JEAN HILTUNEN
versus
OSMO JUHANI HILTUNEN

HIGH COURT OF ZIMBABWE
MAKARAU JP
Harare 25 September and 19 November 2008.

OPPOSED APPLICATION

Mr K Gama for applicant
Mr F Zuva for respondent.

MAKARAU JP: This is an application to declare null and void an appeal noted to this court by the respondent under Civ App 89/07. In the alternative, the appellant seeks an order that the appeal be declared to have lapsed.

The parties in this application are husband and wife. They are embroiled in a divorce that has spawned a number of cases in interlocutory litigation, this application included.

It would appear from the affidavit filed on behalf of the applicant, an issue that I shall revert to in detail shortly, that the applicant purchased certain immovable property in 2002, a year before she married the respondent. The parties agreed that the house be registered in their joint names. The applicant alleges that she donated one half share in the property to the respondent on the understanding that he would in turn make over to her a half share in his dental practice in Switzerland. He appears not to share that understanding for at one stage he requested her to sign an agreement declaring him the sole owner of the dental practice in Switzerland and one half share owner of the immovable property in Zimbabwe. She declined to accede to his demands.

In April 2006, the applicant obtained a default judgment against the respondent in which revocation of her donation of one half- share in the immovable property was "allowed" by the magistrates' court. He attempted to have the decision set aside in an application for rescission of judgment. The application was not successful as it was ruled to be out of time. He again approached the court for condonation for the late filing of the application for rescission. Again luck eluded him, prompting him to note an appeal to this court on 7 March 2007. It is this appeal that the applicant before me wishes to have declared null and void or duly lapsed.

In her application, the applicant made two points. She argues that a year after the appeal was noted, the clerk of the lower court had not prepared the record of appeal and the respondent had not furnished the clerk with a written undertaking to pay the costs of preparing

the record. On the basis of these two grounds, the applicant argued that the appeal is null and void or at least, has lapsed as a year has gone by without the appeal having been prosecuted.

Before I deal with the substance of the arguments submitted by the applicant in this matter, there is an issue that has exercised my mind. It is the manner in which the founding affidavit has been deposed to. My dilemma is that both counsel in the matter did not see anything wrong with the manner in which the affidavit was deposed to and so I did not have any meaningful debate on the issue. The issues I raise herein are from my own research.

The applicant's founding affidavit was deposed to by one Evelyn Gondo under a general power of attorney, granted to her by the applicant on 21 March 2007. The power of attorney constitutes the deponent the applicant's general attorney and agent for managing all her affairs. It then grants her specific powers that are described fully in the body of the instrument. The issue that arises is whether this general power of attorney can authorize the agent to depose to a founding affidavit on behalf of her principal in this matter, testifying as to the facts that she does.

In answer to my query as to why the founding affidavit was deposed to by the general agent, *Mr Gama* for the applicant answered that the deponent had satisfied herself as to all the facts that she deposed to. In other words, she visited the clerk of the magistrates' court and satisfied herself that the record of the matter was not yet ready and that the respondent had not furnished the clerk with the requisite security for the costs of the preparation of the record.

I am unable to agree that the facts deposed to by the applicant's agent are within her personal knowledge. It is all hearsay evidence in my view.

For instance, in paragraph 3 of the founding affidavit, she deposes that the respondent purported to note an appeal in the matter on 7 March 2007. She does not aver that she was present when the appeal was noted for her to have direct evidence of the noting of the appeal. The notice of appeal was not served upon her person or at her place of abode. It was served on the applicant's legal practitioners. She could only have had knowledge of it through information from the applicant's legal practitioners.

Further, the deponent testifies as to the purchase of the immovable property in dispute by the applicant in 2002. She was not a witness to the agreement of sale. She does not indicate in the affidavit her source of information. She merely attaches the document to her affidavit, a feat that could have been accomplished by anyone to whom the story was told by the applicant. Again in my view, that is hearsay.

The deponent testifies as to the inability of the clerk of the lower court to prepare the record of proceedings. She does not indicate in her affidavit that she has personally attended upon the clerk of court and has established that the record is not ready and will not be prepared for want of security for the costs of such preparation.

All in all I have not been able to isolate any facts that the deponent, as a general agent of the applicant would have personal knowledge of. I therefore find that the entire founding affidavit is hearsay and is an affidavit of belief and information. She either believes what she is saying to be correct or she has been informed and verily believes it to be correct.

Like KRAUSE J in *Pountas' Trustee v Lahanas* 1924 WLD 67, I find that the manner in which the evidence of the applicant has been placed before the court is eminently irregular and that the evidence is thus rendered inadmissible. In deciding the matter that was before him, the learned judge relied on the earlier decision of the same division in *Grant-Dalton v Win and Others* 1923 WLD 180 in which it had been held, following the English law practice on the admissibility of statements of belief and information, that generally speaking affidavits must be confined to such facts as the witness is able of his own knowledge to prove, except in interlocutory motions, in which statements as to belief, with the grounds thereof, may be admitted.

Six years later, in *Levin v Saidman* 1930 WLD 256 the same position was upheld as it was held that hearsay evidence in an affidavit is inadmissible in the absence of an explanation as to why direct evidence is unavailable.

The earlier decisions of the Witwatersrand Local Division cited above were applied with approval in *Cerebos Food Corporation Ltd* v *Diverse Foods SA (Pty) Ltd and Anor* 1984 (4) SA 149 (T) where at p 157E-H, VAN DIKJHORST J had the following to say:

"It has been a long-standing practice of this Court in urgent applications to receive hearsay evidence if an acceptable explanation is given why direct evidence is not available and the source of the information and the grounds for the belief in the truth of the statement are disclosed. *Levin* v *Saidman* 1930 WLD 256; *Pountas' Trustee* v *Lahanas* 1924 WLD 67; *Mia's Trustee* v *Mia* 1944 WLD 102 at 104; *Mears* v *African Platinum Mines Ltd and Others (1)* 1922 WLD 48 at 55; *Grant-Dalton* v *Win and Others* 1923 WLD 180 at 186; *The Master* v *Slomowitz* 1961 (1) SA 669 (T) at 673F-G; *Gemeenskapsontwikkelingsraad* v *Williams and Others (1)* 1977 (2) SA 692 (W) at 696. This is also the practice in the other Divisions. *Galp* v *Tansley NO and Another* 1966 (4) SA 555 (C); *Brighton Furnishers* v *Viljoen* 1947 (1) SA 39 (GW); *Southern Pride Foods (Pty) Ltd* v *Mohidien* 1982 (3) SA 1068 (C); *Geanotes* v *Geanotes* 1947 (2) SA 512 (C). An affidavit of information and belief is required to show that the applicant has some reasonable and proper cause for making the statement and has not sworn merely to raise an issue."

As is clear from the authorities cited by the learned judge, the practice has been widely accepted in other divisions of the High Court of South Africa.

More recently, the Cape Provincial Division in *Standard Bank of SA Ltd* v *Sewpersadh and Another* 2005 (4) SA 148 (C) had this to say on the same practice:

"The 'evidence' contained in annexure BLB.6 is, in any event, of a hearsay nature. It is not ordinarily admissible. It must be borne in mind that hearsay evidence is not permitted in affidavits (except in urgent interlocutory matters). There are no special circumstances justifying the inclusion of hearsay testimony in the instant matter. (See *Pountas' Trustee* v *Lahanas* 1924 WLD 67; *Cash Wholesalers Ltd* v *Cashmead Wholesalers* 1933 (1) PH A24 (D).)"

It is trite that in application proceedings, it is to the founding affidavit that the court will look to for the cause of action being alleged by the applicant and the evidence that the applicant has to sustain such a cause of action. Hence as has been said in numerous cases before, an applicant must stand or fall by his founding affidavit and the facts alleged therein because those are the facts which the respondent is called upon either to affirm or deny. (See *Magwiza* v *Ziumbe NO and Another* 2000 (2) ZLR 489 (S) at 492 D-F).

In casu, the founding affidavit was deposed to by a general agent who did not give an explanation as to why the applicant herself could not depose to the affidavit. The agent deposed to facts that were not within her personal knowledge, could not have been within her personal knowledge and did not explain the basis of her belief or the source of her information save for her statements on the alleged non compliance with the provisions of the Supreme Court Appeal Rules, where she informs that she was so informed by the applicant's legal practitioners.

The authorities in South African law are quite clear that unless it is in urgent interlocutory applications, hearsay evidence remains inadmissible in affidavits. While I have not been able to find any local cases where the *Pountas'* and *Levins's* cases have been cited and directly applied in Zimbabwe, it seems to me that the two decisions correctly state the practice of this court, albeit one that has to some extent been amended by the relaxation to the rule against hearsay evidence provided of in section 27 of the Civil Evidence Act [*Chapter 8:01*], ("the Act"), making first hand hearsay evidence admissible on conditions. Section 27 (1) of the Civil Evidence Act provides:

"Subject to this section evidence of a statement made by any person, whether orally or in writing or otherwise, shall be admissible in civil proceedings as evidence of any fact mentioned or disclosed in the statements, if direct oral evidence by that person of that fact would be admissible in those proceedings."

The practice of this court, developed over the years, has been almost overrun by the overwhelming number of affidavits filed under general power of attorney by absentee litigants deposing to matters that are not within their personal knowledge and in my view, without in any manner attempting to satisfy the conditions for admissibility of first hand hearsay evidence laid down in the Act. For first hand hearsay to be admissible under the Act, the evidence must be about a statement made orally or in writing by another person. The person who made the statement must in my view be identified and it must appear from the nature of the evidence that the contents of the statement would have been admissible from the mouth of that person were he or she present and testifying. Thus, if the statement was for instance on an opinion held by that other person, because opinion evidence is inadmissible from the mouth of any witness other than expert witnesses, the evidence would remain inadmissible notwithstanding the amendment to the law. Similarly, second and third hand hearsay remains inadmissible as the amendment to the law only provides for first hand hearsay.

In my view, the legal position remains clear that hearsay evidence is inadmissible in affidavits filed with court applications unless it is evidence of a statement made by a person, where such a statement would have been admissible had it been adduced as direct evidence by the maker of the statement. Hearsay evidence may be admissible, as per the practice of this court, in urgent and interlocutory applications where an explanation as to why direct evidence cannot be led is tendered and the basis of belief and information by the deponent is fully given in the affidavit. I am fortified in my view by the remarks of BEADLE CJ in *Johnstone v Wildlife Utilization Services (Pvt) Ltd* 1966 RLR 596 (G) where he dealt with the admissibility of hearsay evidence in motion proceedings in the following terms at page 597I- 598A:

> "It is accepted, in our practice, that the rules of admissibility of hearsay evidence applicable to interlocutory proceedings are not the same as those that apply to trial actions. Such evidence, given in affidavit form in such applications, is not necessarily excluded because it is hearsay, provided the source of the information is disclosed. As I understand our practice, it is this: first, the court must examine the evidence given in this form and ascertain the prejudice which might result to the opposite party, if the evidence is later shown to be incorrect, would be irremediable; second, the court must examine the passages to see whether there is some justification, such as urgency, for the evidence being placed before it in hearsay, and not in direct form."

I accept that the above remarks were made prior to the amendment of the Act referred to above but in my view the practice of this court remains to a large extent unchanged. The provisions of section 27 (1) of the Act merely provide for the admissibility of statements made by other persons where such statements would have been admissible had they been adduced as

direct evidence by the makers of the statements as detailed above. It does not provide for the wholesale admissibility of hearsay evidence.

The application before me is neither urgent nor interlocutory. Thus, hearsay evidence is inadmissible.

I have had recourse to the provisions of section 27 (1) of the Act to determine whether the contents of the affidavit can be admitted there under. I am unable to find in favour of the deponent in this regard in that the source of information and basis of belief by the deponent is not given. I am therefore unable to determine whether if the source of the information were present and testifying, such information as was supplied to the deponent would have been admissible from the mouth of the source.

On the basis of the foregoing, I come to the conclusion that the founding affidavit before me is inadmissible and thus, there is no application for me to consider.

I have indicated above that I have come to this conclusion without the aid of argument from counsel. Assuming that I have erred in holding that the founding affidavit before me is inadmissible as being hearsay evidence, I still would have dismissed the application on another basis.

The applicant alleges that the respondent did not secure the costs for the preparation of the record of appeal in violation of the rules of the Supreme Court. The respondent denies that he has failed in this regard. He argues that by 8 March 2007, he had tendered security for such costs and has adduced into evidence a letter that was dispatched to the clerk of court tendering the security. The letter was copied to and received by the applicant's legal practitioners. In response to the proof that is afforded by this letter, *Mr Gama* sought to argue that because the letter was written later than the date on which the appeal was filed, it does not save the validity of the appeal. In my view, the argument lacks merit. There is nothing in the wording of the rules that suggest that failure to secure costs on the same date that the appeal is noted renders the noted appeal null and void. I would have dismissed the application on this basis, were such an application properly before the court.

Finally, *Mr Gama* argues that the appeal has lapsed due to non- prosecution. Again with respect, I see no merit in this argument. The lapsing of an appeal is a fact that is declared by the clerk of the court who is custodian of the record of appeal. *In casu*, there is no indication on record that the clerk of the magistrate's court deemed the appeal to have lapsed for any reason provided for in the law. It did not lapse for want of prosecution at common law

for the systemic delays in the processing of appeal records in these days of economic challenges facing the justice delivery system are notorious.

In the result, I make the following order:

The application is dismissed with costs.

Madzivanzira, Gama & Associates, applicant's legal practitioners
Muzondo & Chinhema, respondent's legal practitioners