JEROME N. OKEKE
versus
SIMWAL INVESTMENTS (PRIVATE) LIMITED (1)
and
REGISTRAR OF DEEDS (2)

HIGH COURT OF ZIMBABWE
DEMBURE J
HARARE: 5 & 14 February 2025.

Civil trial

T. J. Kuchenga for the plaintiff
E. Mubaiwa, for the 1st defendant
No appearance for the 2nd defendant

[1] DEMBURE J: This civil trial matter was heard on 5 February 2025. Before the commencement of the trial, the plaintiff's counsel made an oral application for a postponement of the matter. After hearing oral submissions from the parties' legal practitioners, the court issued an *ex tempore* judgment the operative part of which was that the application for a postponement was dismissed. Following the dismissal of the application and the court being satisfied that the plaintiff was not present, I proceeded in terms of rule 56(3) of the High Court Rules, 2021. Consequently, the court granted judgment in favour of the first defendant by dismissing the plaintiff's claim with costs on a legal practitioner and client scale. The plaintiff's legal counsel requested the full written reasons for the court's decision. These are they.

FACTUAL BACKGROUND

[2] The plaintiff herein Jerome N. Okeke is a male adult while the first defendant, Simwal Investments (Private) Limited is a company duly registered in accordance with the laws of Zimbabwe. The second defendant is the Registrar of Deeds cited herein in his official capacity as the suit involved an immovable property registered with his office.

[3] This matter commenced on 17 May 2010 as a court application filed by the plaintiff as the applicant therein against the first and second defendants as the first and second respondents

respectively. In the founding affidavit, the plaintiff then applicant averred that he entered into a written agreement of sale with the first defendant on 26 March 2010 in terms of which he purchased the first defendant's immovable property through its estate agent called stand 585 Quinnington Township of Lot 1A Quinnington Township measuring 8422 square metres otherwise known as N. 90 Crowhill Road, Borrowdale, Harare [*"the property"*] for the sum of US$110,000.00. He further averred that he paid a 'commitment fee' of US$5,000.00 and that before the due date for the next payment of US$50,000.00, the first defendant wrote to the estate agent indicating that the company had decided to cancel the agreement of sale.

[4] It was further stated by the plaintiff that he had no other remedy available against the first defendant who should honour and abide by the said agreement of sale between them. It was also indicated that there was nothing to prevent the first defendant from selling, transferring or disposing of the property by the time the matter is heard. The plaintiff accordingly prayed for an interdict against the first defendant preventing it from selling, ceding, transferring or disposing of its property "pending fulfilment of the remaining terms and conditions of the agreement of sale". In the draft order the plaintiff as the applicant sought an order for the transfer of the property "pending fulfilment of the terms and conditions of the Agreement of Sale by the Applicant."; that in the event of the first respondent failing to comply with the order the Sheriff be authorised to sign all the documents necessary for the transfer to be effected into the applicant's name and that the first respondent pays the costs of suit.

[5] The application was opposed by the first defendant as the first respondent therein. The company contended that there were material disputes of facts which could not be resolved through the papers. On the merits, the first defendant disputed the claim and contended that the offer of US$110,000.00 was accepted but the agreement was to be signed on 26 April 2010. It further averred that the plaintiff made a second offer to pay US$100,000.00 which was rejected. It was also not aware of the payment of the commitment fee until after it terminated the mandate of the estate agents on 30 April 2010. It further contended that the plaintiff failed to pay the initial deposit of US$5,000.00 within seven days. It also denied

that there was an agreement that came into existence. It was also its position that the plaintiff had failed to meet the criteria for the granting of an interdict.

[6] The application was heard before BERE J (as he then was) on 25 July 2012 and the court referred the matter to trial due to the existence of material disputes of fact which could only be resolved through *viva voce* evidence. It was ordered that the applicant's founding affidavit shall stand as summons and the plaintiff would have to file his declaration within ten days and thereafter the matter would proceed in terms of the court rules.

[7] On 25 June 2014, a default judgment was entered against the first defendant which was later rescinded. On 5 November 2020 and before MUSITHU J, the matter was referred to trial on the issues contained in the parties' Joint Pre-Trial Conference Minute filed of record on 6 November 2020. At the case management meeting before me, the Joint Pre-Trial Conference minute was amended by the deletion of the third issue relating to the appropriate order for costs. The matter was initially set down before MUNANGATI-MANONGWA J for trial on 15 October 2024 but the judge recused herself. At one time she dismissed the plaintiff's application for amendment of his claim.

[8] When the matter was set down before me for trial and at a case management meeting held on 14 November 2024, the plaintiff's legal practitioners notified me of their intention to apply for the hearing to be held virtually. This followed an indication by the first defendant that they were ready for trial and would oppose any application for a virtual hearing. By the consent of the parties' legal practitioners, I directed that the application be lodged in writing together with the heads of argument by 19 November 2024, and that the first defendant files its opposing papers and heads of argument by Tuesday 26 November 2024. The consent case management order also incorporated the timelines within which some outstanding documents would be filed for the trial including the indexed bundle of documents.

[9] On 5 December 2024, due to a fatal defect that inflicted the applicant's founding affidavit as it was undated, the plaintiff's legal practitioners conceded that his chamber application was fatally defective. They also conceded that the said application was also not properly withdrawn and that the second chamber application filed on 28 November 2024 without the leave of the court and also when the first application was improperly withdrawn was

improperly before the court. Both applications were struck off the roll with the consent of the parties. The parties were also advised to engage on how they would want the trial to be held but they did not adopt the procedure set out in rule 56C so that the Registrar could refer any dispute they have over the issue to me for determination in terms of rule 56C(2) as read with subrules (3) and (4). The trial was eventually set down on 5 February 2025 and parties were informed on 6 January 2025 that the hearing would be physical. On 5 February 2025, the plaintiff's legal practitioner made an oral application for a postponement. The application was opposed by the first defendant.

APPLICATION FOR A POSTPONEMENT

PLAINTIFF'S SUBMISSIONS

[10] Mr *Kuchenga* submitted that the plaintiff had highlighted to the court that he is not feeling well and that he had not managed to come for medical reasons. Counsel alleged that these facts were known by the court and the other party. It was also submitted that on 31 December 2024, the plaintiff also filed a chamber application for condonation and extension of time to file a chamber application pursuant to the case management order of 14 November 2024 under Case No. HCH 588/24. The first defendant filed its opposing affidavit. In that application, the plaintiff sought an order for the hearing of this matter virtually. The reason is that he is currently in Canada. There was a directive of this court on 6 January 2025 that the hearing will be physical. The applicant was indisposed and unavailable to give us instructions which only came around 25 January 2025.

[11] Counsel further submitted that the plaintiff has sought leave of the court to appeal the directive of this court of 6 January 2025. The plaintiff's view is that the directive is not in line with rule 56C of SI 81 of 2024. The parties were not called to make representations and for the defendant to explain its incapacitation to deal with the matter virtually. He contended that the rules are clear that if the parties cannot agree on the holding of a virtual hearing the judge is supposed to call the parties for representations and the party alleging incapacitation must depose to an affidavit and has the onus. The plaintiff wants to challenge the order of court of 6 January 2025 and the matter is pending. The plaintiff had set down the matter in October 2024 and requested a virtual hearing. Counsel also submitted that he was alive to the provisions of rule 56(3). He argued that the fact is that the plaintiff is not

here and cannot travel for health reasons. The court must exercise its discretion in terms of rule 7 in the interests of justice. Mr *Kuchenga* further submitted that the plaintiff seeks a postponement of the matter *sine die* or the matter may be removed from the roll. The pending applications will determine whether the hearing will be physical or not.

FIRST DEFENDANT'S SUBMISSIONS

[12] On the other hand, Mr *Mubaiwa*, for the first defendant, submitted that we have a litigant who wants relief but does not want to come to court. He frustrates this court and the first defendant is being abused. This court issued an order by consent and the plaintiff did not comply with that order. Three times he filed applications in violation of that order. In his application for condonation, he said he knew a day after the order of the non-compliance and did not immediately file the application. He has forced the court to sit three times. He belatedly brings an application for condonation because he does not want this hearing to proceed.

[13] Counsel also submitted that the plaintiff did not do anything from 6 January 2025 when the directive for a physical hearing was made. The plaintiff knows that the trial will be done physically. The remedy avails on 6 January 2025. He sits and only filed that application for leave on 31 January 2025 and it is three days before the trial. The court is being abused and the first defendant is harassed. If an order was granted against him in his absence, he should have resorted to rule 29(1) and not an appeal. There is no refuge under rule 56C(1). The rules have been misconstrued. The route travelled by this matter is not the procedure provided by the said rule 56C(1). You tell the Registrar that you have failed to agree and then it triggers the referral of that dispute to a judge. The rule is not an order for a virtual hearing. The question of a virtual hearing was terminated after the two applications were struck off the roll.

[14] Mr *Mubaiwa* further argued that the argument by the plaintiff is being used to mask default by the plaintiff. Where is the plaintiff? He has not been excused. He has not asked to be excused. To have the right to seek a postponement you have to appear and then you ask for a postponement. You don't apply while at home. The plaintiff being in default, rule 56(3) entitled the defendant to a judgment for absolution from the instance. The plaintiff argued that the court had always known that the plaintiff was away. The court does not

know that. The first defendant does not know. It is an allegation. The facts are placed before the court through evidence by the parties. That evidence is not there that the plaintiff is ill to the extent that he cannot come to Zimbabwe. The letter written by the plaintiff's legal practitioners did not attach or make any averment that he was ill. It is something arising from the bar. The status of his health needs expert evidence from medical practitioners. We are told he is outside the jurisdiction. The fact that there is an application is not an excuse but he has to appear for trial and the rules oblige him to appear. It was also submitted that the application moved is without merit. The application exhibits an extra layer of him abusing this court process. It should be dismissed with costs on a punitive scale due to the lack of seriousness on the part of the plaintiff. He seeks an indulgence but does not seek to pay for the wasted costs.

PLAINTIFF'S SUBMISSIONS IN REPLY

[15] Mr *Kuchenga*, in his reply to the first defendant's submissions, submitted that one critical issue is the factual position that there are two interlocutory applications pending before this court. It is not in the interests of justice that the matter proceeds before these interlocutory applications are dealt with. Counsel argued that he disagreed with counsel for the first defendant's submissions that rule 56C(1) is not applicable. He insisted that the provisions of rule 56C(1) are applicable. Leave to appeal is appropriately being sought. He further disagreed that the plaintiff forfeited his right to have a virtual hearing. It was argued that a litigant can regularise an application that is struck off the roll.

[16] Counsel further submitted that there was an argument that there is no evidence but he referred the court to the case of *Mhungu v Mtindi* 1986 (2) ZLR 171 (S). The court must refer to its own record. The record shows that there was evidence that the plaintiff was sick. On the issue of costs, he argued that there is no tender of costs. Mr *Kuchenga* argued that the plaintiff advised the court of its intention to postpone this matter. The defendant was served with the applications. They did not show any intention to challenge this application. The application for condonation was filed on 31 December 2024. There was no major delay. The application for leave came after 6 January 2025. There is no justification why a tender of costs should be made. The court should allow for the administration of justice to move. Each party should bear its own costs or costs can be in the cause. Counsel finally

prayed for the matter to be postponed *sine die* or for a longer period to allow the chamber applications to be dealt with.

THE LAW

[17] It is trite that an application for a postponement of a matter set down for hearing is one for an indulgence the grant of which is a matter within the discretion of the court. It is, therefore, not a right obtainable on demand. The applicant must show good cause for such relief to be granted. The discretion, of course, must be exercised judicially with the court considering well-established factors. This legal position was enunciated in *Apex Holdings (Pvt) Ltd v Venetian Blinds Specialists Ltd SC* 33/15 where GOWORA JA said:

> "An application for the postponement of a matter which has been set down for hearing is in the nature of an indulgence sought, the grant of which is in the discretion of the judge or court before which it is made. The applicant must therefore show that there is good cause for the postponement or that there is a likelihood of prejudice if the court refuses the indulgence being sought. In *McCarthy Retail Ltd v Shortdistance Carriers* CC 2001 (3) SA 482 (SCA), SCHULTZ JA remarked:
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> > "A party opposing an application to postpone has a procedural right that the appeal should proceed on the appointed day. It is also in the public interest that there should be an end to litigation. Accordingly, in order for an application for a postponement to succeed he must show a 'good and strong reason' for the grant of such relief: *Centirugo AG v Firestone SA (Pty) Ltd* 1969 (3) SA 318 (T) at 320C-321B. The more detailed principles governing the grant and refusal of postponements have recently been summarised by the Constitutional Court in *National Police Service Union v Minister of Safety and Security* 2000 (4) SA 1110 (CC) at 1112C-F as follows:
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> > "The postponement of a matter set down for hearing on a particular date cannot be claimed as of right. An applicant for a postponement seeks an indulgence from the court. Such postponement will not be granted unless this court is satisfied that it is in the interests of justice to do so. In this respect the applicant must show that there is good cause for the postponement. In order to satisfy the court that good cause does exist, it will be necessary to furnish a full and satisfactory explanation of the circumstances that gave rise to the application. Whether a postponement will be granted is therefore in the discretion of the court and cannot be secured by mere agreement between the parties. In exercising that discretion, this court will take into account a number of factors, including (but not limited to) whether the application has been timeously made, whether the explanation given by the applicant for postponement is full and satisfactory, whether there is prejudice to any of the parties and whether the application is opposed."
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> The learned judge continued at 495;
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> > "The application for postponement falls short on all counts. There is not even a serious attempt to provide a 'full and satisfactory explanation' for the owner's

> unpreparedness or the lateness of the application. Nor is such explanation as there is on oath, notwithstanding counsel's advice to the new attorney."

[18] The above legal position was restated in *Stonewell Searches (Pvt) Ltd v Stone Holdings (Pvt) Ltd & Ors* SC22/21 where the court held that:

> "In exercising the discretion to postpone a matter, several factors have to be considered cumulatively. In *Persadh v General Motors SA (Pty) Ltd* 2006 (1) SA 455 (SE) para 13, the court succinctly set out the applicable legal principles when a party applies for a postponement, as follows:
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> > "First, as that party seeks an indulgence he or she must show good cause for the interference with his or her opponent's procedural right to proceed and with the general interest of justice in having the matter finalised; secondly, the court is entrusted with a discretion as to whether to grant or refuse the indulgence; thirdly, a court should be slow to refuse a postponement where the reasons for the applicant's inability to proceed has been fully explained, where it is not a delaying tactic and where justice demands that a party should have further time for presenting his or her case; fourthly, the prejudice that the parties may or may not suffer must be considered; and, fifthly, the usual rule is that the party who is responsible for the postponement must pay the wasted costs." (Emphasis added)"

ANALYSIS AND DETERMINATION

[19] Applying the above principles, an application for a postponement of a matter set down for hearing is not there for the mere asking. I noted that the attitude adopted by counsel for the plaintiff was that such an application is simply there by the mere asking or as if it is a right that could be demanded from the court. A legal practitioner who adopts that approach does a disservice to his client. The application must also be considered in the context that the plaintiff is required to be present at the trial. In *casu,* Mr *Kuchenga* took off from an erroneous premise that it was known to the court and the other party that the plaintiff was not well and was in Canada. It is the litigant who places facts before the court for the court to be aware of any such facts. He also places the evidence before the court to prove any fact that is in dispute. The facts of the plaintiff's illness and his absence in this jurisdiction were disputed by the first defendant.

[20] The allegation that the plaintiff was ill to the extent of being incapacitated from travelling to Zimbabwe and that he was in Canada once put in issue can only be established through evidence. This is a court of law. It only acts on the evidence placed before it. At best to prove his medical condition or incapacity to attend trial medical evidence was required. In relation to the allegation that he was not in Zimbabwe but in Canada, the

primary evidence would be a copy of his passport and other relevant immigration papers. None of these were placed before me with the plaintiff's counsel simply stating that these facts were known to the court and the other party. The court cannot simply accept bald assertions as proof that the plaintiff could not attend court due to illness and that he was outside the country. It is trite law that one who alleges must prove and that unsubstantiated or bald assertions are not sufficient to establish one's case. In *ZIMASCO (Pvt) Ltd v Tsvangirai & Ors SC 12/20* the court stated as follows:

> "It is trite that "he who alleges must prove". The maxim was applied in the cases of *Circle Tracking v Mahachi* SC 4/07 and *Goliath v Member of the Executive Council for Health, Eastern Cape* 2015 (2) SA 97 (SCA). In the absence of such evidence, the court as the adjudicating authority cannot make its determination."

[21] CHITAPI J in *Sibanda v Yambukai Holdings (Pvt) Ltd & Anor* HH 84/17 also explained the legal position and stated that:

> "The celebrated rule of evidence that he who alleges must prove should always guide practitioners and parties when drafting court pleadings and preparing for court unless the matter at play is one in which an exception to the rule has been provided for as in the case of presumptions…
> It follows therefore that where a party makes bald assertions not backed by evidence and the same are denied by the party against whom they are made, such bald allegations cannot pass as having been proved on a balance of probabilities. A party averring a fact should present evidence of that fact which has a probative value. See generally *Zimbank Ltd* v *Ndlovu* SC 61/2004."

[22] In *casu*, Mr *Kuchenga* failed dismally to show, firstly that the plaintiff was indisposed and could not stand trial at Harare where the court was scheduled to sit and secondly, that he was in Canada. Nothing was placed before the court to show that. It only remained his mere allegations from the bar. I agree with Mr *Mubaiwa* that this application was used to mask a default by the plaintiff. Counsel for the plaintiff referred me to consider the record in line with the decision in *Mhungu v Mtindi supra* that the court should also consider its own records. He claimed that there was an affidavit in the record where the plaintiff explained his illness. However, there is no such affidavit which can assist the plaintiff's case in the record. The applications he referred to me were all considered fatally defective with the plaintiff's counsel's concession and were struck off the roll by consent. Once something is considered fatally defective it is a nullity or incurably bad. It is trite that once a pleading is a nullity it is void at all times and for all purposes. It does not matter

when and by whom the issue of its validity is raised; nothing can depend on it. LORD DENNING MR put it so clearly in *MacFoy v United Africa* Co Ltd [1961] 3 All ER 1169 at 1172 that:

> "If an act is void, then, it is in law a nullity. It is not only bad but incurably bad … And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

There was, therefore, nothing before the court produced as evidence for the plaintiff that proved his incapacitation or that he was in Canada.

[23] The plaintiff failed to explain his absence at the hearing where he was required to be present. When seeking an indulgence, the applicant is also required to be candid and give a full and satisfactory explanation of why he could not attend the hearing and move the court to grant the indulgence sought.

[24] Besides the failure to explain the plaintiff's absence with the requisite evidence, I am also of the view that the said applications for condonation and leave to appeal were merely filed as a delaying tactic for the plaintiff to avoid trial. He simply wanted to prosecute the matter in the way he wanted and according to his own rules. I question the timing of such applications. The case management order for the plaintiff to file his application for a virtual hearing was issued on 14 November 2024. The plaintiff violated the order by failing to file the application by 19 November and when he filed the application it was not accompanied by the heads of argument. After arguing on the validity of his two chamber applications, his counsel finally conceded that they were invalid and they were struck off the roll by consent on 5 December 2024. That order disposed of those two applications. Knowing fully well that the trial would kick off the plaintiff did not immediately seek any condonation. When the matter was eventually set down for trial an application for leave to appeal the directive of 6 January 2025 was belatedly made just three days to the hearing date on 31 January 2025. Clearly these are not genuine steps of a litigant who is serious and who is alive to the inconvenience this would pose to the court and the other party.

[25] Mr *Kuchenga* also failed to make submissions on the other requirements of the importance of the interests of the other litigant and the convenience of the court. I associate myself with the remarks in *Mc Carthy Retail Ltd v Shortdistance Carriers CC* cited with

approval in the *Apex Holdings Ltd* case *supra* that the judge has to prepare for trial by reading the whole record and placing the matter on the roll which meant that other equally deserving litigants have to wait for their chance either later this term or next term. There has to be finality to litigation. This matter has been hanging in this court since 2010 and for one reason or another, it could not be finalised. The plaintiff in my view, spanned that chance to have it finalised as he behaves as if what he demands is of right and ought to be given.

[26] Further, the plaintiff's counsel did not address the issue of prejudice for the other party and stubbornly refused to even tender wasted costs. He maintained that it was in the interests of justice that the plaintiff be granted the indulgence as if he was the sole litigant in this case. It was emphasised in the case of *Stonewell Searches (Pvt) Ltd supra* that the usual rule is that the party who is responsible for the postponement must pay the wasted costs. In *casu,* the Mr *Kuchenga* did not see it proper to tender such costs when they are warranted in an application of this nature. Coupled with the failure to explain fully the absence of the plaintiff and his inability to proceed, the failure to tender costs, and the lodging of the belated applications were indicative to this court that there was no good cause for the granting of the indulgence sought. It was not in the interests of justice to grant the request.

[27] I observed that counsel for the plaintiff devoted most of his time to seeking to convince the court of the merits of the applications the plaintiff had filed. I, however, found the plaintiff's absence not fully explained or that it was not established that he could not attend court due to a serious illness and that he was in Canada. In any event, rule 56C provides for a dispute between the parties over a hearing to be either virtual or not being referred to me for determination by the Registrar. The operation of rule 56C (2) as read with subrules (3) and (4) was not triggered in this case. I accept Mr *Mubaiwa*'s submission that this case did not travel the route provided for by rule 56C. The case only came before me for trial. There was no referral by the Registrar of any dispute over a virtual hearing for me to determine as contemplated by the said rules.

[28] I further observed that the plaintiff adopted a stance that his application must be granted and nothing else. Litigants must be prepared that an application for postponement

can either be granted or refused. If refused they must also be prepared to proceed. The idea of the plaintiff seeking relief from the court from wherever he is without giving any evidence to explain his absence was ill-thought-out.

[29] It was for the above reasons that the court dismissed the application for a postponement as it was half-hearted, to say the least. While counsel for the first defendant sought punitive costs for the dismissal of the application for a postponement, I refrained from issuing an order for costs in a piecemeal manner. It is an issue I had to decide at the end of the proceedings. Following the dismissal of the application, I was satisfied that the plaintiff was not present or was in default and accordingly proceeded in terms of rule 56(3).

JUDGMENT IN FAVOUR OF THE FIRST DEFENDANT

[30] Mr *Mubaiwa* submitted that this is an appropriate case for the court to grant judgment in favour of the first defendant by dismissing the claim with costs on a legal practitioner and client scale in terms of rule 56(3). Counsel submitted there is a distinct variance between the plaintiff's claim and the prayer. The claim seeks an interdict and then the relief is for specific performance. The relief is incompetent. The plaintiff had been aware of his problems. This is why in two records he sought leave to amend his pleadings in Case No. HC 870/22 which he later withdrew and the second application in Case No. HC 1451/22 where he was seeking leave to amend the pleadings. That second application was dismissed by this court before MUNANGATI-MANONGWA J on 10 November 2022. The pleadings are as they stand and do not entitle the plaintiff to that relief.

[31] It was further submitted that the plaintiff, in any case, admitted that he did not perform under the pleadings. He said he only paid US$5,000.00. not as a price but to give him the authority to sign the agreement. In a bilateral agreement, you have no right to seek performance from the other side unless you have performed. The plaintiff accepted in his declaration that the agreement was cancelled by the first defendant. The cancellation has not been set aside.

[32] It was also argued that the plaintiff did not challenge the averment in the first defendant's plea that the property was the company's sole asset and could not be disposed of without the resolution of the members of the company in terms of s 183 of the old

Companies Act now s 214 of the new Companies Act. The contravention of s 183 made the transaction a legal nullity.

[33] I was satisfied that this was a proper case for judgment to be entered in favour of the first defendant in terms of rule 56(3) without the need for evidence from the first defendant. The case was not brought on a proper legal footing. The way the claim was pleaded renders it one which cannot be legally sustainable without further ado. I am fortified in the exercise of this discretion by the case of *Katerere & Ors* v *Triangle (Pvt) Ltd* SC 23/23 at p. 10 where this position was endorsed when the court held that:

> "The decision of the court *a quo* is thus correct and cannot be faulted in this regard. The court correctly exercised its discretion in dismissing the matter. In the case of *Khauyeza* v *The Trial Officer & Anor* SC 23/19, this Court held that an application brought on an improper footing ought to be dismissed rather than be struck off the roll."

While the court was dealing with an application, the reasoning would equally apply to the present action.

[34] Before looking at how the claim was pleaded; I wish to highlight that pleadings are very important in defining the parties' cases and what is required for the court to decide. The pleadings are made for the court, not the court for the pleadings. A party is bound by his own pleadings unless they are amended. The purposes of pleadings were outlined remarkably well in *Medlog Zimbabwe (Pvt) Ltd v Cost Benefit Holdings (Pvt) Ltd* SC 24/18 at pp 10-13 where GARWE JA (as he then was) had this to say:

> *"THE IMPORTANT PURPOSE OF PLEADINGS*
> [25] The manner in which the respondent has handled its case both *a quo* and in this Court brings to the fore the question as to what the purpose of pleadings is. In general the purpose of pleadings is to clarify the issues between the parties that require determination by a court of law. Various decisions of the courts in this country and elsewhere have stressed this important principle.
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> 25.1 In *Durbach v Fairway Hotel, Ltd* 1949 (3) SA 1081 (SR) the court remarked:-
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>> "The whole purpose of pleadings is to bring clearly to the notice of the court and the parties to an action the issues upon which reliance is to be placed."
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> 25.2 Harwood BA in his text *Odgers' Principles of Pleading & Practice in Civil Actions in the High Court of Justice* (16th edn, Stevens & Sons Ltd, London, 1957) states at page 72:-
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>> "The function of pleadings then is to ascertain with precision the matters on which the parties differ and the points on which they agree; and thus arrive at certain clear issues on which both parties desire a judicial decision."

25.3 In *Kali v Incorporated General Insurance Ltd* 1976 (2) SA 179 (D) at 182, the court remarked:

> "The purpose of pleading is to clarify the issues between the parties and a pleader cannot be allowed to direct the attention of the other party to one issue and then, at the trial, attempt to canvass another."

25.4 In *Courtney–Clarke v Bassingthwaighte* 1991 (1) SA 684 (Nm), the court remarked at page 698:-

> **"In any case there is no precedent or principle allowing a court to give judgment in favour of a party on a cause of action never pleaded, alternatively there is no authority for ignoring the pleadings … and giving judgment in favour of a plaintiff on a cause of action never pleaded.** In such a case the least a party can do if he requires a substitution of or amendment of his cause of action, is to apply for an amendment."

…25.6 In *Jowell v Bramwell-Jones* 1998 (1) SA 836 at 898 the court cited with approval the following remarks by the authors Jacob and Goldrein in their text *Pleadings: Principles and Practice* at p 8-9:

> "**As the parties are adversaries, it is left to each of them to formulate his case in his own way, subject to the basic rules of pleadings … For the sake of certainty and finality, each party is bound by his own pleading and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as much bound by the pleadings of the parties as they are themselves.** It is not part of the duty or function of the court to enter upon any enquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by their pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce upon any claim or defence not made by the parties. To do so would be to enter the realm of speculation. … Moreover, in such event, the parties themselves, or at any rate one of them, might well feel aggrieved; for a decision given on a claim or defence not made, or raised by or against a party is equivalent to not hearing him at all and may thus be a denial of justice. The court does not provide its own terms of reference or conduct its own inquiry into the merits of the case but accepts and acts upon the terms of reference which the parties have chosen and specified in their pleadings. In the adversary system of litigation, therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither *party can complain if the agenda is strictly adhered to.*" (my emphasis)

… [26] I associate myself entirely with the above remarks made by eminent jurists both in this jurisdiction and internationally. The position is therefore settled that pleadings serve the important purpose of clarifying or isolating the triable issues that separate the two litigants. **It is on those issues that a defendant prepares for trial and that a court is called upon to make a determination. Therefore a party who pays little regard to its pleadings may well find itself in the difficult position of not being able to prove its stated cause of action against an opponent." [My emphasis]**

[35] In *casu*, the plaintiff in his founding affidavit which became the summons and the declaration in para(s) 10 and 11 pleaded a claim for an interdict. In para 11 he prayed "for an order preventing the first defendant from selling, ceding, transferring or disposing of the property, pending fulfilment of the remaining terms and conditions of the agreement of sale by the plaintiff." He then sought relief completely out of sync with the pleaded cause. He sought an order for specific performance that the first defendant be ordered to effect the transfer of the property to him pending fulfilment of all the terms and conditions of the agreement of sale by the plaintiff. The plaintiff was aware of the difficulties he would encounter with a claim pleaded as bad as this. He sought to amend the pleadings and failed. His application for amendment was dismissed by this court before MUNANGATI-MANONGWA J on 10 November 2022. At that stage, it ought to have dawned on him that he was on a journey to nowhere. He was bound by his own pleadings which did not establish any proper legal cause worth detaining the court.

[36] The plaintiff's legal difficulties were compounded by the claim for specific performance when he acknowledged that he did not perform his contractual obligations. To seek transfer of title is to seek specific performance of the contractual obligations by the seller. It is trite that a party has no right to seek specific performance from the other party unless he has performed his contractual obligations. Wessels, *The Law of Contract in South Africa* volume 11, stated that:

> "The court will not decree specific performance where the plaintiff has broken the contract or made a material default in the performance on his part. A party is not entitled to a specific performance where he has failed to show that he has performed in terms of the contract."

[37] See also *Blumo Trading (Pvt) Ltd Nelmah Mining Company (Pvt) Ltd & Ors* 2011 (1) ZLR 196 (H) where PATEL J (as he then was) emphasized the same settled legal position as follows:

> "It is a fundamental premise of every contract that both parties will duly carry out their respective obligations. See *Green* v *Lutz* 1966 RLR 633; *ESE Financial Services (Pty) Ltd* v *Cramer* 1975 (2) SA 805 (C) at 808-809. As is explained by Christie: *Business Law in Zimbabwe* at pp. 106 & 119:
>
> > "There is a presumption that in every bilateral or synallagmatic contract, *i.e.* one in which each party undertakes obligations towards the other, the common intention is that neither should be entitled to enforce the contract unless he has performed or is ready to perform his own obligations. …

> …Conversely, a party who has caused the other to commit a breach cannot found a claim on the breach ….”

The law authoritatively deals with the plaintiff's situation. He accepted that he did not fully perform his contractual obligations by paying the full price. In his summons and declaration, the plaintiff did not tender payment of the full purchase price before the transfer. He admitted that he only paid what he said was a “commitment fee” of US$5,000.00 and in his prayer (i) he sought transfer of the property “pending fulfilment of all the terms and conditions of the agreement of sale by the plaintiff.” He did not allege that he had fulfilled his side of the bargain or that he tendered payment of the full purchase price for the transfer to be effected. He in fact sought transfer first and asked the court that he fulfil the agreement later. That claim of specific performance is untenable at law. The claim was, therefore, at odds with the law.

[38] In para 9 of the declaration, the plaintiff admitted that the first defendant cancelled the agreement. It is trite that once admissions are made, the maker is bound by such admissions and it shall not be necessary or be required to prove any fact admitted or lead any evidence to contradict the admitted fact on record. See s 36 of the Civil Evidence Act [*Chapter 8:01*]. The effect of an admission was also restated in *Manyenga v Petrozim (Pvt) Ltd* SC 40/23 where the Supreme Court went to great lengths in articulating the effect of an admission by a party. The court held that:

> “32. The effect of an admission has been held to be the following in the case of *Potato Seed Production (Proprietary) Ltd v Princewood Enterprises (Pvt) Ltd & Ors* HH 45-17 at p 4;
>
> “Indeed the effect of an admission is settled law. Once made it binds its maker with the attendant consequences see *Kettex Holdings P/L v S Kencor Management Services P/L* HH 236-15.”
>
> 33. The consequences of making an admission which is not withdrawn is that it will not be necessary to prove the admitted fact(s): *Adler v Elliot* 1988 (2) ZLR 283 (S) at 288C. In addition, this Court, in the case of *Mashoko v Mashoko & Ors* SC 114-22, held that:
>
> “The law on admissions in pleadings and indeed in evidence, is also settled. A party to civil proceedings may not, without the leave of the court, withdraw an admission made, nor may it lead evidence to contradict any admission the party would have made. By equal measure, a party is not permitted to attempt to disprove admissions made.”

[39] Once it is accepted that a contract has been cancelled one cannot seek specific performance without an order for the cancellation to be set aside first. The court cannot

grant specific performance in respect of a cancelled contract without a prayer for the setting aside of such cancellation. This position was confirmed in *Mwayera v Chivizhe & Ors* SC 16/16 where the court had this to say:

> "It is trite that cancellation is a unilateral act which takes effect as at the time of its communication to the other party to the contract. It requires no concurrence from the party receiving notification of the same**. The effect of the cancellation was to put an end to the primary obligations between the parties. Primary obligations are those related to the performances due by the respective parties under the contract. In the instant case, once the contract was terminated by the appellant, the entitlement to specific performance by the fourth respondent terminated. In order to obtain specific performance under the cancelled contract, it behoved the fourth respondent to first seek an order setting aside the cancellation as a basis for the order prayed for. This he failed to do**. The court in effect gave relief under an agreement that was no longer in existence for the performance of bilateral obligations." [My emphasis]

[40] In this case, the plaintiff only sought specific performance from an agreement he accepted was cancelled without seeking an order for the setting aside of the cancellation and also without having performed the contract or being ready to perform his own obligation by making a tender of performance before the transfer. The claim, in my view, had no legal footing and ought to be dismissed. The first defendant was entitled to judgment in his favour in terms of the rules without the necessity for the defendant to give evidence in these circumstances. Having made the above findings, based on the plaintiff's pleadings before me, which showed a serious lack of understanding of the law of contract, it became academic to decide on the effect of s 183 of the old Companies Act as argued by Mr *Mubaiwa*. It was unnecessary for me to do so.

COSTS

[41] It is settled that punitive costs may be granted in exceptional circumstances at the discretion of the court. In *Nel* v *Waterberg Landbouwers Ko-operative Vereeninging* 1946 AD 597 at 607 his TINDAL JA stated:

> "The true explanation of awards of attorney and client costs not authorized by statute seems to be that, by reason of special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party, the courts in case considers it just, by means of such order, to ensure more effective than it can do by means of judgment for party and party costs that the successful party will not be out of pocket in respect of the expenses caused to him by the litigation ."

I agree with Mr *Mubaiwa* that exceptional circumstances existed in this case warranting an award of costs on a legal practitioner and client scale. The plaintiff ought not to have

persisted with this claim especially after attempts to amend his pleadings failed. The claim as pleaded clearly exhibited poor appreciation of the principles of the law of contract. The current legal practitioners should have properly guided their client to avoid pushing on with a claim as legally unfounded as this. Proceeding in the circumstances with a claim bad at law to this end was an exercise tantamount to an abuse of court process. Taking into account the long period this matter has been pushed on against the first defendant in its present format when it ought to have seriously caused any diligent legal practitioner to pause and retreat or possibly start afresh the only award of costs just and proper for the first respondent to recover the unwarranted litigation costs it incurred would be costs on a punitive scale.

[42] The plaintiff's counsel even pushed this matter further by seeking the indulgence of a postponement without placing before the court any iota of evidence to explain why the plaintiff did not appear in court. The plaintiff was bound by the conduct of his own legal practitioner. The lawyer, after all, is the representative whom the litigant has chosen for himself (*Apostolic Faith Mission in Zimbabwe & Ors v Murefu* SC 28/03). In *MM Pretoriuos (Pvt) Ltd & Anor v Chamunorwa Mutambizi* SC 39/12 ZIYAMBI JA observed that;

> "A legal practitioner is not engaged by his client to make omissions and to commit "oversights". He is paid for his professional advice and for the use of his skills in the representation of his client. He is not paid to make mistakes. These could be costly to his client. He is professionally ethically and morally bound to exercise the utmost diligence in handling the affairs of his clients."

The matter ought not to have been pursued in its current state. I awarded the first defendant costs on a legal practitioner and client scale as that met the justices of this case.

DISPOSITION

[43] In the circumstances, the court was satisfied that the first defendant was entitled to judgment in its favour as ordered.

DEMBURE J: ……………………………………………

James Majatame Attorneys, plaintiff's legal practitioners
Matizanadzo Attorneys, 2nd defendant's legal practitioners