

ROBERT DOW  
versus  
POMELO MINING (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE  
TAGU J  
HARARE, 29 June & 27 July 2022

### **Opposed Application**

*H Mudha*, for the applicant  
*R Nyapadi*, for the respondent

**TAGU J:** This is an application to dispense with leading of oral or *viva voce* evidence in terms of r 53(14) of the High Court Rules, 2021.

The factual background of the matter is that on 14 May 2015 the applicant entered into a facility Agreement with the respondent in terms of which applicant advanced the sum of US\$ 200 000 to the respondent. The purpose of the facility was to place within the respondent's gold trading account in Harare, Zimbabwe with Central African Building Society (CABS), and that all funds were to move via Mauritius, and if required, to meet working capital and purchase costs of physical gold by the respondent. The facility repayment was to be completed within twelve (12) calendar months pursuant to clause 7 of the Agreement, that is to say, the facility was supposed to be repaid by May 2016. On 17 May applicant wrote to the respondent advising that they were in default of the Agreement and demanded immediate repayment. Despite such demand, the respondent did not repay the loan. Consequently, on 6 September 2018 the applicant's legal practitioners of record acting upon the applicant's instructions instituted summons in the main action (Case No. HC 8115/2018) against the respondent for payment of the sum of US\$ 200 000 together with interest.

The main matter has gone beyond the Pre-Trial Conference stage and was set down for trial on 24 and 25 January 2022. Upon being served with the Notice of Set down, the applicant through his legal practitioners wrote to respondent's legal practitioners highlighting the practical

challenges that the applicant was facing with regards to attending trial to lead evidence. On 17 January 2022 the respondent's legal practitioners advised that they do not consent to his evidence on oath being admitted in substitute of oral evidence. Given the respondent's refusal to consent to applicant filing an affidavit of evidence, the applicant was left with no option than to approach this Honourable Court for an order that he places his evidence on affidavit.

The respondent filed a Notice of Opposition through one EDWARD HOLME. In his answering affidavit to the respondent's Notice of Opposing the applicant raised a point *in limine* that the deponent Edward Holme is not the respondent in this matter and neither does he allege to be deposing on behalf of the respondent. To that extent the respondent has not opposed the application and consequently, Notice of Opposition should be struck out of the record and the application be granted as a matter of course. At the hearing of the matter the applicant persisted with his point *in limine*. The point *in limine* was opposed by the respondent. I allowed the parties to address me on this point *in limine* as well as the merits of the application. I then reserved my judgment to enable the court to go through the authorities cited by the applicant in advancing his point *in limine*. In dealing with this matter I will dispose of the point *in limine* first before dealing with the merits of the application.

The Notice of Opposition filed by "EDWARD HOLME" states as follows:

"I, EDWARD HOLME, do hereby make oath and state as follows:

1. I have read the Applicant's founding affidavit and I wish to respond thereto as follows;
2. AD Paragraph 1-3 –No issues arise.
3. AD PARA 4....."
- 4.

Edward Holme then proceeded to comment on the applicant's founding affidavit paragraph by paragraph.

In his oral submissions Mr H *Mudha* said despite this allegation having been brought to the respondent, Edward Holme did not respond. Therefore there is no valid opposition because the deponent did not state his position to the respondent. Further, there is no resolution from the respondent Company authorizing the deponent to represent the company and that the deponent may be on a frolic of his own since companies act through directors on authority of a resolution. The deponent did not state that he can positively swear to the facts or averments set out there in contrary to the provisions of r 58(4) of the High Court Rules, 2021.

Rule 58(4) of the High Court Rules, 2021 provides 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”

It was the contention of the applicant’s legal practitioner that the Notice of Opposition be struck out and matter be dealt with as unopposed because Mr Edward Holme did not state that he could swear to the facts or averments he was making on behalf of the respondent. In motivating his argument the counsel cited a number of authorities such *Madzivire & Ors v Zvarivadza & Ors* 2006 (1) ZLR 2006 (1) 514 at 516 B-C where CHEDA JA with the concurrence of CHIDYAUSIKU CJ & SANDURA JA had this to say:

“It is clear from the above that a company, being a separate legal persona from its directors, cannot be represented in a legal suit by a person who has not been authorized to do so. This is a well - established legal principle, which the courts cannot ignore. It does not depend on the pleadings by either party. The fact that the first appellant is the managing director of the fourth appellant does not clothe him with the authority to sue on behalf of the company in the absence of any resolution authorizing him to do so. In *Burstein v Yale* 1958 (1) SA 768 (W), it was held that the general rule is that directors of a company can only act validly when assembled at a board meeting.”

In this case there is no notice of a board meeting that authorized Edward Holme to represent the company. The same sentiments were repeated in the case of (1) *Harold Crown* (2) *Portriver Investments (Private) Limited v (1) Energy Resources Africa Consortium (Private) Limited* (2) *Energy Resources Africa (Private) Limited* SC 3/2017. See also *Beach Consultancy (Private) Limited v Obert Makonya* and the Sheriff of High Court HH696/21 and *TN Gold –Arcturus Mine (Private) Limited v Zvanyadza Pari and Environmental Management Agency* HH 612/21. In the *TN Gold –Arcturus Mine* (supra), the Judge had this to say:

“the correct position is that the quoted rules speak to the need for the deponent to be able to swear positively to the facts. The rules do not detract from the requirements that in proceedings involving a company, the deponent to the founding or opposing affidavit as the case may be should plead and establish the basis for such person’s authority to represent the company. Whilst the non-production of the actual written resolution of authority may not be fatal to the applicant’s case or respondent’s defence as the case may be, it still remains necessary for the deponent to the affidavit to speak to the nature and content of the resolution as well as give details of by whom, where and when it was made.”

Counsel for the respondent submitted that the present chamber application is born out of the main matter HC 8115/18 which is now at Pre-Trial stage and has not been finalized. He said in the P.T.C. stage the respondent was represented by Edward Holme and applicant did not take issue with that. Coming to the authorities cited he said the court must take into account

circumstances of each case to determine that deponent is on a frolic of his own or not. He said it has not been challenged that the deponent is a director to the respondent. He prayed that the point *in limine* that was taken out of malice be dismissed.

In the present matter the deponent to the respondent's Opposing Affidavit did not state who he is. He did not state on what authority he was representing the respondent. The respondent being a separate persona that can sue or be sued on its own did not pass a resolution authorizing Edward Holme to represent it in these proceedings. Neither did he state that he can speak to the facts and averments he was making on behalf of the respondent. Further while it may be true that Edward Holme represented the respondent at the Pre-Trial Conference, this fact has not been stated in these proceedings and the record of such proceedings was not produced before this court. It is difficult for this court to refer to a record that is not before it.

In the circumstances the court agrees with counsel for the applicant that the Opposing Affidavit is fatally defective. The Opposing Affidavit is struck out and this matter is treated as an unopposed application. Be that as it may the court has to consider whether the applicant's application is merited or not. This is an interlocutory application in terms of r 53(14) of the High Court Rules, 2021, to allow the applicant to dispense with *viva voce* evidence in trial proceedings under HC 8115/18.

The issues for determination in this chamber application are whether or not there are sufficient grounds for the granting of the relief sought, and whether or not an affidavit and interrogatories are sufficient to place the required evidence before the Court. Rule 53(14) of the High Court Rules, 2021 provides the test for adduction of interrogatories as follows:

“In the absence of any agreement in writing, between the legal practitioners of all the parties and subject to these rules, the witness at the trial of any action shall be examined *viva voce* and in open court, but the court may at any time for sufficient reasons order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness, whose attendance in court ought for some sufficient cause to be dispensed with, be examined by interrogatories or otherwise before a commissioner or examiner:

Provided that where it appears to the court that the other party genuinely and sincerely desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit.”

Emanating from the provisions outlined above are three clear requirements, namely:

- a) that there be sufficient cause for dispensing with the witness's attendance at court;
- b) the facts sought to be proved can be competently proved through an affidavit, and

- c) that the other party genuinely and sincerely desire production of a witness for cross-examination.

**ARE THE THREE REQUIREMENTS MET AND SUFFICIENT REASONS TO DISPENSE WITNESS'S ATTENDANCE AT COURT?**

It is common cause that the main action case HC 8115/18 had been set down for trial on 24 and 25 January 2022. The applicant is a *peregrinus*. He does not reside within the jurisdiction of this Court. In fact he a resident of Wokingham, England. At the time the applicant's legal practitioners received the Notice of Set down, which was given on short notice, the country was under Lockdown due to the Covid-19 pandemic. It is common knowledge that stringent travel restrictions were still in place for visitors travelling to Zimbabwe. The Public Health (COVID-19 Prevention, Containment and Treatment) (National Lockdown) (No. 2) Amendment) Order, 2021 (No. 37) published in Statutory Instrument 276 of 2021 provided that every visitor must quarantine for ten days regardless of whether they present a negative polymerase chain reaction (PCR) test from elsewhere. The applicant was in a quandary at the time he was notified of the set down date. Firstly, the notice of set down was given on a short notice. There was no sufficient time to make travel arrangements to travel to Zimbabwe. If he had to travel to Zimbabwe then he was to be quarantined for ten days at Ministry of Health approved facility prior to the trial. This was impossible given the short notice and quarantine of 10 days was highly onerous for a trial that was only slated to last 1-2 days. Secondly, this matter from the reading of the papers is straightforward, based on a liquid document, with no evident disputes of fact beyond bald allegations by respondent that the Agreement was novated or varied. If applicant was to default appearing in court, a default judgment was to be granted against him and to revert back to the *status quo* after the default judgment was to be granted, would be costly and proceedings would be protracted. Further, it is apparent from the papers filed of record that the loan agreement was, in any event, conducted virtually. There was never a need for the parties to meet as it was accepted across the board, albeit tacitly, that this is the most efficient manner of doing business. In my view respondent will not suffer any prejudice should the court dispense with hearing viva voce evidence. Rule 53(14) was meant to provide for the situation where a party is unable to attend trial and it provides further for any facts proved by affidavit, to be examined by interrogatories.

The interrogatories sought to be made herein are sufficient to support the Applicant's case in the main matter. The words of MATHONSI J (as he then was) in *Mahlangu v Dowa & Ors* HH- 359/13 are apposite:

"I am also mindful of the fact the authorities make it clear that pretty nearly anything that is material to the issue between the parties may be asked and that interrogatories are admissible for supporting the plaintiff's case and also for impeaching or destroying his opponent's case."

Further it is trite that an affidavit is acceptable as evidence before a court because it is a sworn statement before a commissioner of oaths. See *Tianze Tobacco Co. (Private) Limited v Mutuyendwa* HH 626/15. In this case the supplied documents therefore clearly set out the evidence, with nothing that will be added by *viva voce* evidence. The respondent does not seriously need to cross examine the applicant after he has given *viva voce* evidence as there are no material dispute of facts. This a case that deserves the filing of an affidavit in place of oral evidence because an affidavit and resultant interrogatories are sufficient to place all the evidence before the court that is necessary for it to reach a fair and just determination. The current application therefore ought to succeed.

**IT IS ORDERED THAT**

1. The application for applicant to lead evidence on affidavit in Case Number HC 8115/18 be and is hereby granted.
2. The applicant shall file and serve on the respondent, its notarized affidavit in terms of rule 53(14) of the High Court Rules, 2021, within ten days of granting this order.
3. The respondent shall cross examine applicant's evidence on affidavit through interrogatories as set out in Form No. 21 of the rules within five (5) days of being served with applicant's notarized affidavit.
4. The applicant shall, within ten (10) days of receiving the respondent's interrogatories, file and serve his response to the same, in which case the applicant's case shall be deemed to have been closed.
5. The applicant may, within a further 5 days from the date of filing his response to the interrogatories, file any such further affidavit in clarification to the interrogatories.
6. Respondent and any of its witnesses shall file and serve duly authenticated affidavit(s) of evidence within a further ten (10) days of the applicant closing its case.

7. Applicant shall cross examine respondent's evidence on affidavit through interrogatories as set out in Form No. 21 of the High Court Rules, 2021, within five (5) days of being served with respondent's affidavit.
8. The respondent shall, within ten (10) days of receiving the applicant's interrogatories, file and serve its response to the same under oath, in which case the respondent's case shall be deemed to have been closed unless it wishes to file any further affidavit in clarification to its responses to the interrogatories, in which case it shall do so within a further five (5) days from the filing of its response.
9. Any party that wishes to file closing submissions in respect of the matter shall do so within ten (10) days of the closing of the respondent's case.
10. Each party bear its own costs for this Application whilst the costs under Case No. HC 8115/2018 shall be in the cause.

TAGU J:.....

*Manokore Attorneys*, applicant's legal practitioners  
*Muza & Nyapadi*, respondent's legal practitioners