

Judgment No. HB 41/07
Case No. HC 480/07
Xref HC 461/07,2745/06,
1507/06,1981/06

MIRIAM MKANDLA

AND

DAVID MKANDLA

VERSUS

FLETCHER PARKS DUBE

AND

CHARLES NYONI

AND

THE DEPUTY SHERIFF, BULAWAYO N.O

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
BULAWAYO 12 MARCH 2007 AND 15 MARCH 2007

Urgent Chamber Application

Point in limine (in chambers)

CHEDA J: This is an application for a stay of execution.

The background of this case is that applicants and respondents have an outstanding dispute. Applicant seeks to stay the execution of orders in cases HC 1981/06 and HC 2745/06.

At the hearing, Mr Manenji raised two points in limine being that of urgency and that applicants were approaching the courts with dirty hands, as they have not purged their contempt of the order(s) in the cases cited above.

During both counsels' submissions I noticed that first applicant Miriam Mkandla's founding affidavit was duly signed by herself, but, not before a commissioner of oaths.

Rules of this court an application of this nature requires a founding affidavit to be filed outlining the basis of the application. The affidavit was not signed before a commissioner of oaths. The question then is, what is its status in the present case. A deponent to an affidavit is required to take an oath as to the truthfulness of his averments. An oath is infact a religious declaration that one will tell the truth at the sametime impliedly praying that God punishes him if he does not do so. Therefore it is a serious and material judicial statement in all judicial proceedings.

An affidavit is therefore a solemn or attested declaration reduced to writing and sworn to or affirmed before a commissioner of oaths appointed as such or holding office by virtue of his office.

In casu, what applicant purports to be her founding affidavit is infact not an affidavit at all, as it was not attested to and signed by the commissioner of oaths or some such officer authorised to do so. See *Derby Shirt manufacturers (Pty) Ltd –v- Nel N.O and Another N.O* 1964(2) SA 599.

An affidavit placed before the court or Judge should satisfy the court or Judge that it has been made in a proper form, which means that it should be sworn to, before a commissioner of oaths, justice of the Peace, Notary public or some such official authorised to administer such oath, See *Labushagne –v- Labschagne* 1959(3) SA 368.

While the court has a discretion in all matters before it, it is my view that the said discretion should not be exercised where it is clear that the deponent signed it in the absence of a commissioner of oaths.

Therefore, what first applicant purportedly filed as an affidavit is not, with the greatest respect of an affidavit at all.

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In other words there is no application before me as there is no founding affidavit.
In light of the above, there is no need to even consider points raised in limine by Mr
Manenji.

For the above reasons alone, the application is accordingly dismissed with costs.

Cheda and Partners, applicants' legal practitioners

Messrs Mabhikwa, Hikwa and Nyathi, respondents' legal practitioners