chooses a more expeditious route to have the application set down for hearing. This is so because of the short time limits given for the filing of opposing papers and a reply. In terms of the rules, once an application has been served upon a respondent, such respondent if opposed to the relief sought must file opposing affidavits within 10 days of service of the application. The applicant may file an answering affidavit and/or if represented by a legal practitioner, heads of argument following which the applicant may set down the matter for hearing with the respondent filing heads of argument if represented a in turn within 10 days of service of the applicant's heads of argument or 5 days before the date of set down which is the earlier date.

The choice of application procedure though more expeditions than action or summons procedure may prove to be a shortcut which may end up being a wrong route in that the applicant may not get to his or her destination in that he can easily lose the application following its dismissal. A litigant who chooses to litigate must always remember that because no oral evidence is adduced by the parties at the hearing, save as the court may in its discretion allow, the litigant or applicant should make out his or her case on the founding affidavit. The affidavit is not just an ordinary pleading but it also constitutes or must contain the necessary, essential or material evidence which would otherwise be led at the trial. It has been stated time and again and is considered trite that in application proceedings the applicant succeeds or falls on his or her founding affidavit. See *Austerlands (Pvt) Ltd* v *Trade & Investment Bank & 2 Os* SC 92/05 *Pountas Trustee* v *Lahanas* 1924 WLD 67 at 68, *Fuyana* v *Moyo* SC 54/06. It goes without saying therefore that an applicant and indeed a respondent as well needs to exercise great care in

drafting the founding and opposing affidavits because in the case of the respondent, he may be deemed not to have a defence or to have admitted facts set out in the founding affidavit if he does not meticulously traverse them. Since an applicant's case is made out or falls on the founding affidavit I should think that the court should be slow to allow an applicant to file an additional or supplementary affidavit.

The applicant after the filing of the opposing affidavit is allowed to file an answering affidavit. The answering affidavit as the name suggests should be a reply to disputed points or facts raised by the respondent. The answering affidavit should not be used to make out new grounds for an application. See Van Winsen J in *SA Railways Recreation Club & Anor* v *Gordonia Liquor Licencing Board* 1953 (3) SA 256 (c) at 260 where it is stated that:

> "It is not permissible to make out new grounds for the application in the replying affidavit."

The applicant thus has a distinct advantage in that he files two sets of affidavits namely the founding and replying affidavits. I venture to reason therefore that the court's approach should be more liberal when it is the respondent applying to file an additional affidavit than if it is the applicant.

The three sets of affidavits, that is, founding, opposing and answering affidavits constitute the body of pleadings which a court must ordinarily rely upon in determining an application. The reason why I consider it necessary to refresh on application procedure is that, in dealing with an application by a litigant for leave to file an additional or supplementary affidavit after the three set have been filed, the court or judge must necessarily address his mind to the question why a litigant should in the circumstances of a given case be allowed a second bite at the cherry. It therefore appears to me that an additional affidavit to the set of three should only be allowed by the court in exceptional circumstances and in the exercise of a court's discretion. Such discretion should not be exercised in favour of the applicant if it will prejudice the respondent. The Supreme Court has qualified or extended the considerations to include whether the prejudice cannot be cured by an appropriate order of costs. In my view prejudice which can be cured by costs envisages the kind of prejudice associated with such issues as the postponement of the application. Prejudice which is in the manner of seemingly allowing the litigant to build his case or defence which otherwise would not have stood on the three sets of affidavits cannot be the type of prejudice which can be remedied by a costs order.

I will consider this application bearing in mind the principles of law and procedure as I have tried to extrapolate them above. The additional affidavit sought to be filed by the applicant as respondent in the main case was deposed to and signed before a notary public at Nairobi Kenya on 24 April, 2015. It was filed of record bearing the main case No HC 10681/14 on 5 May, 2015 as evidenced by the Registrar's stamp. The purported filing of this affidavit was irregular and a nullity. Rule 235 is very clear that no further affidavit after the set of 3 may be filed before such leave has been sought. In *Standard Bank of SA Ltd* v *Sewpersadh & Another* 2005 (4) SA 148 (c) at paras 12-13, DLODLO J stated as follows when dealing with a similar application as *in casu*;

> "The applicant is simply not allowed in law to take it upon himself and (to) file an additional affidavit and put same on record without even serving the other party with the said affidavit ……
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> Clearly a litigant who wishes to file a further affidavit must make formal application for leave to do so. It cannot simply slip the affidavit into the court file (as appears to have been the case in the instant matter). I am of the view that this affidavit falls to be regarded as a pro-non *scripto*."

The first respondent herein raised the issue of the impropriety on the part of the applicant of the filing the additional affidavit without the leave of the court. The applicant did not file any answering affidavit to address the anomaly. In my view, the leave of the court cannot be sought in retrospect. The applicant did not even allude to the impropriety in the heads of argument. After the respondent had raised the issue of the impropriety of filing the additional affidavit before leave had been sought and granted, the applicant could have filed a notice of withdrawal of the affidavit. The applicant could have sought to move the court to condone the applicants' error. No such application was made even orally at the hearing of this application.

CHIGUMBA J was faced with a similar situation in the case *Rio Zim Limited* v *African Export Import Bank* HH 31/14 where the applicant had filed a supplementary affidavit after the respondent had filed a notice of opposition before seeking the leave of the court. The applicant verbally applied for condonation of the irregular filing of the affidavit and sought to persuade the court to condone the irregularity through the invocation of its powers in r 4C of the High Court Rules 1971 to authorize or condone a departure from the provisions of the rules.

The learned judge was not persuaded to condone the irregularity. She was of the view that it was necessary for a party seeking to move the court to act in terms of r 4 C to show special

circumstances why the court should act so. Rule 4C is clear that is open for the court or judge to use it in the interests of justice in relation to any case before the court or judge. The rule is very wide. In my view, it derives from the settled position that rules are made for the court and not that the court is made for the rules. It is however a rule which the court should not invoke *mero motu* but upon request by a party seeking that his non-compliance with the rules be authorised or condoned.

The learned judge further stated:

> "It is my view that the interests of justice would not be served by allowing the affidavit of Mr Succeed Takundwa to form part of the application for leave to appeal. No written application for leave to file such an affidavit was filed prior to the filing of the affidavit. Applicant pre- empted the exercise of the court's discretion by filing the affidavit first, and applying for leave to file it after the fact, and orally from the bar. Clearly, there is no provision for proceedings in such a cavalier manner in the rules of court."

I am aware of some South African decision to the effect that r 6 (5) of the Uniform Rules (the equivalent of our r 235) is not explicit that the placing of the additional affidavit may not be done with leave being sought afterwards. The reasoning put forth for this argument is that the words "no further affidavit may be filed without the leave of the court or a judge" do not expressly forbid a party from placing on record the affidavit proposed to be admitted in evidence prior to the making of the application for leave. The argument then is that the court or judge's discretion to grant leave can still be exercised in respect of a filing which will occur or has already occurred. See *Longbeach Home Owners Association* v *Great Kei Municipality, Amathole District, Eastern Cape & 7 Ors*; Case No. 28064.14 (High Court of South Africa)-Gauteng Division Pretoria).

The applicant has not as I have already noted addressed the impropriety or otherwise of filing the additional affidavit prior to filing an application for leave to do so. I am not persuaded that a construction which has the effect that parties can just be allowed to continue to file additional affidavits *ad infinitum* and seek leave that the same be admitted later would be consistent with the aim or rationale of application procedure because the procedure is intended to ensure an expeditious set down of matters for disposal. Allowing affidavits to fly all over the place would hardly be conducive to realizing the objects of the application procedure. I however consider that it may be advisable that r 235 be amended to be more explicit by the substitution of the word may with shall or that the rule be extended *mutatis mutandis* along the lines of r 83 on

the effect of a bar by providing that the registrar should not accept for filing any further affidavit after the answering affidavit without leave of the court. I leave the digression as a matter open for debate.

The other related issue which has exercised my mind is whether or not the rules should not require that the application for leave to file an additional affidavit be set down for determination by the same judge or court at the same time as the main application. It appears to me that it is really a waste of time that I determine an application on whether an additional affidavit ought to be allowed separately from a determination on the main application which then awaits to be reset down for determination on another day by a different yet in the process of this application, I have had to read through the papers filed in the main application. In my respectful opinion, logic dictates that where as in this case, the parties had already filed all their affidavits and heads of argument, the ancillary application for leave to file of a supplementary affidavit should be heard simultaneously with the main application. This appears to me to be a more holistic approach. Again these are my views and debate leading to a common agreed procedure may be necessary.

For the purposes of my judgment, I will treat the filed affidavit of Kevin Terry as *pro non scripto.* If it is so treated, then it is as good as if it is not existent. It stands expunged from the record. I cannot therefore dismiss the application on the basis of this technicality because the fling was a nullity. A costs order will however be appropriate to impose against the applicant.

The parties in this application filed the last set of papers prior to set down of the main application being the respondent's heads of argument on 28 April, 2015. The applicant then purported to file the affidavit of Kevin Terry on 5 May, 2015. In para 3 of his affidavit which the applicant proposes to file, the deponent states that he prepared his affidavit after reading the founding affidavit, the opposing affidavit and the answering affidavit. He was also furnished with the affidavits deposed to by the arbitrator who is the second respondent. In his affidavit and in the main, he denies having a "long standing friendship" or "close association" with the arbitrator, albeit agreeing to have interacted with him directly or indirectly and setting out some of such occasions. He was directed as per e-mail on which points to direct his responses to arising from the documents sent to him.

The respondent has argued that the affidavit of Kevin Terry was tailor made to suit the respondent's case and is therefore prejudicial to the applicant. I take the view that this argument is not sustainable. What is important is for me to determine whether the material contained in the affidavit is relevant to the issues arising for the court's determination in the main matter. If the material is relevant, to deny the court the benefit of having all relevant facts before it would result in an injustice. The applicant made allegations that the arbitrator, the second respondent herein was biased in favour of the first respondent on account inter alia of the association or connection between the arbitrator and Kevin Terry. There can be no argument that it would be relevant to the court to receive and interrogate the explanations regarding the interactions and association. As regards the allegation that the depositions by Kevin Terry were tailor made to suit the applicant and the second respondent's deposition, this is an issue which will be more suited to be determined by the court hearing the main application as it goes to questions of admissibility and weight to be attached to Kevin Terry's depositions. For my purposes, I cannot determine whether the depositions are truthful. I however hold that the material contained in the affidavit is relevant to the matters to be determined by the court and are conducive to bringing about a just determination of the matter. Had I determined that the contents of the affidavit read against the gravamen of the main application are irrelevant I would have dismissed the application without further ado. I do not detect any *mala fides* on the part of the applicant in seeking to place the affidavit of Kevin Terry before the court.

Turning to the explanation given for not filing the affidavit timeously, again I am not persuaded that the applicant's explanation is unreasonable. The first respondent argues that Kevin Terry's affidavit was purportedly filed 2 months and 18 days after the opposing affidavit. Delay in seeking to file the additional affidavit is a relevant factor in considering the explanation for not filing the affidavit timeously. This factor is not looked at isolation and neither is it determinant on its own. The deponent to the affidavit as in common cause was then based in Kenya. The applicants' legal practitioner has deposed to an affidavit detailing the efforts he made in order to connect with Kevin Terry, once the legal practitioner had considered that it was necessary to place the evidence of Kevin Terry before the court. The first respondent has not denied that the applicant's legal practitioner made efforts to contact Kevin Terry. It argued that it was unnecessary for the applicant to solicit for additional evidence after the filing of its heads of

argument because by filing heads of arguments the applicant's actions implied that it was satisfied with its defence.

Mr Jori's affidavit is however clear. He stated that on 13 February, 2015 which was 3 days after service of the first respondent's heads of argument, he then considered it necessary that the evidence of Kevin Terry who is not the person who had deposed to the opposing affidavit on behalf of the applicant as the first respondent in the main case would be invaluable to the court in reaching a just decision. He sent an e-mail to Kevin Terry in Kenya. The legal practitioner attached to his affidavit copies of the e-mails which were exchanged concerning Kevin Terry's affidavit. The first respondent has not denied the authenticity of the e-mail but only queried the fact that Kevin Terry's affidavit should have been returned to Zimbabwe by DHL within 3 days of 24 April, 2015 when Kevin Terry stated that he dispatched it. In my view, without evidence as to when it was received in Zimbabwe, I cannot make a finding of dilatoriness on the part of the applicant nor its legal practitioner.

I accept that Mr Jori's explanation for the delay in seeking to file the affidavit and more importantly his explanation for not having prepared an affidavit of Kevin Terry on time are both reasonable.

Having determined that an acceptable explanation for not preparing the affidavit of Kevin Terry has been proferred and further determined that the affidavit is relevant to the matter before the court, I must consider whether the first respondent will be prejudiced by the admission of the affidavit in a manner which cannot be cured by a costs order. Kevin Terry's affidavit simply deals with issues of which the first respondent is aware, that is, pertaining to the conduct of the arbitration. It also deals with the issue of his alleged association or connection with the arbitrator as a basis for bias which was attributed to the arbitrator as having induced him to dismiss the first respondent's claim in the main application. These are not new matters which would adversely affect the purport and substance of the first respondent's application. There can be no prejudice to be suffered by the first respondent save that it has been put to the expense of this application. The first respondent has not suggested that it needs leave to respond to Kevin Terry's affidavit otherwise I would have considered granting the first respondent leave to file an affidavit in response or rebuttal.

In an application of this nature the discretion of the court should, depending on all the circumstances be exercised in favour of promoting the interests of justice rather than by stifling it through dogmatically sticking to the rules. I have also considered that in a proper case as *in casu* and considering that it is the respondent in the main case who is seeking leave as the applicant herein, the request or applicantion should be treated more liberally than in the case of a request by an applicant who according to procedure falls or stands on his founding affidavit.

In the premises I make the following order which I believe will protect the interests of the first respondent as well.

1. The applicant is hereby granted leave to file and serve as a supplementary opposing affidavit, the affidavit of Kevin Terry sworn to at Nairobi, Kenya on 24 April, 2015 within 5 days of the granting of this order.
2. The first respondent if so advised may file a response to the said affidavit of Kevin Terry within 5 days of service of the supplementary affidavit aforesaid.
3. Either party may in the light of the adduction of the affidavits aforesaid and if so advised file supplementary heads of argument within 15 days of the granting of this order.
4. The applicant shall pay the costs of this application and in the event that at the hearing of the main application, an award of costs is made in favour of the applicant herein, it shall not be entitled to recover any costs connected with the filing of Kevin Terry's affidavit on 5 May, 2015.

Wintertons, applicant's legal practitioners
Magwaliba & Kwirira, 1st respondents' legal practitioners