FRANCIS ROLAND HAISAID
(in his capacity as the Executor of the Estate Late Stephen Omar Hayisa also known as Stephen Haisaid)
versus
OLIVER MASOMERA
and
THE MASTER OF HIGH COURT (N.O)
and
THE REGISTRAR OF DEEDS (N.O)

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 27 July 2018

Opposed application

Applicant, in person
E. Ngwerewe, for the 1st respondent

CHITAKUNYE J: The applicant approached this Court with a Court application which he termed an application for revocation of Letters of Administration and consent to sell, in which he seeks an order revoking the Letters of Administration given to the first respondent and that the consent to sell that was given to the first respondent to sell some immovable property be cancelled and also that his initial appointment as Executor be re-instated.

The application is opposed. In its opposition the first respondent raised three *points in limine* which are basically that, there is no proper founding affidavit and the founding affidavit is fatally defective and so the matter be dismissed on that ground with costs on a higher scale as it does not show that it was signed by the applicant. In para 12 of one of his affidavit, the first respondent does allude to that. She in fact says, in effect there is no proper founding affidavit, that affidavit which is supposed to have been signed by the applicant, and appears to have been signed

by someone else on behalf of the applicant with the use of the terms PP. In those circumstances there is no valid founding affidavit so he says.

That is a point that was raised in the opposing affidavit. Another *point in limine* raised was that, the applicant has adopted a wrong procedure as his complaint was about the revocation of his Letters or his removal from the office of Executor of the Deceased Estate and his replacement by the first respondent, which in terms of the Administration of Estates Act is supposed to be brought to this court on review since he is complaining about the decision by the Master removing him in the office and substituting him with someone else.

The other point *in limine* was that the applicant has no *locus standi* in the sense that in his own affidavits whilst alleging that he is approaching this Court as an Executor, he later on in para 6(b) of the same affidavit conceded that he was removed from the office of Executor and therefore, in terms of the law, he no longer had the *locus standi* to represent the Estate in question.

In looking at the three *points in limine*, it is my view that the first point that has to be considered is that which pertains to whether or not there is a proper application before me. Once there is no proper application, then the last two points *in limine* would not really be necessary in the sense that it is only when there is a proper application that other aspects can be considered.

As regards the applicant's response to the first *point in limine*, which is on the founding affidavit, the fact that it appears not to have been signed by him, but by someone else on his behalf, with the use of the letters PP. The applicant in his answering affidavit seemed to have missed the point, he instead asserted that this assertion by the first respondent is misleading as the affidavit was properly attested to by a Commissioner of Oaths. Indeed, that response would have been fine had it been an issue of the commissioning of the affidavit. The issue here is on the deponent of the affidavit. It is in this regard that in his answering affidavit applicant went on to state further that: "I do not understand why the first respondent is alleging that there is no founding affidavit yet the Registrar of the High Court has accepted my founding affidavit an authentic document"

It is my view that the question was not only whether the document had been accepted by the Registrar or whether it was commissioned by a Commissioner of Oaths, the question pertained to the signature thereon, with the letters PP. This question the applicant did not answer. Indeed, at the beginning of this hearing, I did ask the applicant about the founding affidavit, signatures thereon and the signatures on other documents that he filed and he conceded that there were

differences with the signatures on some other documents he filed. His explanation was that he has different signatures as he pleases because in England that is a practice well-known. However, I did not find him to clearly understand the issue, the issue was not so much about differences in one person's signature, but about a different person signing on behalf of the other in the manner of so signing.

It is clear that the founding affidavit is signed 'PP' and then a signature is scribbled, which is totally different to any of the applicants' names. The preceding of the signature by the letters 'pp' is what was being asked of him to explain and the signature itself. Of the three names that he uses none has the initials of P. On the signature that is scribbled on this founding affidavit, applicant confirmed that the last letter is an 'e', yet none of his names ends with an 'e'. It may also be noted that a casual look at that signature on the founding affidavit and his signature on the answering affidavit clearly shows that it could not have been the same person who signed the two. Those signatures are miles apart, yet he wanted this Court to believe that he is the same person who signed on the founding affidavit, which signature he preceded with the letters 'PP'. Further, that is totally different from the one he then used for his answering affidavit. The impression created is that applicant simply intended that the application be heard in spite of someone else having signed the founding document on his behalf.

Indeed, as argued by the first respondent's legal practitioners, the founding affidavit is a key document in any application proceedings. And when one is found to be fatally defective, it means the entire application is not properly before Court. Indeed, it is self-evident that on the signatures, the founding affidavit bears the letters PP which as counsel properly cited, stands for 'per procurationem', and is traditionally used when signing a letter on behalf of someone else. This court cannot accept applicant's explanation that for his founding affidavit he chose to put a totally strange signature to his names or his initials and chose to prefix it with 'pp', and then when coming to his answering affidavit, he then chose to use his proper signature. As I said earlier the answering affidavit came after receiving a complaint about a wrong person having signed the founding affidavit.

I am of the view that as has been held by this Court in a number of cases, an application stands or falls on the founding affidavit. If that affidavit is fatally defective, it means there is nothing else that can be done with it, it cannot stand the test. What it means is that there is no

proper application before me. See *Success Auto (Pvt) Ltd & Ors* v *FBC Ltd & Anor* HH 157/15 and *Mpofu & Anor* v *Qhakaza Investments (Pvt) Ltd t/a The Baby Shop & Anor* HB 103/10.

The first respondent asked for costs on a legal practitioner and client scale. He argued that the applicant was fore-warned when he received the notice of opposition in the opposing affidavit, but instead of making corrections by withdrawing those papers and then filing a proper application with a proper founding affidavit, he chose to persist. And even in this court when initial indications were made to him in the differences in the signatures on his papers, especially the founding affidavit, and when it was made clear that the signature on the founding affidavit was not his, he still persisted in proceeding with the hearing. On those grounds, Counsel argued that costs should be on a punitive scale.

I am inclined to agree with Counsel on that because the glaring defects noted on the applicant papers are an indication that he should have paid heed to the fore-warning that was given and should have duly attended to his papers to put them in order, but somehow he persisted in his own mind believing that this court would be swayed to accept his explanation that his signatures vary. What we have here is not a variation in a signature, but we have got a difference in signatures including the use of the words PP which are normally used when you are signing on behalf of someone else who is not available, and we know that for affidavits, an affidavit is supposed to be a sworn statement by a person with the knowledge of what they are swearing to. It cannot then be an affidavit in the name of an applicant which is then signed or sworn to by a different person altogether. Then it does not become the applicant's affidavit.

In the circumstances of this case, it is my view that there is no need to proceed to the other *points in limine*, the application will be struck off, with the applicant to pay costs on the legal practitioner and client scale.

Chatsanga & Partners, 1st respondent's legal practitioners