DANIEL SIBANDA
versus
RAY C. NDHLUKULA
And
THE MINISTER OF LANDS AND RURAL RESETTLEMENT

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 16 FEBRUARY AND 21 APRIL 2016

Opposed Matter

P. Dube for the applicant
G. Mlotshwa for the 1st respondent
E. Mukucha for the 2nd respondent

MOYO J: This is an application for leave to be granted to applicant in terms of section 85(1) (c) of the Constitution of Zimbabwe, alternatively in terms of the Class Actions Act [Chapter 8:17] to bring a class action against the respondents.

At the hearing of the matter first respondent's counsel raised two points *in limine*, that of a fatally defective founding affidavit and that of a non-joinder of anther party to the proceeds. Applicant's counsel submitted that the application does not comply with the Justice of Peace and Commissioners of Oaths Act and Regulations because it is not sworn to declared, or attested to by a commissioner of the oaths since it only contains a thumb print with no explanation as to why there is a thumb print as opposed to a signature and that there is nothing in the affidavit to show that the commissioner of oaths satisfied himself that the deponent understood the contents of the affidavit as he is illiterate.

The Regulations cited by the first respondent's counsel as well as the legal texts are all South African. The difference between the Zimbabwean disposition and that of the Republic of South Africa is that whilst the South African Act Justice of the Peace and Commissioners of Oaths has regulations that stipulate on how the process of administering an oath should be done, our Zimbabwean statute and its regulations do not delve into specifics. The general broad

requirement as per our Zimbabwean Law is that a commissioner of oaths should not authenticate a signature where he has not seen the signatory sign, neither should he sign or procure the signature of blank documents.

Both counsels have not given me authority from Zimbabwe on that such requirements are specific and binding as it follows that the statutory requirements of a neighbouring country do not apply in Zimbabwe. The requirements in our law are that the commissioner of oaths must be satisfied that the affidavit is by the deponent and that the deponent appends his signature before the commissioner of oaths. It therefore follows that in the absence of evidence to the contrary, the commissioner of oaths must have satisfied himself as such. To say simply because it was not printed in black and white then it should be inferred that it was not done would be overstretching the requirement. For instance, the same South African Regulations, Regulations Governing the administering of an oath or affirmation GN 1258 1972 that first respondent's counsel is alluding to in paragraph 2 (1) provides that:

> "Before a commissioner of oaths administers to any persons the oath or affirmation prescribed by regulations, he shall ask the deponent:
> a) Whether he knows and understands the contents of the declaration.
> b) Whether he has any objection to taking the prescribed oath, and
> c) Whether he considers the prescribed oath binding on his conscience.
>
> This requirement in terms of South African Law is expected for both literate and illiterate deponents. The regulations never state that the commissioner of oaths should record as such on the affidavit and if they do, I believe the first respondent's opposing affidavit if it were to be subjected to the same test, would also fail for all it states is "sworn to at Harare this 16th day of June 2015".

It therefore follows that we do not have such requirements in our own law as to state that the commissioner of oaths upon satisfying himself of any fact should then register as such on the face of the document. It follows therefore that no finding can be made that the commissioner of oaths who authenticated applicant's affidavit did not satisfy himself that applicant being illiterate, understood the contents thereof for why would he make a man swear to that which he does not know or understand? In the absence of evidence to the contrary, this court is enjoined to accept the affidavit as it is.

This point *in limine* is not valid in my view and should thus be dismissed.

As for the point on non-joinder of O. Connolly Pvt Ltd, it is settled by the rules of this court that a non-joinder or misjoinder of a party does not and cannot render proceedings fatal. Refer to order 13 Rule 87 of the High Court Rules. In any event if first respondent really felt that O. Connolly Pvt Ltd should be joined to these proceedings they were within their rights to file a chamber application long before this matter was set down seeking an order that the company be so joined.

It is for these reasons that I dismiss both points *in limine* and order that the matter proceeds to be set down and be heard on the merits

Webb, Low & Barry, applicant's legal practitioners
Majoko & Majoko, 1st respondent's legal practitioners
Attorney General's Office, 2nd respondent's legal practitioners