

PROSECUTOR GENERAL
versus
ENMORE MAKARICHI
and
THE REGISTRAR OF DEEDS N.O
and
THE REGISTRAR OF MOTOR VEHICLES N.O

HIGHCOURT OF ZIMBABWE
CHIKOWERO J
HARARE; 19 July and 12 September 2023

Opposed Application

M Mutamangira, for the applicant
JJ Chirambe with J Nemaisa, for the 1st respondent
No appearance for the 2nd and 3rd respondents

CHIKOWERO J:

INTRODUCTION

1. This is an application for civil forfeiture made in terms of ss 79 and 80 of the Money Laundering and Proceeds of Crime Act [*Chapter 9:24*] (“the Money Laundering Act”)
2. The applicant urges me to forfeit to the State the fifteen motor vehicles and two immovable properties on the basis that they are proceeds of serious crimes. The contention taken being that the first respondent raised money from unlawful activities and, to conceal the illicit origin of that money, used those funds to purchase the property sought to be forfeited.
3. Although the first respondent opposes the application on a number of preliminary points and the merits, the application falls to be determined on one of the preliminary points.
4. I turn to that preliminary point.

THE APPLICATION IS FATALLY DEFECTIVE BY DINT OF THE INVALIDITY OF THE SUPPORTING AFFIDAVITS

5. Sections 3 and 6 of the Justices of the Peace and Commissioners of Oaths Act [*Chapter 7:09*] (“the Act”) provide that the Minister of Home Affairs and Cultural Heritage or any other Minister to whom the President may assign the administration of the Act from time to time, may, appoint justices of the peace and commissioners of oaths for Zimbabwe or for any one or more districts. The Minister is required to notify every appointment or cancellation of an appointment of a person as a justice of the peace and commissioner of oaths through publication in the Government Gazette.
6. In terms of s 7 of the Act a justice of the peace shall *ex officio* be a commissioner of oaths for the area for which he has been appointed a justice of the peace.
7. Subject to two exceptions which are not material for my purposes s 8 of the Act provides that a justice of the peace or commissioner of oaths may within the area for which he has been appointed administer an oath to any person.
8. I pause to record that a duly admitted and registered notary public is an *ex officio* commissioner of oaths.
9. An affidavit is a statement, in documentary form, sworn to before a commissioner of oaths. The deponent must make the oath and swear to the statement, as well as sign it, before the commissioner of oaths. The latter must administer the oath and sign the affidavit at the same time and in the presence of the deponent. For a document to qualify as an affidavit the foregoing requirements must be met. Considering the significance of an affidavit, and the office of a commissioner of oaths, it is vital that the document be such and the person who commissions it be a commissioner of oaths. The person who signs the document must be identified as Commissioner of Oaths and there must be evidence that he or she is a Commissioner of Oaths.
10. In *Firstel Cellular (Pvt) Ltd v Netone Cellular (Pvt) Ltd* 2015(1) ZLR 94(S) at 98C- 99A PATEL JA (as he then was) with the concurrence of ZIYAMBI AND GARWE JJA (as they then were) said:

“The respondent’s founding affidavit in the court below was sworn before one Raymond Moyo, a registered legal practitioner, who appended his signature above the designation “Commissioner of Oaths.” The stamp used for the purpose is one that would ordinarily have been used to certify copies of original documents as being true and correct. However, it also denotes Raymond Moyo as a Commissioner of Oaths and notary public.

Counsel for the appellant cites *S v Deyi* [2013] ZAGPPHC 75 for the proposition that the stamp adopted must clearly indicate the status of the Commissioner of Oaths. In that case, the court was called upon to apply the directory provisions of regulations, made under the South African Justices of the Peace and Commissioners of Oaths Act 1963, which require a Commissioner of Oaths to state his or her designation and the area for which he or she holds his appointment of office. The Commissioner in question was evidently a police constable, but the stamp that was used that of a magistrate. The court found that this stamp misrepresented the office of the Commissioner and was likely to cause confusion in that regard. Consequently, it declined to exercise its discretion in favour of receiving the document relied upon in that case as a sworn affidavit.

It is common cause that there is no specific legislation regulating the issue in this jurisdiction and that the matter is one that is governed by practice. In that regard, what is required is that any stamp that is used to designate a Commissioner of Oaths should clearly identify the person before whom an affidavit is deposed and the office or capacity in which he or she acts as a commissioner. *In casu*, it is not disputed that Raymond Moyo is a legal practitioner and a notary public and, as such, a recognised commissioner of oaths. The respondent has therefore verified its cause of action in an affidavit duly authorised thereto, before a clearly identified commissioner of oaths. That, in my view, suffices for the intended purpose of adducing evidence under oath and renders the validity of the respondent's founding affidavit manifestly impervious to challenge."

11. In this jurisdiction, a decision of the Supreme Court binds this court. Accordingly, in line with *Firstel Cellular (supra)* it follows that the person before whom the affidavit was signed (the Commissioner of Oaths) should be clearly identified as should be the office or capacity in which he or she acts as a Commissioner of Oaths.
12. To similar effect is this court's decision in *Muzanenhamo v Gadaga and Ors* HH 65/2006. There, at p 3 of the cyclostyled judgment, GOWORA J (as she then was) said:

"The applicant contends that the document is an affidavit. An affidavit must be sworn before a person competent to administer an oath. The applicant in his affidavit makes the averment that the document was sworn to before a magistrate. The document bears the stamp of the magistrates court. The person who signed as Commissioner of oaths is not identified, nor is he described as commissioner of oaths. There is, in fact, no indication that the document was signed by a commissioner of oaths. In the circumstances the document is not an affidavit. What it is in fact a written statement not made on oath."

13. That only documents satisfying the legal requirements as to their nature should be accepted into evidence and acted upon by the Court was underscored by the case of *Tawanda v Ndebele* 2006(1) ZLR 426(H). In that matter, the court held that a power of attorney authenticated by a solicitor in England did not, in the absence of evidence that he

was also registered as a notary public, comply with the provisions of r 3 of the High Court (Authentication of Documents) Rules 1971(RGN 995 of 1971) The rule reads:

“(3) Any document executed outside Zimbabwe shall be deemed to be sufficiently authenticated for the purpose of production or use in any court or tribunal in Zimbabwe or for the purpose of production or lodging in any public office in Zimbabwe if it is authenticated:

- (a) by a notary public, mayor or person holding judicial office; or
- (b)

Section 2 of the Rules define authentication, in relation to a document, as the verification of a signature thereon.

14. In *Tawanda v Ndebele*, (*supra*)CHEDA J (as he then was) said at 428G – 429C:

“The particulars of a person who authenticated Prosper’s power of attorney indicate that he is a mere solicitor. In the absence of evidence that he is registered as a notary public, I find it difficult to accept that he is indeed a notary public authorised to practice as such in terms of the laws of the United Kingdom.

The office of a notary public is very important and his signature together with his seal of office is so important that it commands international recognition to the extent that the mere exhibition of a notarised document is absolutely acceptable for judicial purposes. For this reason, therefore, a notary public’s office should be protected for what is worth. Prosper’s signature was not authenticated by a notary public. Therefore its authority is questionable.

It is my view, therefore, that there should be no compromise by seeking to accept a questionably authentic document either for academic or expedience purposes. The rules of this court has listed certain officials who are authorised to authenticate documents and those rules should be applied in toto.

In light of the above, there is no power of attorney before this court authorising Albert to act for and on behalf of applicant. Accordingly, the application is dismissed with costs.”

15. The significance of the ratio decidendi in the foregoing case is that I must be satisfied that there is evidence that each of the supporting affidavits were deposed to before a commissioner of oaths for me to uphold their validity.

16. In *Derby Shirt Manufacturers (Pty) Ltd v Nel N.O and Another*, N.O 1964(2) SA 599 the court held that a document which purported to be an affidavit was a nullity because it had not been attested by a commissioner of oaths.

17. In the matter before me, Tanyanyiwa Mangena, a Detective Sergeant in the Zimbabwe Republic Police, deposed to the purported first supporting affidavit. This document is not an affidavit because the identity of the supposed commissioner of oaths is not disclosed.

Above the designation “Commissioner of Oaths” appears not the name of the purported commissioner of oaths but a signature and a handwritten endorsement suggesting that the signatory is a Detective Inspector. The stamp used is for the Zimbabwe Republic Police Officer – In- Charge, Team One, Criminal Investigation Department. Further, the office or capacity in which the unknown signatory was acting as the purported commissioner of oaths is not disclosed.

18. Mkhululi Nyoni is a police officer in the Zimbabwe Republic Police stationed at the Criminal Investigation Department, Asset Forfeiture Unit, Northern Region as the Acting Head. What was meant to be his supporting affidavit is not an affidavit. The identity of the person who was supposed to be the Commissioner of Oaths as well as the office or capacity in terms of which he or she signed Nyoni’s “affidavit” as Commissioner of Oaths are unknown. Above the designation “Commissioner of Oaths” appears a signature together with a handwritten endorsement “C/Insp” for I think, “Chief Inspector.” There is no stamp for a commissioner of oaths on the document. Instead, the document bears the 30 August 2022 date stamp for the Zimbabwe Republic Office, General Headquarters, Superintendent Organisational Research Planning and Development P.O Box CY 34 Causeway, Harare.
19. Admire Marichana is an Accounting Assistant employed by the Grain Marketing Board. He is based at the Head Office in Harare. The person who commissioned his “affidavit”, the office or capacity in terms of which such person acted as commissioner of oaths and the place where the document was signed by both Marichana and the supposed commissioner are unclear. By way of identification of the purported commissioner of oaths, I have been presented with a signature, some digits (Ms Mutamangira told me this is the force number of the signatory) and the endorsement, in long hand, “Insp,” which I presume stands for “Inspector” being a rank in the Zimbabwe Republic Police. Instead of the Commissioner of Oaths stamp, the document bears the 29 August 2022 date stamp of the Zimbabwe Republic Police, General Headquarters, Superintendent Organisational Research Planning and Development P.O Box CY 34 Causeway, Harare. Another disquieting feature is that the document reflects that it was sworn to on an undisclosed date in 2022 at Mkushi Depot, Harare (formerly Morris Depot) yet the date stamp is for

the Police General Headquarters. I take judicial notice of the fact that the Police General Headquarters is not located at the same place as Mkushi Depot. Even if the Commissioner of Oaths had been identified and described the document would still not have qualified as an affidavit because there is no evidence of the date and place where the oath was administered and proof that the deponent and commissioner signed it contemporaneously and in the presence of each other. It could not have been possible that the same affidavit would have been sworn to at Mkushi Depot in Harare as well as at the Police General Headquarters in Harare.

20. Precious Mugwagwa is employed as Manager by the Grain Marketing Board. She is stationed at the Concession Depot. The person who signed, as commissioner of oaths, what was intended to be her affidavit was neither identified nor was the office or capacity in terms of which that person acted as a commissioner of oaths described. Above the designation of the commissioner of oaths is what appears to be a combination of a signature and some digits, at the same position. Adjacent thereto is the 22 August 2022 date stamp of the Officer –In –Charge, Zimbabwe Republic Police, Concession.
21. In a nutshell, care should have been taken in composing the supporting affidavits and in ensuring that they were properly deposed to. The dates and places of such depositions should have been clearly reflected as well as the respective identities of the commissioners of oaths and the offices or capacities of the persons in terms of which they acted as commissioners of oaths. For example, if a person is a commissioner of oaths by virtue of being a duly admitted and practising notary public in Zimbabwe, the following information would be reflected on the commissioner of oaths' stamp: his or her full name, that the person is a legal practitioner, conveyancer (if such be the case), notary public and commissioner of oaths. The description as notary public would be evidence that the person signed the affidavit as an *ex officio* commissioner of oaths. For certainty, such thorough commissioners of oaths would also reflect, on their stamp, the law firms under which they practice their profession and their physical address. Immediately above the designation of the commissioner of oaths, the commissioner would then append his or her signature.

22. For police officers who are appointed either as commissioners of oaths or as justices of the peace and hence *ex officio* commissioners of oaths I would suggest that the commissioner of oaths stamp bears such person's full names, their rank in the Zimbabwe Republic Police, their force number, the designations as justice of the peace and commissioner of oaths as well as the name and address of the police station, district, provincial or head office where the person is based. Such commissioner of oaths would, in terms of the law, have to administer the oath and sign the affidavit in the presence of and at the same time as the deponent to that affidavit. Finally, the date of deposition to the affidavit must appear on the affidavit itself.
23. What was placed before me as supporting affidavits fell far short of the legal requirements. They were not affidavits at all.
24. The deponent to the founding affidavit had no personal knowledge of what she deposed to. She did not say that she believed the facts or averments set out in her affidavit to be true and correct. Indeed, as pointed out by Mr Chirambe, the founding affidavit was predicated on the validity of the supporting affidavits. This was so because the applicant in the founding affidavit admitted that she did not have personal knowledge of the facts of the matter. She could not be expected to have such knowledge. All she did, on behalf of the applicant, and in her founding affidavit, was to rely on the history of the matter and the evidence uncovered during investigations to file an application for civil forfeiture of the property in question. Without the supporting affidavits, which I have found to be invalid, the application itself becomes fatally defective. See, generally, *Chiadzwa v Paulkner* 1991(2) ZLR 33(SC) and *Bubye Minerals (Pvt) Ltd and Anor v Rani International Ltd* 2007(1) ZLR 22(S).

ORDER

25. It is ordered that:

1. The preliminary point be and is upheld.
2. The application be and is struck off the roll.
3. The applicant shall pay the first respondent's costs of suit.

The National Prosecuting Authority, applicant's legal practitioners
Mambosasa Legal Practitioners, first respondent's legal practitioners