STREAMSPACE INCORPORATED (PVT) LTD

Versus

HAYES CONSTRUCTION (PVT) LTD

And

LINKGATE INVESTMENTS PVT LTD

And

GRACE MUGABE FOUNDATION TRUST

And

MAZOWE RURAL DISTRICT COUNCIL

And

PROVINCIAL TOWN PLANNING OFFICER
MASHONALAND CENTRAL PROVINCE
And

MINISTRY OF LOCAL GOVERNMENT PUBLIC WORKS
AND NATIONAL HOUSING
And

MINISTER OF LANDS, AGERICULTURE, FISHERIES,
WATER AND RURAL DEVELOPMENT

HIGH COURT OF ZIMBABWE
COMMERCIAL DIVISION
CHILIMBE J
HARARE 20 January and 5 February 2025

Interlocutory application on a point of law

R. Chatereza for applicant
B. Diza for first respondent
R. Madzingira for fourth respondent
No appearance for second, third, fifth and sixth respondents

CHILIMBE J

BACKGROUND

[1] This is a ruling on a point of law raised in a parent dispute whose fuller facts I set out under judgment number HH 93-24. In essence, applicant approached the court on motion seeking an

order declaring two agreements of sale of land between itself and first respondent invalid. It also prayed for the refund of purchase price in the sum of US$220,000. This is the extant dispute between the parties.

[2] The main application was initially resisted by first, third and fourth respondents. The rest of the respondents, later joined by third respondent, elected to stay out of the broil. The matter proceeded to argument as an opposed application whereafter I issued the following order; -

1.The present application be and is hereby referred to trial for resolution

2. The founding and opposing papers will constitute the summons, plea, replication, bundles and summaries respectively.

3. The parties here from, progress the matter in terms of the rules

4. The question of costs be reserved for resolution in the main matter.

THE CONVERSION ORDER

[3] I must mention in passing that this order was influenced by the contentious factual issues identified. It was predicated on the need to progress the matter and ventilate the said issues at trial without delay. I also recognise that it falls within the broad discretionary ambit contemplated by r 46 (10) of the High Court Rules SI 123/21 ("the High Court Rules"). Rule 46 (10) deals with conversion of applications into trial causa and applies to proceedings in the Commercial Division via the avenue of r 4 (2) of the rules of that Division.

[4] It has occurred to me that the jurisdiction has an established and preferred approach to the wording of conversion-of-motion-to-trial orders. The founding papers stand as summons, whilst the opposing papers take the stead of an appearance to defend. The newly crowned plaintiff is then directed to file its declaration within a set period. Thereafter, the parties are directed to retrace the pleadings process required by the rules under action procedure. See also *Larric Services (Pvt) Ltd v Blackiynx (Pvt) Ltd & 2 Ors* HB 187-22 and *Simbarashe Adams v Grace Muzvidzwa & Anor* HH 622-23). This being an ancillary matter to the core point of law now before me, I will issue a final comment on it before concluding this judgment.

CONVERSION TO TRIAL

[5] I shall continue to refer to the parties by their motion proceedings` citations. Following HH 93-24, the applicant (as plaintiff) filed its summaries and bundle of evidence but first and fourth

respondents (as first and fourth defendants) did not. A minute setting out matters for trial was drawn up and set out the draft issues, onus, witnesses and anticipated duration of trial. A pre-trial case management conference was then scheduled and held on 22 November 2024. This was pursuant to r 18 of the Commercial Court Rules SI 123/20 ("the Commercial Court Rules") . Rule 18 facilitates the convening of a pre-trial case management conference before a judge to explore various pre-trial case mapping or settlement objectives.

[6] These matters are set out in r 17 of the same Commercial Court Rules. I will revert to these rules in greater detail the course of this judgment. In attendance on 22 November 2024 were Mr. *Chatereza* for plaintiff, Mr. *Diza* and Ms *V. Pfumvuti* for first defendant, and Ms. *Moyo* for third defendant. The fourth defendant was excused following a written request by its counsel. This request necessitated an adjournment of the conference. Following a brief engagement with the parties, I prepared to close the conference.

[7] Mr. *Chatereza* thereafter indicated that he intended to move an oral application in terms of r 25 (1) of the Commercial Court Rules which deals with the making of applications. Given the fully committed court roll for the day, the absence of fourth respondent`s legal practitioner and lack of prior notice, the request could not be accommodated. After engaging the parties, over the matter I issued an order by consent whose paragraphs 1(a) to (c) are relevant to the present matter and were set out as follows; -

> 1. Matter be and is hereby removed from the roll subject to the directions that; -
>
> (a) Plaintiff files, by 25 November 2024, written submissions on the point of law that it intends to raise,
>
> (b) The defendants, if so inclined to respond to the plaintiff on its point of law to file their responses thereto by 28 November 2024,
>
> (c) Plaintiff to file, no later than 30 November 2024, a request for the set down of the matter for argument on the point of law.

THE POINT OF LAW: IMPUGNED OPPOSING AFFIDAVIT

[8] The applicant duly filed its submissions on the point which was opposed only by first respondent. Applicant`s gripe was that the opposing affidavit filed in the motion proceedings was defective. The reason being that it was commissioned by Ms *Veronica Pfumvuti*, a legal practitioner practising with the first respondent`s firm of legal practitioners of record. This

attestation was allegedly a breach of s 2(1) of the Justices of the Peace and Commissioner of Oaths General Regulations SI 183 of 1998 which prohibited the swearing of an affidavit before a commissioner of oaths in matters in which such commissioner had an interest[1].

[9] Applicant contended that this breach constituted a fundamental defect. In that regard, it meant that the matter was never, in the first instance opposed. The subsequent judgment and order under HH 93-24 to refer the proceedings to trial could not sustain, having been premised on the incorrect presumption that the matter was properly opposed. Applicant relied on a number of authorities to support the contention of invalidity (*Chifanza vs Edgars Stores Limited & Another* HB 27-05, *Clenika Nkomo & Another vs Drawcard Enterprises (Private) Limited & 2 Others* HB180-23, and Herbstein & Van Winsen[2]).

[10] Applicant further referred to the following authorities in moving the argument on consequences of the defective affidavit; - *Macfoy v United Africa Company limited* (1961) 3 All ER 1169 (PC) at 1172, *Muchakata vs Netherburn Mine* 1996(1) ZLR 513 (S) and *Ndoro & Another vs Conjugal Enterprises (Private) Limited & Another* HH 814-22. These authorities also supported, according to applicant, the procedure adopted in raising the objection as a point of law. I will return to these decisions and fuller argument thereon.

[11] First respondent opposed the point raised and argued as follows; - the applicant had adopted a wrong procedure in moving its point of law. It ought to have filed a court application as prescribed by r 25 of the Commercial Court Rules. First responded contended that applicant sought to cause the court to revisit its order under HH 93-24. But the court could no longer exercise such power having become functus officio. Thirdly, the first respondent took the position that the order under HH 93-24 converted the opposing affidavit into a plea. As such, applicant`s attacks, being trained on an affidavit rather than a plea, were essentially ineffectual.

[12] In addition, applicant submitted that in HH 93-24, the court directed the parties on how to progress the dispute. The parties were obliged accordingly. Fourthly, first respondent argued that the relief sought by first respondent was incompetent. The absence of an opposition did not necessarily result in a court granting the prayer in terms of the original draft. First respondent relied on *Olympia Farm (Pvt) Ltd v Release Power Investments (Pvt) Ltd* SC 105-24 for this proposition.

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[1] "No justice of peace of commissioner of oaths shall attest any affidavit relating to a matter in which he has any interest".
[2] The Civil Practice of the Superior Courts in South Africa,3rd Edition at page 443

THE LEGAL ARGUMENTS

[13] In the oral submissions before the court, Mr *Chatereza* for the applicant, defended his election to move the point of law via an oral application. That oral application that he made during the case management conference on 22 November 2024 was, he submitted, permitted by r 25 of the Commercial Court Rules which provided that; -

> 25. (1) Subject to these rules, all applications made for whatever purpose in terms of these rules or any other law, other than applications made orally during the course of a hearing, shall be made—
>
> (a) as a court application, that is to say, in writing to the court on notice to all interested parties;
>
> (b) or as a chamber application, that is to say, in writing to a judge.

[14] As his next argument, counsel contended that in HH 93-24, the court rendered a non-appealable procedural ruling. A ruling which, according to *Jesse v Chioza* 1996 (1) ZLR 341 (S), was not a judgment as contemplated by s 2 of the High Court Act [Chapter 7:06][3]. Consequently, the court was still seized with the matter. The court was not restricted by the interdict of functus officio. Instead, the court was at large to revisit its decision under HH 93-24.

[15] Counsel cited the decisions of *Stumbles & Rowe v Mattinson* 1989 (1) ZLR 172 (H) as well as *African Consolidated Resources PLC v & 4 Ors Ministry of Mine & 2 Ors* HH 205-10. A court could not be bound by a procedural order (a) improperly procured and thus unsupportable at law and (b) whose basis had, in any event, fallen away. Once the basis of impropriety behind the issuance of an order was demonstrated to the court, then such order could be properly vacated.

[16] Mr. *Chatereza* relied on the further authority of *National Foods v Godfrey Ngwaru & 2 Ors* HH 213-16 for this argument. Counsel responded to the first respondent`s contention that the court had before it, a plea which derived from the opposing affidavit. As such, there could be no plea before the court if that plea was drawn from an invalid affidavit. Mr. *Diza* for first respondent persisted with the contention that the applicant had adopted the wrong procedure in raising its point of law. Rule 25 (1) of the Commercial Court Rules expressly provided that (i)

[3] Section 2 of the High Court Act defines "judgment" as including a decision or order.

all applications, (ii) for whatever purpose, (ii) whether derived from the rules or any other law, (iv) had to be made as court or chamber applications. The rule was peremptory. Failure by applicant to file a court application became fatal to its cause.

[17] The court, according to counsel, became functus officio after handing down the ruling in HH 93-24. Whilst accepting the general precept that an interlocutory ruling did not necessarily result in the court becoming functus officio, Mr. *Diza* sought to distinguish the present dispute from the situation that obtained in *Jesse v Chioza* (supra). He submitted that under HH 93-24, the court had made some factual findings and issued an order referring the matter to trial.

[18] The court had, by its order, invested the papers filed under the motion proceedings with the valid and formal status of a summons and plea respectively. That position rendered the present matter markedly different. In *Stumbles & Rowe v Mattinson* (supra) the relief sought was to have the notice of opposition struck off, rather than the plea, as was the case in the instant.

[19] Such relief was not, per Mr. *Diza,* available to present applicant. Further, Mr. *Diza* took the view that a trial in the present matter would not be an academic exercise. Evidence would be led and a decision handed down. Mr. *Chatereza*`s response was essentially to criticize his colleague for failure to advance authorities for the propositions he proffered in argument.

ANALYSIS OF THE LEGAL ARGUMENTS

WHETHER POINT OF LAW SHOULD HAVE BEEN MOVED AS AN ORAL, OR COURT APPLICATION

[20] Mr. *Diza* insisted that the point of law ought to have been raised as a court application as per r 25 (1) of the Commercial Court Rules. One may comment that r 25 (1) does not categorize which matters shall be launched by court of chamber application, or made from the bar as oral applications. It does not again, at a glance, seem to address itself to the age-old principle that a point of law can be moved at any point during the course of proceedings. Mr. *Diza*`s view was that even a point of law ought to be raised as an application in terms of r 25 (1).

[21] I note that no pointed argument was made by either counsel on the import of the phrase "those made during a hearing" in r 25 (1) regarding oral applications. Mr. *Chatereza* was presumptuous that his application during the case management conference of 22 November 2024 amounted to an oral application "during a hearing".

[22] Similarly, Mr. *Diza* in his argument also ignored entirely, the case management order of 22 November 2024.Logically, the success of Mr. *Diza*' s argument objecting to the procedure meant the setting aside of the case management order which had directed that the parties file written submissions. I am not sure that counsel paid sufficient regard to the paradox behind his objection. I will return to this point in due course.

[23] Nonetheless, the question of procedural correctness invites a number of considerations arising herein. It is a question however, whose answers derive from three sources. These being (i) guidance on the raising of oral or court applications from decided cases, (ii) the same aspect from the case management conference process perspective and (iii) the established requirements attendant to a party who wishes to raise a point of law.

(i) guidance from decided cases

[24] Whether a matter may be moved as a court or oral application in terms of r 25 (1), is largely a question of subject matter. In *Agribank v Nickstate Investments (Pvt) Ltd & 2 Ors* HH 231-10, GOWORA J (as she then was) dealt with an application for amendment of pleadings and ruled that such could not be made orally from the bar. The applicant had to file such as a court application. A similar request awaited the court in *Mashonaland Turf Club v Susan Peters & Anor* HB 7-21 where the application was refused.

[25] In *Couchgrass (Pvt) Ltd v Sayles Corporation (Pvt) Ltd* HH 332-24, this court dealt with yet another familiar subject matter; - the application for upliftment of the bar under r 39(5) of the High Court Rules 2021. MUSITHU J held as follows [at page 9]; -

> "The said rule does not delineate those circumstances under which the said application may be brought through the chamber book or made orally at the hearing. The court is at large to dictate the way the application should be made. What is paramount is to consider the interests of justice and the need to achieve finality in litigation. In so doing, the court must not overlook the prejudice that maybe occasioned to the other party to the dispute. For instance, if the applicant was unprepared to respond to the application, the court would have been inclined to postpone the matter to give it an opportunity to prepare and respond to the application."

[26] Herein, neither party, as observed earlier, raised argument as to whether the rules specifically permitted or barred the particular application moved by present applicant. I draw

one lesson from the above cited authorities. Whether an application can be moved orally from the bar is a matter either specifically provided for by the rules, or an exercise of the court`s discretion predicated on the justice of the case. This view dovetails into the principles regarding points of law in general. As they also do with the broader case management objectives under rr 16 to 22 of the Commercial Court Rules. I will now proceed to these rules of court.

(*ii) the case management conferences under the Commercial Court Rules*

[27] Surely, the procedurally commodious purview of the case management facility under the Commercial Court Rules should provide a quick and ready answer or solution to the issues now raised in argument before me? In *Blakey Investments (Pty) Ltd v Delta Beverages (Pvt) Ltd & 2 Ors* HH 388-23 MAFUSIRE J summarised the purpose, functionality and jurisprudential disposition of the Commercial Court. He dwelt on r 2 and paragraph 3 of the Second Schedule which I discuss further below. (See also *Rosenfeldt v Brackenhill Trust & 4 Ors* HH 348-23, and *Hashiti &Anor v Seedco* HH 615-24.)

[27] In the same vein, the learned judge considered (this time in *CFI Holdings Limited v Stalap Investments (Pvt) Ltd & 4 Others* HH 154-24), the facility of case management as an indispensable enabler of this newly established division`s mandate to dispose of commercial disputes expeditiously. Similarly, in *Centenary Tobacco (Pvt) Ltd v CMED* HH 591-24, CHIRAWU-MUGOMBA J adverted to the spectrum of case management options from r 16 to r22.

[28] My conclusion, subject to the guidance further articulated below, is that with sufficient sincerity, parties can capitalise on the case management procedure, if not to voluntarily resolve their disputes, then at least to narrow down or accentuate the issues. I draw attention to the following provisions of r 17 of the Commercial Court Rules; -

> 17. (1) Judicial case management shall comprise the following processes—
>
> (a) after the closure of pleadings, the record of the commercial dispute shall immediately be allocated to a presiding judge and in accordance with a roll kept in the registrar's office.
>
> (b)) upon receipt of the record aforesaid, the presiding judge shall allocate a date for an initial case management conference to deal with inter alia—

(i) the scheduling of the matter;

(ii) the setting of deadlines for the filing of any further documents and or pleadings;

(iii) agreeing on the set down dates for the hearing of the main dispute **or any interlocutory matters;**

(iv) the giving of general directions in relation to the dispute;

(c) at least one more pre-trial case management conference may be scheduled before a judge the purpose for which High Court (Commercial Division) Rules, 2020 shall be to try and resolve one or some or all of the issues in dispute before going to trial or a full hearing on applications;

(d) if no settlement is reached at the second pre-trial case management conference the dispute shall proceed to trial or hearing of the application, on issues identified by the parties and agreed to by the presiding judge;

(e) at any of the case management conferences **the presiding judge shall deal with** all aspects of the matter, **including all interlocutory applications;**

[29] Applying the aforegoing authorities and provisions of r 17 cited above to the present matter I ask again, was Mr. *Diza* correct in raising an objection to the procedure prescribed by the case management order of 22 November 2022? Namely that the parties file written submissions on their respective positions? An order to which counsel had, on behalf of applicant, consented?

[30] Further, do case management conferences, in their various forms, constitute "hearings" as contemplated in the rules of court; - and specifically, r 25(1)? To the extent that the oral application made by Mr. *Chatereza* during a case management conference qualifies as an "oral application made during a hearing" as required by the said r 25(1)? In answering the first question, I commence with r 19 (5) and (6) which prescribe as follows; -

(5) The judge may at any time during a pre-trial case management conference where the parties are agreeable to a settlement of some or all of the matters in dispute in the suit or proceedings, record such agreement as an order of court or where the matter is settled in full, enter judgment in the suit or proceedings or make such other order to give effect to the settlement as may be required.

> (6) An order by consent issued under sub rule (5) shall not be set aside save in exceptional circumstances and on good and sufficient cause shown and the provisions of Rule 15 shall apply to the extent possible

[31] Clearly, first respondent would ordinarily have been bound by r 19 (6) and obliged to file an application for the setting aside of the case management order of 22 November 2024. The only redeeming aspect is that I am not certain that the direction to file written submissions on the point of law constituted a settlement of a matter in dispute. The procedure to adopt in moving the point of law had not yet been put into contention.

[32] Mr *Diza*`s objection was raised- not on 22 November 2024- but subsequently in his written response to applicant`s motivation. If anything-and to add to the list of paradoxes herein-Mr *Diza*`s own objection became an attack which could have triggered a counter objection on exactly the same footing as his[4]. I am thus inclined, on that strictly exceptional basis, to extend a reprieve to Mr. *Diza* for turning against the provisions of a case management order which, from the record, he had consented to. Otherwise, case management orders issued with the consent of the parties in terms of r 19 become binding and are not to be easily set aside. That being the essence of *Centenary Tobacco (Pvt) Ltd v CMED*.

[33] This aspect raises as imperative, the need for case management proceedings, including resultant prayers, requests, orders and directions, to be focused, well-thought and properly framed. I am certain that a solution could have been found to dealing with the both the procedural and substantive arguments behind the point of law. Especially having come thus far via the conversion direction issued in HH 93-24, whose procedural proposals the parties did not appear to quarrel with. I will opine a bit more on this before closing.

[34] Generally our civil procedure recognises the need, in appropriate circumstances, to call upon a party in breach to remedy their infraction if the breach is capable of remediation. The case management procedure set out in the Commercial Court Rules is in my view, is designed to help eliminate, rather than cheer on the needless adjectival obstacles that have traditionally impeded efficient litigation.

[35] I return, on this point to paragraph 3 of the Second Schedule of the Commercial Court Rules whose provisions were articulated in the decisions cited in [26] and [27] above.

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[4] Using the "sword rather than shield" approach in *Sumbureru v Chirunda* 1992 (1) ZLR 240 (H)

Paragraph 3 reiterates the need to redeem litigation from the gaping maws of procedural complexities; -

> 3. The core attributes of the Commercial Court are:
>
> (a)) reduction and simplification of processes;
>
> (b) curtailment and minimisation of costs and time;
>
> (c) full integration of electronic case management systems;
>
> (d) complete digitalisation of records;
>
> (e) across the board training;
>
> (f) enhanced professionalism and increased efficiency;
>
> (g) new rules of procedure

[36] But the Supreme Court in *Inebriant Cache & Anor v French Smith trading as Customs Services* SC 89-24, laid down a critical requirement regarding orders, decisions or outcomes of case management under the Commercial Court Rules. MAVANGIRA JA held that the latitude extended to the court (and therefore parties) under the aegis of speedy resolution of commercial disputes had to be anchored on applicable legal principles. The learned judge of appeal cautioned against resorting to unsanctioned solutioning under the guise of case management. She stressed the need for decisions and processes under case management to complement, rather than obviate established legal principles and issued the following guidance at page 17; -

> "The Second Schedule does not, in my view, displace, detract from or do away with the command not to derogate from established law. The command to the court *a quo* to have due regard to the set of values set out in the Second Schedule, does not detract from the established position of the law that he who alleges must prove."

[37] With this sobering guidance in mind, I turn to the second question as to whether a case management conference constitutes a hearing in terms of r 25(1). Should the wideness of engagements enabled by judicial case management under the rules be deemed to be "hearings"? Or is the opportunity to rise from the bar (or conference table) to move an oral application in terms of r 25 (1) unavailable to parties because case management conferences are not hearings? I again reiterate that this issue was not argued by the parties. I will therefore leave that as a matter for another day.

(ii) the requirements of a validly raised point of law.

[38] On that basis, I recognise that the effective test nonetheless, as to the propriety of the procedure adopted by applicant, lies in the principles governing points of law. Both counsel referred to the authority of *Muchakata v Netherburn Mine* 1996(1) ZLR 153 (S) where I note the remarks of KORSAH JA as follows at 157A:

> "Provided it is not one which is required by a definitive law to be specially pleaded, a point of law, which goes to the root of the matter, may be raised at any time, even for the first time on appeal, if its consideration involves no unfairness to the party against whom it is directed: *Morobane v Bateman* 1918 AD 460; *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A) at 23D-G."

[39] The Supreme Court, per MALABA DCJ (as he then was) cited the above decision with approval in *Gold Driven Investments (Private) Limited v Tel One (Pvt) Limited & Anor* SC 9-13 and held as follows at page 9; -

> "The theme that runs through the principles is that a question of law can be raised at any stage of the proceedings provided it does not occasion prejudice to the other party. These principles are subject to the absence of clear provisions governing procedures in particular proceedings. It is particularly applicable where the procedure in question does not provide a sufficient remedy for raising a point of law. The principles do not, on their own, provide a separate legal basis on which a court can ignore explicit provisions of law designed to deal with the raising of questions of law." [underlined for emphasis]

[40] The requirements pre-requisite to raising of points of law may thus be distilled as follows from *Muchakata* and *Gold Driven*; -

i. A point of law ought not be one that must, by a definitive law, be specifically pleaded.

ii. Alternatively, it must address the procedural deficiency created by the absence of clear provisions governing procedures in particular proceedings

iii. It must not be utilised to usurp, circumvent, obviate or conflate existing explicit provisions of the law mean to address such issue

iv. It must percolate to the root of the matter and be potentially dispositive of it

v. It must cause neither unfairness nor prejudice to the other party

[41] I am persuaded, based on the above considerations; that the point of law deals with an issue, which if successful, may dispose of part of the dispute. The question of the impugned affidavit is not a routine matter whose procedure is specifically prescribed by the rules, law and practice. Apart from the fact that applicant was within its rights to raise the point of law, the court also properly sanctioned the procedure taken in raising the point.

[42] The first respondent was given notice and served with written submissions. It managed to respond and even countered by challenging the procedure adopted. It is my conclusion that the point of law was properly taken, on a valid point and accordingly responded to. I will therefore disallow Mr. *Diza*' s objection to the procedure. I now proceed to consider the merits of the point of law.

WHETHER THE COURT IS NOW FUNCTUS OFFICIO FOLLOWING ITS JUDGMENT IN HH 93-24

[42] This question hinges on whether the judgment in HH 93-24 is final or interlocutory. Or alternatively, whether an order converting motion proceedings into action renders the court functus officio. In *Jesse v Chioza* 1996 (1) ZLR 341 (S) the Supreme Court was confronted with an appeal against an interlocutory order issued by the High Court. GUBBAY CJ relied, in dismissing the appeal, on the judgment of INNES CJ in *Union Government (Minister of the Interior) & Registrar of Asiatics v Naidoo* 1916 AD 90 who held at 51-52 that: ―

> "Is there under these circumstances any decree in existence against which we should be justified in granting leave to appeal? In *Dickenson 's* case (1914 AD 424) a ruling upon evidence was held not to be an order against which leave to appeal could be granted, because it did not constitute a decision upon an application for specific relief. This is a converse case. There has been an application for relief, but no decision upon it. The prayer of the petition falls under nine separate heads, and in regard to none of them has any order been made. The application has merely been postponed for further evidence. When the enquiry is resumed the judge may decide in favour of the present applicants on the facts; or he may possibly, though very improbably, revise his view of the law upon further argument." [underlined for emphasis]

[43] The court also considered other South African decisions of *Engar & Ors v Omar Salem Essa Trust* 1969 (2) SA 423 (D) at 425G-H, which followed *Union Government v Naidoo* (1916 AD 50) and *Pfizer Inc v South African Druggists Ltd* 1987 (1) SA 259 (T) at 262C-263D; *Klep Valves (Pty) Ltd v Saunders Valve Co Ltd* 1987 (2) SA 1 (A) at 40H-41H; and *Wallach v Lew Geffen Estates CC* 1993 (3) SA 258 (A) at 263B-C before concluding at page 346 that; -

> "On this well settled expression of the law, with which I respectfully agree, it is clear that the directive given by Sandura JP was not a judgment. It did not decide the merits. It was merely a procedural ruling that oral evidence was necessary before the factual disputes could be determined." [Underlined for emphasis]

[44] In *Stumbles & Rowe v Mattinson*, the High Court went further to consider whether the order under contestation was procedural in addition to being interlocutory. GREENLAND J took the approach that firstly, a court had to satisfy itself that it possessed the power to set its own order aside and importantly, whether it was necessary for it to do so. The court expressed itself in the following terms in deciding whether to exercise the power and discretion to interfere with its own order; -

> "To insist that the court is bound by a procedural order which it knows is fatally defective is to insist on the court conducting a sham trial. It is illogical, senseless, unjust and unreasonable to say to a litigant, "We will proceed with this expensive and protracted exercise which is a trial and you can start all over again when the Supreme Court rightly sets the proceedings aside because of this fatal procedural defect." [underlined for emphasis]

[45] Mr. *Chatereza*` s argument becomes unassailable on the facts and as against these authorities. The ruling in HH 93-24 was an interlocutory order. It merely referred the parties to trial in order to further place, examine and test the evidence supportive of the respective causa. The court is therefore at liberty to revisit, abandon or interfere with it. But, as noted by GREENLAND J in *Stumbles & Rowe,* should the court proceed to exercise such power? The answer draws from the fundamental point; - the validity or otherwise of the opposing affidavit.

EFFECT OF THE IMPUGNED AFFIDAVIT

[46] Did the opposing affidavit, attested to before Ms V. *Pfumvuti*, render the opposition to the original application defective? If so, then what impact did such defect have on the proceedings under HH 93-24. To begin with, Mr. *Diza* did not, perhaps to his credit, contest the primary

attack on the affidavit itself. Whilst noting that Van Winsen[5] indicates that the question of "interest" may need to be ventilated, I am inclined to accept that the affidavit was indeed tainted as alleged and apparently conceded.

[47] Essentially, the deposition of sworn statements is governed by the Justices of the Peace and Commissioner of Oaths Act [Chapter 7:09]. Section 8 thereof prescribes (and limits) the power to administer oaths. Section 8 must be read with the said s 2(1) of the Justices of the Peace and Commissioner of Oaths General Regulations.

[48] It has not been disputed further, that Ms Pfumvuti is a commissioner of oaths as defined by the Act and regulations. See also *Pulserate Investments (Pvt) Ltd v Andrew Zuze & 5 Others* HH 656-23). This court held, in *Clenika Nkomo &Anor v Drawcard Enterprises* (supra) per TAKUVA J, that an affidavit attested before the deponent or litigant`s legal practitioner was invalid for purposes of founding an opposition.

[49] Mr. *Diza* however, cited the Supreme Court decision of *Olympia Farm (Pvt) Ltd v Release Power Investments (Pvt) Ltd* SC 105-24 as authority for the argument that a maligned opposition was still an opposition all the same. As such, he proposed that the criticism raised against the opposing affidavit did not efface the opposition itself. This argument cannot sustain. Herein the challenge is on the validity of the opposing affidavit rather than its quality. I will do no more than refer to the remarks of MATHONSI JA in that matter where he held at page 8 that; -

> "In my view, the tardy manner in which the respondents confronted the application for leave to appeal certainly affects the quality of their contestation and no more. To the extent that they do not meet the averments made in the founding affidavit, most of what the applicant deposed to remains unchallenged.
>
> That however does not mean that there is no opposition to the application. This is so because the opposing affidavit says something about the merits of the applicant's proposed grounds of appeal. I am therefore unable to find that there is no opposition to the application. I am only prepared to go as far as stating that the strength of the

[5] At page 453 of Volume 1 5th Edition; - "On the other hand the word "interest" in the subregulation must be given a limited meaning, and cannot be extended to cover the remote and indirect interest that an employee of attorney has in the matters dealt with in the attorney`s office".

> opposition to the application has been weakened by the lack of diligence on the part of those representing the respondents."

DISPOSITION

[50] The critical matter raised in the point of law is that a defective affidavit founded the opposition. This anomaly escaped both the court and the applicant resulting in the judgment and order in HH 93-24. The decision under HH 93-24 merely referred the parties deemed to be properly before the court to trial. As further explained below, a ruling that one such party is now irregularly before the court cannot offset the entire judgment. It will merely non-suit the offending party.

[51] Indeed, Mr. *Diza* proffered no other escape route that could salvage first respondent`s case. I note that this court in *Ndoro & Anor v Conjugal Enterprises (Pvt) Ltd* HH 814 -22 (cited by Mr. *Chatereza*) granted some respite to a respondent whose opposing affidavit was ruled as defective. Having upheld the objection to the affidavit concerned, the court per DEME J, took the approach in the excerpt below. I am unable to adopt same for reason that it was neither proposed nor considered through argument. DEME J held thus at page 6; -

> "Ms *Ruwona* motivated the court to regard the matter as an unopposed matter. I disagree with this approach as the defect raised is not a fatal one. Rather, it is a remediable defect. For that reason, it is appropriate to ensure that the respondents are given time to cure the defect concerned by removing the matter from the roll. This is in harmony with the need to uphold the right to fair trial established in terms of S 69 of the Constitution. The right to fair trial is one of the rights that is non-derogable according to S 86(3) of the Constitution. Deeming the present application as an unopposed case will not bring finality to litigation. The applicants will only be entitled to default judgment under such circumstances. The respondents may then seek to set aside the default judgment which will prolong the litigation between the parties. The need to bring finality to litigation was emphasized In *Ndebele* v *Ncube*,[6] where it was held that…"

[52] Returning to the issue at hand, my dismissal of the functus officio argument means that the judgment and order in HH 93-24 may be revisited or interfered with. But given the facts

[6] 1992 (1) ZLR 288 (S).

before me, such interference can only extend to striking out first respondent`s defence. The judgment and ruling in HH 93-24 otherwise remain intact and binding on the rest of the parties. So too does the dispute remain alive and as between first and fourth respondent. But first respondent ceases to be a party before the court and stands as barred.

[53] I did reflect over the effect of striking out first respondent`s defence. Could the order to convert the proceedings into a trial still stand given that the noted material dispute of facts, emanated in part from the facts borne by the impugned opposing papers? I took the view that HH 93-24 could still stand for the following reasons. To begin with, the irreconcilable disputes did not issue exclusively from the facts conveyed by the condemned opposing affidavit of first respondent. Paragraph [16] of HH 93-24 recorded that; -

> "The responses by Hayes Construction [first respondent] and Mazowe RDC [third respondent] were mutually supportive."

[54] I further recognise that the authorities in the first instance, discourage the courts from proceeding in the face of an unpurged defect of a material nature. Herein, the opposing affidavit violated a condition fixed by an Act of Parliament. Additionally, that violation triggered a sustainable objection which demanded an answer from the court.

[55] Concomitantly, as the third reason, the court ought not lose sight of the purpose behind the raising of the point of law; - to do justice between the parties. One may refer to a comment by GILLESPIE J in *Harare Sports Club & Another v United Bottlers Ltd* 2000 (1) ZLR 264[7] (H) at page 268 which joins countless other dicta discouraging atavistic adherence to rules that; -

> "Our law, however, is not aptly a casuistic set of rules and exceptions but rather a just and logical application of principle."

Or to borrow the words of GREENLAND J in *Stumbles & Rowe*, rejecting the entire judgment in HH 93-24 because of the impugned opposing affidavit would be perhaps "…illogical, senseless, unjust and unreasonable." For these reasons, the judgment in HH 93-24 will stand despite the variation necessitated by the ruling on the objection whose effect is to bar the first respondent.

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[7] Cited with approval by HUNGWE J (as he then was) in *African Consolidated Resources PLC v & 4 Ors Ministry of Mine & 2 Ors (supra)*

[56] I may, before concluding, now comment on the directions issued by the conversion order in HH 93-24 as earlier discussed in paragraphs [3] and [4] above. The established approach in conversion of applications to trials which directs parties to retrace the pleadings procedure generates three comments. First, the framing of conversion or referral to trial orders will need, for the Commercial Division, to align, address, sidestep or furnish an alternative to the peculiar requirements of rr 8 and 12 of the Commercial Court Rules. These rules prescribe that the summons and declaration as well as plea must be accompanied by bundles and summaries of evidence.

[57] Secondly, such order must similarly recognise and deal with the unique arrangement created by r 12 (1) which obliges a defendant to file its plea within 7 days of service of summons, and r 10 (1) which directs the same defendant to file its appearance to defend within 10 days of the said service of summons. These rules, especially the latter set, are a source of much interlocutory argument in this court.

[58] To my mind, if not fully provided for in the conversion order, these matters can still be properly addressed under the various case management options in the Commercial Court Rules. In doing so, the court will also be guided by the established position that pleadings may be amended at any stage of the proceedings. The purpose being to define the controversy with as much clarity and simplicity as possible and in turn, facilitate its speedy disposal.

[59] Finally, before returning to the point of law, I may urge litigants in the Commercial Court to have regard to rr 6 and 7. These rules require parties to reflect (deeply) on whether their causa is best driven by motion or action proceedings (see also *Boustead Beed (Pvt) Ltd v Triangle Limited* HH 576-24 and the classic authority of *Room Hire Company (Pty) Ltd v Jeppe Street Mansions (Pvt) Ltd* 1949 (3) SA 1155 (T).

[60] Coming to the point of law, the ruling imposes a bar of first respondent, whilst the rest of the parties may proceed in terms of the rules of court. The applicant`s prayer that judgment be entered in its favour as framed in the original draft cannot be granted for reason that such relief in not automatic upon this finding that first respondent stands barred.

It is hereby ordered that; -

1. The point of law raised by applicant challenging the validity of the first respondent`s defence be and is hereby upheld.

2. The first respondent`s defence herein, filed as its notice of opposition, be and is hereby struck out.
3. The matter to proceed in terms of the rules.
4. The first respondent to meet the costs of this application.

Dube, Manikai & Hwacha-applicant`s legal practitioners
Diza Attorneys-first respondent`s legal practitioners

[CHILIMBE J____05/02/25]