MEDIWOOL (PRIVATE) LIMITED
versus
GILBERT KARENGA MASWERA
and
MESSENGER OF COURT NO.
and
SWIFT DEBT COLLECTORS (PVT) LTD t/a RUBY AUCTIONS
and
MACLOUD NESHIVA

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 10 October 2024 and 13 March 2025

Opposed application-Review

Mr *E T Muhlekiwa* for the applicant
Mr *P Tichaona* for the 1st respondent

MUSITHU J: This application for review was filed in terms of s 27 of the High Court Act [*Chapter 7:06*]. The applicant seeks the setting aside of the decision of the second respondent which directed the third respondent to advertise and conduct a sale in execution of the applicant's cotton wool processing plant (the plant) and the subsequent sale in execution held on 29 December 2023. The applicant averred that the procedure leading to the sale of its plant was grossly irregular as it was done in contravention of the provisions of the Magistrates Court (Civil) Rules, 2018 (the rules). To that end, the applicant approached this court seeking relief couched in the draft order as follows:

> **"IT IS ORDERED THAT**
> 1. The decision by the second respondent of 14 December 2023 directing the third respondent to advertise and sale in execution the applicant's plant be and is hereby set aside.
> 2. "The sale in execution by the second respondent in the matter of Gilbert Karenga Maswera vs Mediwool (Pvt) Ltd Case No. C-CG1424/23 be and is hereby set aside
>
> or *alternatively*
>
> The sale in execution by the second respondent in the matter of Gilbert Karenga Maswera vs Mediwool (Pvt) Ltd case No C-CG1426/23 be and is hereby set aside"

3. The fourth respondent be and is hereby ordered to surrender the cotton wool processing plant i.e. the 5-piece auto cleve bleaching machine, cotton dryer processor, 3 trutzchler cotton final processor, link packaging machine, industrial boiler and trolley jack to the applicant forthwith failure of which the Sheriff shall take all necessary steps to restore the cotton wool processing plant to the applicant.
4. The costs of this application shall be borne by the first and second respondents jointly and severally the one paying the other to be absolved on a legal practitioner and client scale."

Applicant's case

The applicant's affidavit was deposed to by one Mercy Mugove Sibanda in her capacity as the director of the applicant by virtue of a resolution passed on 12 July 2023. Curiously, in her affidavit, the deponent used the first-person language in which she portrayed herself as the applicant itself. The deponent averred that on or about 1 October 2020, she and the first respondent entered into a five-year long lease agreement in terms of which she leased the first respondent's warehouse which is located at No. 17042 A, Culton Road, Graniteside, Harare (hereinafter referred to as the premises). The lease was due to expire on 1 October 2025. In terms of the lease agreement, the deponent was to set up a plant at the first respondent's premises to conduct a cotton wool manufacturing business.

The deponent averred that pending the tenure of the said lease agreement, she was surprised to receive a notice of attachment of her plant from the second respondent on 2 June 2023. She was thereafter served with an *ex parte* application for rent attachment in terms of s 34 of the Magistrates Court Act [*Chapter 7:10*] (the Act) under HRE C-CG 1426/23. The deponent averred that upon perusal of the *ex parte* application, she noted that the rent attachment had been granted on 5 May 2023 in the court a *quo*. She further averred that she was surprised to learn that the first respondent had instituted proceedings against her on 27 April 2023 under HRE C-CG 1424/23. The summons and particulars of claim were, however, served upon her on 27 June 2023, some two months after they were issued.

The deponent entered appearance to the summons claim, and the first respondent reacted by filing an application for summary judgment under the same case number. The application for summary judgment was dismissed by the court a *quo* on the basis that it failed to meet the requirements of an application for summary judgment. The court reckoned that there were triable issues that required ventilation at trial. The matter proceeded to pre-trial conference. The first respondent obtained a default judgment against the applicant at the pre-trial conference on 30 November 2023, after the deponent defaulted. The deponent claimed that she had never been

served with the notice of set down of the pre-trial conference. On becoming aware of the default judgment, the deponent's legal practitioners approached the first respondent's legal practitioners seeking their consent to rescind the default judgment. The request was turned down.

The deponent's legal practitioners made enquiries with the second respondent on whether he had been given instructions to enforce the default judgment under **HRE C-CG1424/23**, but the second respondent advised them that he had no instructions to execute the default judgment. The deponent immediately filed an application for the rescission of the default judgment. The judgment was expected to be handed down on 30 January 2024.

On 2 January 2024, the deponent was surprised to learn that the second respondent through the third respondent had conducted a sale in execution of its plant on 29 December 2023. This is the plant that had been attached by the second respondent through a rent attachment order under **HRE C-CG 1426/23**. The deponent averred that the sale was conducted unlawfully as there was no warrant of execution issued by the court a *quo.* It was also averred that at any rate, property attached as security for rent could not be sold in execution as a consequent of the said rent attachment.

The deponent was aggrieved by the decision of the second respondent of 14 December 2023, which directed the third respondent to advertise and sell her plant and the subsequent sale in in execution of that plant. It was for the foregoing reasons that the deponent approached the court seeking the relief set out above.

First Respondent's Case

The application was opposed by the first respondent. The second, third and fourth respondents did not file opposing papers. The first respondent's opposing affidavit raised a myriad of preliminary points, which were that: the applicant's affidavit was incurably defective and misleading; the applicant had not exhausted domestic remedies available at its disposal and approaching the High Court on review was tantamount to forum shopping; the application was not properly before the court as it was filed out of time; the relief sought by the applicant was incompetent and defective; and that the hearing of the present application ought to be stayed pending payment of the first respondent's costs awarded by the court in his favour in another matter involving the same parties under HCH 216/24.

Submissions and analysis of the preliminary points

Before delving into the merits of the matter, it is critical to dispose of the preliminary points raised by the first respondent as they have a bearing on the question whether this application is properly before the court.

Whether the applicant's affidavit is incurably defective

As already observed, the deponent to the applicant's affidavit used the first person language that portrays her as the applicant in this matter. The first respondent had serious misgivings with that approach. In his opposing affidavit, the first respondent averred that the deponent to the applicant's founding affidavit was pleading evidence and facts that related to herself in her personal capacity and not the applicant, which had been sued. It was further contended that there were no averments that constituted the applicant's case because Mugove Mercy Sibanda never entered into a lease agreement with the first respondent. Rather it was the applicant that had a lease agreement with the first respondent.

The second contention was that it was the applicant's property that was attached and not the deponent's property. The third contention was that paragraph 3 of the founding affidavit showed that it was the company that deposed to an affidavit and not the natural person acting on its behalf, and yet a company did not speak but acted through the natural person. The fourth averment was that in HCH 216/24, MHURI J struck off the roll the applicant's urgent chamber application which had a founding affidavit identical to the present one. I pause here to observe that the reason why that matter was struck of roll is not relevant to the present matter. That matter was struck off the roll because the deponent to the applicant's affidavit, who happens to be the same deponent herein, had inadvertently stated that she had been authorized to depose to the founding affidavit by the first respondent (the same first respondent herein), by virtue of a resolution passed by the applicant's board. She obviously intended to say that her authority was derived from a resolution passed by the applicant's board. That made the affidavit defective because the deponent could not have been a director of the first respondent, a natural person.

In the answering affidavit in the present matter, the deponent was defiant and insisted that she would continue to address the applicant in the first person language. She nevertheless denied that she was the applicant insisting that Medwool (Pvt) Ltd was the applicant. She also denied that the judgment by MHURI J had a bearing on the matter.

In its heads of argument the applicant argued that at law, it was a legal persona capable of suing and being sued, and doing any act which a natural person could do. In doing so, the applicant could only act through its authorized agent. No law precluded the applicant from referring to itself in the first person language in pleading its case.

Affidavits serve an important role in motion proceedings as they take the place of pleadings. They provide a platform through which litigants can place evidence before the court in those matters where the issues to be dispensed do not present factual disputes that necessitate the hearing of oral evidence. Rule 58(4)(a) of the High Court rules, 2021 regulates the filing of affidavits in motion proceedings as follows:

> "(4) An affidavit filed with a written application—
> (*a*) shall be made by the applicant or respondent, as the case may be, or by a person who can swear to the facts or averments set out therein; and
> (*b*) may be accompanied by documents verifying the facts or averments set out in the affidavit and any reference in this Part to an affidavit shall be construed as including such documents."

From my reading of the above provision, any person who may not be a part of the litigation before the court but can swear to the facts or averments in an affidavit can depose to an affidavit. With artificial persons such as companies, the person deposing to the affidavit must prove that they were authorized to depose to the affidavit on behalf of the company by attaching a resolution of the Board of directors authorizing them to depose to that affidavit as well as represent the company in those proceedings. In the present matter, the deponent attached a resolution which showed that she was authorized to represent the applicant in these proceedings.

It is the way in which what was presented as the applicant's affidavit was deposed to and placed before the court that is somewhat novel and rather strange. The opening sentence of the affidavit refers to the deponent as Mugove Mercy Sibanda. However, paragraph 3 of the founding affidavit states as follows:

> "I, Mediwool (Private) Limited am the applicant in this matter. I am a legal *persona*, duly incorporated in terms of the laws of Zimbabwe, with capacity to sue and be sued"

Thereafter, the entire affidavit proceeded on the premise that the deponent was the applicant itself. While there is no law that precludes one from deposing to an affidavit in the first person language, it does not necessarily mean that it becomes legally permissible at all material times to do so. In the present matter, the indulgence may have been carried too far as it unnecessarily conflated the acts of the applicant and those of the deponent. It must be recalled that

although the company acts through agents or its representatives, the company itself remains a separate legal *persona* and its acts of omission or commission cannot be attributed to the person who deposed to the affidavit on its behalf. The company remains responsible for those acts or omissions, unless its corporate veil is pierced to impute personal liability upon its directors, shareholders or other officers. There is no need to conflate the representative/natural person and the artificial person when their roles are properly delineated under corporate law.

The conventional way of deposing to affidavits on behalf of artificial persons in this jurisdiction is well known. The deponent deposes the affidavit as the authorized representative of the company since the company itself does not have hands with which to sign its affidavit. It cannot swear positively to the facts or averments set out in the affidavit because it does not have a mouth with which to speak. It is for that reason that it must act through the agency of an authorized representative. However, that does not make the authorized representative the company itself as the deponent sought to portray in these proceedings. As correctly submitted by the first respondent, it was the company that had a lease agreement with him and not Mugove Mercy Sibanda. It was also the company whose property was attached and sold in execution and not Mugove Mercy Sibanda's property.

Litigation comes with its own obligations and consequences. Where the legal entity is the plaintiff or the applicant and the court makes an adverse order of costs against it, then it is the company that must incur those costs and not the person who deposed to an affidavit on its behalf. But what happens where the deponent portrays herself under oath as the company? Should it be the company or the deponent that bears those costs since the deponent represented herself as the company? It must be recalled that in motion proceedings the affidavits constitute the pleadings. An application stands or falls on its founding affidavit. See *Yunus Ahmed* v *Docking Station Safaris (Private) Ltd t/a CC Sales* SC 70/18. This means that the contents of the founding affidavit must be taken as they are. The picture that the founding affidavit portrays must be taken to be what it is.

The picture that the deponent asserted in the founding affidavit was that she was the one who entered into a lease agreement with the first respondent, when she knew that this was factually incorrect. It was the company that had a lease agreement with the first respondent. She also asserted that her plant was attached and sold in execution when this was factually incorrect. The property that was attached and sold in execution belonged to the company.

The decision by the deponent to portray herself as the applicant, when in fact she was not the applicant meant that she swore to acts that legally and factually could not be attributed to her but to the company, which as a separate legal persona had the standing to enter into contracts with third parties. The conclusion is that since the deponent was not the company that entered into the lease agreement with the first respondent, but portrayed herself as the party that did so, she ended up deposing to falsehoods. Her affidavit became a cocktail of falsehoods because it did not present the correct picture of what happened.

In the court's view, the decision to depose to the founding affidavit in the first person language was ill-advised and a risk taken recklessly as it conflated the role of the deponent as both the applicant as well as its authorized representative, yet she was only acting in a representative capacity. An authorised representative of a company does not metamorphose into the company itself by reason of the resolution that authorized her to represent the company. The corporate personality of a company must be respected. Once registered, a company assumes a legal status of its own that allows to sue or be sued in its name. To show that she was unmindful about the rights of the applicant as a legal *persona*, the deponent made the following bold declaration in paragraph 1 of her answering affidavit:

"For the record, I will continue to address the applicant in first person language herein".

It is not clear what the deponent sought to achieve or meant by that declaration. The deponent was not addressing the applicant. She was supposed to be pleading the applicant's case as its authorized representative instead of portraying herself as the applicant itself. What was supposed to be a simple application in which the applicant sought a review of the administrative decision of the second respondent was reduced to some muddled up, convoluted and jumbled document that was hard to follow and relate to in an application of this nature. This was probably done in the spirit of innovation and redesigning the way an applicant's case must be pleaded in an affidavit. That experiment unfortunately made the founding affidavit incurably defective, an imperfection that this court cannot countenance or condone.

The ultimate consequence of all this is that there is no proper application before the court. Litigation must never be reduced to an exploratory game or some trial and error adventure. It must be taken seriously. For the above reasons, the court determines that the founding affidavit deposed by Mugove Mercy Sibanda is incurably defective and for that reason the application is improperly

before the court. In light of this conclusion, it is needless to traverse the remaining preliminary points and the merits of the application.

Resultantly it is ordered that:

1. The application is hereby struck off the roll for being defective.
2. The applicant shall bear the first respondent's costs of suit.

MUSITHU J

Muhlekiwa Legal Practice, legal practitioners for the applicant
Chatsama & Partners, legal practitioners for the 1st respondent