HC4353/21
Consolidated with HC4383/1
Cross Ref HC 4936/20;HC2258/21

1) NYARAI MUDUNGWE
And
WITNESS MUDUNGWE
Versus
RHODIAN PHOTO
And
AROSUME PROPERTY DEVELOPMENT (PVT) LTD
And
THE MINISTER OF LOCAL GOVERNMENT AND PUBLIC WORKS

2) AROSUME PROPERTY DEVELOPMENT (PVT) LTD
Versus
RHODIAN PHOTO
And
THE MINISTER OF LOCAL GOVERNMENT AND PUBLIC WORKS
And
WITNESS MUDUNGWE
And
NYARAI MUDUNGWE

HIGH COURT OF ZIMBABWE
HARARE 16 March & 7 November 2022
CHILIMBE J

Opposed application

Appearance as per parties` citation in case (1)
S.M. Bwanya-for applicants
S. Murondoti with *S. Dizwani* for first respondent
F. Nyangani for second respondent
No appearance for third respondent.

CHILIMBE J

> *"The inevitable regurgitating of the same facts already traversed shows the undesirability of writing piecemeal judgments*." CHITAPI J[1]

[1] At page 1 of *Exavier Maoneke v Trustees of Mount Olive Trust* HH 640-22

BACKGROUND

[1] This is a piecemeal judgment. For that and other reasons explained hereunder, the above remarks by CHITAPI J become quite relevant to the resolution of points *in limine* raised by first respondent, in this application for rescission of judgment.

[2] The Learned Judge`s observations in *Exavier Maoneke v Trustees of Mount Olive Trust* (supra), are but a timely reminder that objections *in limine*, like all other responses by a litigant to its opponent`s case, must at all times be correctly packaged and raised at an appropriate stage in the litigation lifecycle. Much has been said in this court in recent times with emphasis lying more on what points *in limine* are not and should not be. I will return to this point in concluding this judgment. The parties shall be referred to as cited in case (1) HC 4353/21.

[2] In barest of detail (the dispute is laden with complexities), the background is as follows; the present application seeks to reopen determination of the rights, title and interest in a piece of land. This being stand number 194 Carrick Creagh Township of Carrick Creagh of Section 4 of Borrowdale Estates ("Stand 194 Carrick Creagh"). This property is located in and forms part of a township development or "scheme" administered by second respondent ("Arosume"), on behalf of, or under the regulatory authority of third respondent ("The Minister of Local Government").

[3] The disputants contesting for the title in Stand 194 Carrick Creagh are "Mrs and Mrs Mudungwe" or first ("Nyarai") and second ("Witness") applicants on one side, and a gentleman named Rhodian Photo ("Rhodian"), the first respondent, on the other. Arosume Property is basically in support of Mrs and Mr.Mudungwe`s claim to Stand 194 Carrick Creagh. The Minister of Local Government is neither a referee nor even a spectator to this contest. He deferred his regulatory authority to the decision of this court, confirming preparedness to abide and be guided by such ruling.

[4] Rhodian approached this court first on 8 September 2020 under HC 4936/20. He sought a declaratur confirming the priority of his rights to the piece of land over other claimants. This attempt was resisted by Arosume Property and Witness. Pending the resolution of that dispute, Rhodian returned to court on 14 May 2021 in HC 2258/21. This time, on an urgent basis and praying for an order barring all development on the stand.

[5] This court per CHITAPI J granted Rhodian`s prayer and issued, on 26 May 2021, a provisional order in HC 2258/21 prohibiting any such activity on the piece of land. This is the order that was then confirmed (in default) with amendment per MANGOTA J on 21 July 2021.I may mention that this confirmation, as amended, effectively issued the relief which Rhodian had originally sought under his first application for a declaratur in HC 4936/20. So on that day, Rhodian won his belt without throwing a punch. He is now resisting all attempts to strip him of his title.

[6] Those attempts are represented by two cross applications for rescission of judgment HC 4354/21 and HC 4383/21 which have since been consolidated. Mrs and Mr. Mudungwe filed their application HC 4353/21 for rescission of this court`s order per MANGOTA J, on 31 August 2021.Hard on their heels came Arosume the very next day, with their own application HC 4383/21 to rescind the self-same order. Rhodian opposed both applications and commenced his defence with a barrage of objections *in limine*.

[7] Reduced from a much longer original list, the objections raised went as follows ;- (a) that the relief sought was incompetent, (b) that Witness was not properly before the court (c) that Arosume was also not properly the court, (d) that there was material non-disclosure by basically all the deponents to the affidavits before the court. In argument, counsel for Rhodian basically dwelt on material non-disclosure and the incompetency of the relief and abandoned (properly so) objections (b) and (c).

[8] These objections were opposed by the applicants. I will return to the objections after dealing with the circumstances under which the default judgment was obtained, which circumstances are intertwined with the objections in question.

THE DEFAULT JUDGMENT

[9] The applicants seeking rescission, Mrs and Mr Mudungwe on one side, and Arosume Property on the other, all allege sharp practice on the part of Rhodian`s legal practitioners. More particularly the applicants accuse the said legal practitioners of deliberately, calculatedly and surreptitiously snatching judgment during a moratorium to explore settlement options. Rhodian fiercely contests this averment. He argued instead, that the applicants and their lawyers were simply imprudent in letting their guard down. He submitted that no blame could be ascribed to him or his legal practitioners. They simply moved to exercise their entitlement in terms of the rules of court by seeking and obtaining judgment in default. Even more vehement were the refutations by Rhodian`s legal practitioners to allegations of unprofessionalism.

[10] Which brings me to the next point; -annexed to the litigants` founding, opposing and answering papers were supporting affidavits sworn to by the parties` respective legal practitioners (to a total of five). These being (1) Stanslaus Munyaradzi Bwanya, (2) Frank Nyangani, (3) Phil Mutukwa, (4) Simbarashe Absolom Murondoti, and (5) Tendai Rusinahama.

[11] Before dealing with the content and import of these depositions, I may state that as a general rule, it has been held that legal practitioners should only file affidavits on behalf of their clients in exceptional circumstances. In addition, the deposition of affidavits by legal practitioners on behalf of their clients is a matter that has generally raised disquiet from a propriety and ethics perspective. I may refer to the remarks and authorities on the matter I made and cited in a recent judgment[2] to the effect that; -

[2] *Zimbabwe Teachers Association v Pure Gold Housing Trust* HC 7157/21 at page 2.

"[9] The propriety of legal practitioners deposing to affidavits (or filing certificates of urgency) on behalf of litigants they are representing has been well ventilated in many authorities. From the disparate positions taken in *Mudekunye & 3 Ors v Mudekunye & 2 Ors* HH 190-10[3] and *Chafanza v Edgars Stores Ltd & Anor* 2005 (1) ZLR 301 (H), the indisputable conclusion is that affidavits by legal practioners do raise a degree of discomfort. NDOU J summarised the position as follows [at page 3] in *Mandaza v Mzilikazi Investments (Private) Limited* HB 23-07; -

"Generally, I agree with Mr Ndove, that a legal practitioner should not depose to a founding affidavit on behalf of a client. This court has previously stated why it is undesirable for legal practitioners to do so. But there is an exception to this general rule if the facts are within the knowledge of a legal practitioner (he may swear an affidavit on behalf of the client) – Samkange & Anor v The Master & Anor HH-63-93. Even in such exceptional cases, the route should be, in my view, be sparingly resorted to. The facts of this application are within the knowledge of the applicant's legal practitioner. He is in fact, in better position to highlight the applicant's case as the application is about procedural matters. In the circumstances the legal practitioner was justified in deposing to the affidavit."

[10] The simple rationale issuing from the above dictum is that necessity can validate a lawyer`s deposition on behalf of the client. This approach was taken in decisions such as; *TFS Management Co (Pvt) Ltd v Graspeak (Pvt) Ltd & Another,* 2005 (1) ZLR 333; *Zimbabwe Banking Corporation Limited v Trust Finance Limited & Another* 2006 (2) ZLR 404; *Metal Sales (Pvt) Ltd v Sakurai Mbanda t/a Faunorld Enterprises (Pvt) Ltd* HH 812/16; *Matinyarare v Chirimudondo & Anor* HMA 40-21;"

[12] Any neutral with a fair mind would agree that the five (5) legal practitioners liberally traded accusations and counter accusations of everything from mendacity to

[3] In *Mudekunye*, BERE J (as he then was) considered a number of authorities which reflected differing approaches on the matter in the High Court.

incompetence in their respective affidavits filed of record. Given this hotly contested character of the evidence on papers before the court, it is not feasible, at this preliminary stage, to identify or isolate with ease, the alleged material non-disclosure raised as a point *in limine*. Such task can only be properly undertaken as part of a wholesome exercise into the merits of the matter. Simply put, the point *in limine* on material disclosure cannot be excised from a consideration of the main dispute on its merits.

[13] In the same respect, the relief sought in the draft orders has been attacked as incompetent. Coincidentally (and unsurprisingly), the draft orders in the two separate applications by Mrs and Mr Mudungwe on one hand, and Arosume Property are identical. In paraphrase, the orders merely seek a rescission of the judgment of this court in HC 2258/21 as well as ancillary matters regarding heads of argument and set down. If there is the relief sought is maligned by some defect, then the incompetency concerned can only be exposed through a canvassing of the issues constituting this

[14] My conclusion is that the points taken *in limine* are intrinsically woven into the merits and cannot be severed from such. They remain live issues raised by the parties and in need of a resolution by the court. I will therefore defer the determination of the points raised *in limine* until after the matter has been exhaustively argued on the merits. This approach is sometimes referred to as the "rolled over" process of determining points *in limine* and is regularly resorted to by the courts to deal pragmatically with objections *in limine*.

[15] This is the route followed or considered by, among other authorities, (see The *Trustees of UMRRT v City of Mutare & Anor HMT 3-19; Sheila Mpofu v Emmanuel Chirwa & Anor HH 9-22).* DUBE-BANDA J in *Stewart Dhliwayo v Warman Zimbabwe (Pvt) Ltd & 2 Ors* HB 12-22, at page 4; -

> "Each side of the divide made every effort to outdo the other side on the basis of points *in limine*. At the commencement of the hearing, I informed counsel that I shall adopt a holistic

approach. This approach avoids a piece-meal treatment of the matter, in that the points *in limine* are argued together with the merits, but when the court retires to consider the matter, it may dispose of the matter solely on the basis of the points *in limine* despite that they were argued together with the merits."

DISPOSITION

[16] The points *in limine* cannot be crisply separated from the merits of the matter. I will therefore defer the determination of same to the main judgment. Before closing, I am duty bound to once again urge litigants and legal practitioners to resort proper usage of preliminary objections. In that respect, I can do no more than advert to the guidance by MATHONSI J (as he then was) in *Telecel v Potraz & 2 Ors* HH 446-15 [at page 7];

> "I agree with Mr *Girach* that raising the issue of urgency by respondents finding themselves faced with an urgent application is now a matter of routine. Invariably when one opens a notice of opposition these days, he is confronted by a point *in limine* challenging the urgency of the application which should not be made at all. We are spending a lot of time determining points *in limine* which do not have the remotest chance of success at the expense of the substance of a dispute. Legal practitioners should be reminded that it is an exercise in futility to raise points *in limine* simply as a matter of fashion. A preliminary point should only be taken where firstly it is meritable and secondly it is likely to dispose of the matter. The time has come to discourage such waste of court time by the making of endless points *in limine* by litigants afraid of the merits of the matter or legal practitioners who have no confidence in their client's defence *viz-a-viz* the substance of the dispute, in the hope that by chance the court may find in their favour. If an opposition has no merit, it should not be made at all. As points *in limine* are usually raised on points of law and procedure, they are the product of the ingenuity of legal practitioners. In future, it may be necessary to rein in the legal practitioners who abuse the court in that way, by ordering them to pay costs *de bonis propiis.".*

[17] The parties may proceed, should they be so advised, to set the matter down for argument on the merits.

It is hereby ordered; -

That the ruling on the points *in limine* be and is hereby deferred, with costs in the cause, for determination with the merits in the main matter.

Mutuso, Taruvinga and Mhiribidi Attorneys-applicants legal practitioners
Rusinahama-Rabvukwa Attorneys-first respondent`s legal practitioners
Nyangani Law Chambers-second respondent`s legal practitioners

CHILIMBE J_____09/11/22