

MAXWELL MATSVIMBO  
and  
GLADYS SIBANDA  
versus  
MARTIN NDORO  
and  
MERCY NDORO  
and  
MESSENGER OF COURT

HIGH COURT OF ZIMBABWE  
WAMAMBO J & MUCHAWA J  
HARARE 16 June & 1 December 2022

### **Civil Appeal**

Appellant in person  
*C T Tinarwo* for the 1<sup>st</sup> & 2<sup>nd</sup> respondents  
No appearance for the 3<sup>rd</sup> respondent

**WAMAMBO J:** This is an appeal against the order by a Magistrate sitting at Harare Magistrate Court. The Magistrate rendered an order dismissing the application for stay of execution launched by the appellant.

Dissatisfied with the said order the appellants launched an appeal before this court. We rendered an *ex tempore judgment* dismissing the appeal with costs. The appellant requested for full reasons for the dismissal of the appeal.

These are the reasons:

Before the Magistrate was an application for stay of execution launched by the appellant. The court *a quo* found that the founding affidavit by appellant was not commissioned and that the application was not signed by the appellant and that it was not dated.

The Magistrate disposed of the application in the following words at page 11:

“The court will not belabour itself getting into the merits of this application. The reason being that the founding affidavit by Maxwell Matsvimbo Sibanda is not commissioned. The page 8 of the application is not signed by the applicant or the Commissioner of Oaths or even dated. There is no application before the court. It is hereby dismissed with costs.

In his notice of appeal appellant raised a plethora of grounds of appeal. The grounds are either unclear, terse, argumentative and sometimes repetitive.

For instance instead of being clear and specific of why he says the Magistrate made an error to say appellant's affidavit and application was not signed appellant just makes the bald averment.

The fact that the Clerk of Court accepted the application does not legitimise it for the Clerk of Court will not sit to hear the matter and the decision in the case that could only be made by a Judicial officer.

Stunningly one of the grounds of appeal is that the court *a quo* did not observe that appellants and third respondent did not complain of "unsigned commissioned application"

The appellant is the one who lodged the application and was at fault. Would he complain about his own mistake. If so for what reason and to what end. The third, respondent (The Messenger of Court) is normally not represented in such matters and is only cited in a nominal ? capacity. In any case the respondents in the matter before the court *a quo* would not raise the issue as it would clearly be to their disadvantage and not in their favour.

Most of the prurpoted grounds of appeal are clearly convoluted and argumentative. One of the grounds (ground 2a) fails to observe that the Magistrate *a quo* employed order 34 of the Magistrates Court, Rules, 2019 postponed the matter to allow parties to file all processes. The matter was then postponed to 7 December 2021 by consent of the parties. See page 14 of the record.

Ground 2 3 raises the complaint that the court *a quo* erred by not asking the parties representatives if "their copy was signed and commissioned during the hearing on 17 January 2022 before dismissing the case"

It is unclear which copy is being referred to. One has to assume that the reference is to the appellant's founding affidavit. The Court *a quo* was dealing with documents filed of record.

If there was a signed copy it was not in the record. There was no attempt from a reading of the record by any of the parties to point out that there was a signed copy available for the Court's sight.

The fourth ground of appeal avers that the interpleader had merit. No details of the merit are given. There is in ground 4 a suggestion that the matter was before the High Court and would be determined within two days from date of dismissal by the Magistrates Court.

It is unclear which matter is being referred to. The case number is not cited and the relevance or relationship of that matter to the instant case is not clarified.

I note that appellant at the commencement of proceedings had applied for a postponement of the matter pending a decision of the Supreme Court in SC 59/22. We dismissed, this application. What became clear from a reading of the record which contains documents from various other cases and supporting annexure is that appellant has many pending cases before the High Court and Supreme Court. The appeal in this case was instigated by appellant who now sought for a postponement of the same appeal he filed. Due to the faulty of information on the relevance of SC 59/22 and the multiplicity of cases involving appellant we decided to deal with the instant matter on the merits.

To my mind the only ground that may be worth considering is ground 1 (a) it reads as follows:

“The court *a quo* erred by dismissing the application without looking at the merit. Furthermore erred to award respondent’s costs.”

In its justification for dismissing the application the court *a quo* found that appellants founding affidavit was not commissioned and that “ p 8 of the application is signed by the applicant or the commissioner of Oaths or even dated”.

The above is indeed borne by the record. An application stands or falls by its founding affidavit. In this case a document purporting to be a founding affidavit was being relied on by appellant. The document was bare so to speak. It has no signature of the deponent. It is undated. It has no stamp and signature of the Commissioner of Oaths. It is therefore not an affidavit. There is nothing founding about the document. It lays no basis for the matter. The matter could not succeed without a founding affidavit.

We find that the learned Magistrate was correct to find that there was nothing before the court and the resolution of the matter was to dismiss the application.

Costs are in the discretion of the trial court. The general rule is that costs follow the result. There is nothing submitted by appellant to rebut the general rule.

In fact appellant is content to allege tersely that the court erred to award respondents’ costs. To that end we find that an order of costs was indeed justified.

We dismiss all the grounds of appeal as raised and find that the appeal is devoid of merit.

For the reasons as aforementioned we rendered the following order.  
The appeal is dismissed with costs.

**MUCHAWA J : .....** Agrees

*Zimudzi & Associates* first & second respondent's legal practitioners