

NETONE CELLULAR (PVT) LTD
versus
REWARD KANGAI

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 26 September 2018 and 14 June 2019

Application to file further affidavit rule 235

S. Banda, for the applicant
T.B. Biti, for the respondent

CHITAPI J: This application is made pursuant to Order 32, rule 235. The applicant is the respondent in case No. HC 10400/16 (main case) and the respondent is the applicant. In the main case, the respondent prays for the following relief as set out in the draft order to that application

IT IS ORDERED THAT:

1. The respondent's board, did not have the power and authority to suspend the applicant without pay and benefits as it did on 3 October, 2016.
2. The respondent's suspension without pay and benefits is therefore unlawful.
3. The respondent is barred and stopped from instituting disciplinary proceedings against the applicant on the basis of their bias.

Or alternatively

4. The parties must agree on an independent arbitrator who shall determine any charges to be brought by the respondent against the applicant and whose decision shall be final
5. The respondent shall pay costs of suit.

The applicant and respondent are involved in a termination of employment dispute with applicant as employer respondent as employee in this and the main application HC10400/19. In relation to the main application, the parties filed their affidavits of claim, opposing affidavit and the answering affidavit. Of particular note however is that the

opposing and answering affidavits were respectively filed on 27 October, 2016 and 2 December, 2016. The application before me was filed 6 months after the answering affidavit on 16 June, 2017. I must determine whether the information or evidence intended to be adduced should justifiably be allowed to be adduced given the time lapse of 6 months. In other words the applicant given the length of the delay must provide a satisfactory explanation for the delay.

Ordinarily, a party intending to reopen pleadings must justify why such an indulgence should be given. Application procedure by itself is a quicker procedure for bringing cases up to hearing stage and it is more cost effective than action procedure. Rule 235 which allows the court a discretion to allow the filing of further affidavits has the effect of prolonging application procedure which it is not intended to be. The court will have to extend the times past the close of filing the answering affidavit. In my view, rule 235 should be viewed as an exception and not the norm. There must therefore be special justification for a departure from the general run of the filing of pleading otherwise the purpose and aims of speedy disposal of disputes by way of court applications procedure can easily be defeated if the rule is allowed to be abused. As a general rule therefore, r 235 should not be used by either the applicant or the respondent to adduce evidence to build further on a claim or defence previously pleaded. In the majority of the applications in which resort to rule 235 is adopted, it is usually the respondent who seeks to address new issues which may arise from the answering affidavit of the applicant.

There is a plethora of locally decided cases dealing with the filing of a supplementary opposing affidavit as sought to be done by the applicant herein. In *United Refineries Limited v Mining Industry Pension Fund and 3 Ors* SC 63/14 GOWORA JA underlined the point which I have made that in applications of this nature, the court is called upon to exercise a judicial discretion. The learned judge at p19 of the cyclostyled judgment stated that “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:-

- (a) A proper and satisfactory explanation as to why the information had not been placed before the court at an earlier stage.

(b) The absence of *mala fides* in relation to the application itself;
That the filing of the supplementary affidavit will not cause prejudice which cannot be remedied by an order of costs”

In the case of *Associated Newspapers of Zimbabwe v Media Information Commission* 2006 (1) ZLR 128 (H) a decision of this court cited by both counsels in their heads of argument, the court emphasized that an additional affidavit may be allowed to be filed in exceptional circumstances. This underlines the point I made earlier that the filing of an additional affidavit after the answering affidavit should be the exception and not the norm. In *N & R Agencies (Pvt) Ltd & Anor v Thabani Ndlovu & Anor* HB 198/11, MATHONSI J made the point that a litigant who makes an application to file a supplementary affidavit must show the utmost good faith. It is also my view that the supplementary affidavit should not be allowed if it introduces facts or evidence which was in existence at the time of the preparation of the opposing affidavit and would have been relevant to answering the applicant’s case in whole or in part. In other words the supplementary evidence should not have been relevant in responding to the applicant’s claim in either admitting, denying or confessing to and avoiding the claim.

In *Colen v Nel* 1975 (3) SA 963 (W) at 966 cited by the respondent’s counsel, it is stated: “the court has a discretion to be exercised judicially upon a consideration of the facts of each case. Basically it is a question of fairness to both side. The respondent’s counsel also cited the case of *Herman v Jacobs Brothers* 1931 EDL 284 at 286 where the court stated:

“... the court should accept affidavits if they contain a matter that is material to the issue...”. In *Riesberg v Rieserberg*, 1926 WLD 59 at p 60, it is stated: It is quite true that it is not usual to allow a new matter to be introduced by the respondent in a further affidavit after the applicant has filed his answering affidavits but the court may allow it to be done if it is considered desirable ...” I am in total agreement with the dicta in the cases. It makes good jurisprudence because the respondent who wishes to raise a claim against the applicant can file a counter application in terms of r 229A instead of making fresh claims after the answering affidavit which is the last affidavit in application procedure.

I now deal with the merits of the application and will apply the principles which guide the court in determining such applications as set out above. The starting point is to appreciate that in the main application, the respondent seeks an order declaring that the applicant’s board did not within the employer and employee relationship have the power and authority to

suspend the respondent as the board purported to do on 3 October, 2016. The other relief sought that the purported suspension be declared unlawful and further that the applicant be stopped from conducting disciplinary proceedings consequent on the suspension aforesaid, is consequential to the main relief. The consequential relief is dependent on the answer to the main question whether or not the applicant's Board had power or authority to suspend the applicant. If the board did not have such power or authority, then it must follow as a matter of law that its actions were null and void. If the board is found to have had the power and authority to suspend the respondent as it did, then, the whole application would be dismissed and it would not be necessary for the court to determine the ancillary relief.

I have considered the founding, opposing and answering affidavits in the main case. It is not my intention nor is it desirable that I express an opinion on the merits or demerits of the respondent's claims and the applicant's defence. It will suffice for me to observe that the gravamen of the main application is that the respondent impugns the acts or actions of the applicant in purportedly suspending and terminating the respondent's employment contract in law and in fact. The respondent provided a paper trail of how he was suspended and had his employment terminated. He also related to the perceived illegalities in the whole process including raising jurisdictional issues as rendered the conduct of the respondents acting through its board, a nullity. It is on basis of the alleged unlawful conduct of the applicant that the respondent prayed for a declaratur as already captured herein.

In the opposing affidavit the applicant first attacked the application on the basis that there was no cause of action since the disciplinary proceedings meant to have been conducted by the applicant were withdrawn a day before the main application was filed. The applicant chronicled the paper trail from 3 October, when the respondent was first suspended from employment until 13 October, 2016 when the main application was filed. In brief the applicant pointed out that the respondents suspension from employment was lifted on 12 October, 2016. On the same date however, the applicant then terminated the respondent's employment contract on 3 months' notice. It is the applicant's contention in the main case that the respondent should have withdrawn the main case because the relief sought amounted to a moot point. Further it was the applicants' contention that if the court were to grant the declaratory order, the same would amount to a *brulmen fulmen*.

Again, without seeking to determine the main case, I observe that the applicant's contentions that the main application became academic following the withdrawal of the

respondent's suspension from employment does not properly appreciate the purport of the main application. As I understand it, the purport of the declaratory order application is for the court to determine what powers the applicant's board has over the respondent in relation to the applicant's employment. The fact that the same board lifted the challenged suspension and proceeded to terminate the respondent's employment contract constitutes acts which the respondent challenges. Put another way, the board if it does not have authority to suspend the respondent would equally not have authority to uplift the suspension. The law is that once the originating act is invalid, then nothing derives from it. It is as good as it was not done. The upliftment of the suspension does not cure the illegality. The court would in my view still order if it agrees with the respondents' contentions, that the applicant's board did not have authority to act as it did. This would have a bearing on the legality of the termination of the applicant's employment contract by the board. I will leave it at this after noting that the point *in limine* does not appeal to me as having legal substance. It may well be that after full argument on it, the court hearing the main matter may have a different perception and reach a different. My views will remain a *prima facie* view.

The point I consider next is that from the supplementary affidavit intended to be filed by the applicant, the deponent to the opposing affidavit states in paras 12, 13 and 14 as follows:-

- “12. Respondent was paid out the total sum of US\$247 983.33 (Two Hundred and Forty Seven Thousand Nine Hundred and Eighty United States Dollars and Thirty Three Cents) but a total of US\$20 386.65 (Twenty Thousand Three Hundred and Eighty Six United States (sic) and Sixty Five Cents) was paid to NSSA, WCIF, Old Mutual, Cormation, The Pension Fund, Medical Aid and Funeral assurance. I attach hereto a schedule with the breakdown of the payment made to respondent marked as annexure “F” as well as the proof of payment, marked as Annexure “G”.
13. However, Respondent has consistently adopted a deceitful and fraudulent non-disclosure approach, by refusing to acknowledge the payment.
14. It is common cause that the payment puts paid to the matter.”

Annexure F is a document headed “Reward Kangai Payout – 01 November 2016 to 30 June, 2017.” It is a schedule of how the sum of US\$247 984.33 was computed. The date of preparing the schedule is not indicated anywhere on it. Annexure G is the applicant's payslip showing a net pay of \$US144 142.82. The payslip bears the date 22 March, 2017 reflected on the applicant's date stamp franked on the payslip. On the next page, there is also another date stamp franked thereon. It bears the date 25 April 2017.

Further to annexures F and G aforesaid, the applicant's legal practitioners by letter dated 23 March, 2017 which was received by the respondent's legal practitioners advised of the payment of the US\$247 984.33. The letter aforesaid stated as follows in part-

- ".... (b) Please note that, your client's contract having been paid out, he is no longer entitled to payment of compensation for loss of office in terms of section 4 (b) of the Labour Amendment Act, as intimated in paragraph 4 of the Termination letter dated 12 October, 2016
7. The Contract pay out puts paid to any and all claims by your client against ours.
 8. In the premises, we look forward to your client's Notices of Withdrawal of proceedings in the High Court under case no. HC 10400/16 and HC 11003/16."

The respondent's legal practitioners responded to the letter aforesaid on 27 March 2017 and in particular they stated in paragraph 3 and 4

- "3. Your client's purported termination of our client's contract of employment is unlawful for the reasons which appear fully in the two applications that our client has raised.
4. Because the termination is unlawful and unconstitutional your client is duty bound to continue paying our client his salaries."

In the same letter the respondent's legal practitioners responded stating that even if they were to assume pending the respondent's confirmation that the payment in issue had been made, they took the legal position that the payment would be treated as normal salary due in terms of the existing contract. In other words there was no agreement of a mutual termination of the employment contract or payments due in consequence of the termination. I again leave it at that in order that I do not express an opinion which may materially impact on issues for determination in the main case.

The parties exchanged further correspondence and e-mails then onwards. What is clear from a perusal of the exchanges is that the respondent continued to hold its position that the purported termination of the contract of employment by the applicant acting through its board was invalid. I however specifically refer to annexure 'H5' being a letter dated 12 April 2017 from the applicant's legal practitioners to the respondent's legal practitioners. It is necessary to quote the contents of the letter. It reads:

"RE: REWARD KANGAI v NETONE CELLULAR (PRIVATE) LIMITED LABOUR RELATIONS – CONTRACT PAY OUT

1. We refer to the above matter and write further to our letter of 28 March, 2017.
2. Do you now have instructions to withdraw your client's claim
3. If the matter is proceeding for hearing, we will have to apply for leave to file a further affidavit by our client to place the court into full picture regarding the contract payout.
4. We still await acknowledgment of receipt by your client of the sum of US\$247 984.33 (Two Hundred and Forty Seven Thousand Nine Hundred and Eighty Four

United States Dollars and Thirty Three Cents) for salaries and benefits from November, 2016 to June 2017, the date of expiry of his employment contract by effluxion of time.

5. Kindly advise your client's position in the next three (3 working days).

Yours faithfully

SINYORO AND PARTNERS

It is common cause that shortly after these correspondences, the respondent filed an urgent application Case No. HC 3538/17 for an order to interdict the applicant from filling the position of Chief Executive pending the determination of Case No. HC 11003/16. In judgment No. HH 325/17 delivered on 24 May, 2017, CHIGUMBA J determined that the application was not urgent which effectively meant that the court did not decide the merits of the application. The effect of the declaration that the matter is not urgent would be that the respondent could still take up the application for determination on the ordinary roll, subject to complying with rules which regulate non urgent applications.

The applicant did not file this application after the three (3) working days post 12 April, 2017 as threatened. The answering affidavit had been filed on 2 December, 2016. I have not been able to find from the applicant's founding affidavit a reasonable explanation for the delay in filing the application post 2 December, 2016 and in particular after the payment in March, 2017 and at best after the three day ultimatum of 12 April, 2017 which ultimatum did not move the respondent to comply. This application was filed 58 days later after the expiry of the ultimatum of 12 April, 2017

The applicant explained off the failure to put the proposed information before the court on the basis that the payout had not been done at the time of filing the opposing affidavit. Applicant explained the delay in filing the application on the basis that it "anticipated that respondent would withdraw the frivolous applications, as is apparent from the correspondences attached above." I have already dealt with the correspondence. From a reading of the paper trail, the respondent was steadfast that it would not withdraw the main case. There was no basis for the applicant to point in anticipation that the respondent would withdraw the matter. An application to file an additional affidavit has the effect of delaying the determination of the application since leave to file it is required to be sought from a judge or court by way of application. The application may be opposed as *in casu* and a hearing becomes necessary. A delay in filing the application further exacerbates the delay and must be a factor that should properly be taken into account when the court determines in its

discretion whether special circumstances exist to allow for the filing of the supplementary affidavit. In *James Brown & Hamer (Pty) Ltd v Simmons N.O* 1963 (4) SA 656 (A) 660E-F the following is stated:

“where, as in the present case, an affidavit is tendered in motion proceedings both late and out of its ordinary sequence, the party tendering 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 the circumstances of the case nevertheless be received.”

I am in agreement with the above dicta particularly on the need to justify the delay in tendering an affidavit out of sequence. It should not just be a question of explaining why the information sought to be introduced was not pleaded earlier. The delay in seeking to tender it from the time it became known is a relevant consideration in addition to other requirements as set out in decided cases which I alluded to.

The next point I deal with is the impact of the new evidence sought to be adduced on the relief sought by the respondent in the main matter. I am in agreement with the respondent’s counsel that the applicant wants to bring up a totally different defence from the one which it raised in answer to the founding affidavit. The proposed supplementary affidavit seeks to bring the defence of a *transactio* or estoppel as the court might determine. By averring that the respondent was paid off and no longer had a running contract with the applicant the applicant seeks to plead a new defence altogether. This position was from the outset of correspondence vehemently opposed by the respondent. On that basis, I do not consider that the matters sought to be raised would be relevant to the prayer sought by the respondent in the main case. It would also be a misdirection to hold that the subsequent alleged payouts put paid to the case because the respondent denies that they did. The declaratur sought in my view is in answer to the question whether or not the board acted within its powers and authority to suspend the respondent from employment and purport to commence disciplinary proceedings. If such power and authority was not there then it would not proper for the court to say “what does it matter anyway since your contract was paid out and/or it terminated?” Such conclusions can only be reached if the respondent should pursue whatever rights he believes he might be entitled to follow following a declaration if given of the invalidity of the board’s actions. The court cannot conjecture or speculate on this.

To cap it all, I foresee prejudice to the respondent which cannot be cured by an order for costs because there are other pending cases related to the respondent employment with the

applicant. To allow the applicant to introduce the supplementary affidavit would render the other litigations superfluous as they will have been anticipated by an order of compromise if it were to be granted. The applicant does not suffer prejudice if its application were to be dismissed because should the respondent seek to raise any issues to do with the legality or otherwise of his employment contract, the applicant can still raise this new defence of a payout and/or the termination of the employment contract by effluxion of time.

Given the totality of the facts and circumstances of this case with particular to the relief sought in the main case, I hold that it would amount to an injudicious exercise of the court's discretion to allow the applicant to file an additional or supplementary affidavit to the opposing affidavit.

In regard to costs, the respondent prayed for costs of the higher scale in the event of this application being dismissed. I am not persuaded to accept that the application is an abuse of the court process. The parties exchanged correspondence in regard to the materiality and impact of the alleged contract payout. There was no *mala fides* on the part of the applicant to take the view that its payout extinguished whatever disputes there were between the parties. Its position was understandable but legally untenable. A party does not get punished with punitive costs for holding a contrary legal position because arguments on the law should be encouraged as they enrich our jurisprudence. If the applicant had raised spurious issues of fact, then a punitive costs order could well be justified on the basis that a party who denies evidence which is in blue and white or as clear as day does so *mala fides*. The appropriate order of costs in the exercise of my discretion is to order costs on the ordinary scale.

Resultantly, I dispose of the applications as follows

“The application by the applicant to file a supplementary opposing affidavit be and is hereby dismissed with costs.”

Sinyoro & Partners, applicant's legal practitioners
Tendai Biti Law, respondent's legal practitioners