JCDECAUX ZIMBABWE (PRIVATE) LIMITED
versus
JONATHAN TAWONANA SAMUKANGE (1)
and
NAUSHADALI AKBERALI MERALI DEWJI (2)
and
ABBASALI MERALI (3)

HIGH COURT OF ZIMBABWE
DEMBURE J
HARARE: 28 February & 26 March 2025

Opposed Court Application

K. C. Rusike, for the applicant
R. G. Zhuwarara, for the respondents

DEMBURE J:

INTRODUCTION

[1] This is a court application for dismissal of an action on the ground that it is frivolous and vexatious. The application was filed in terms of rule 31(1) of the High Court Rules, 2021. After hearing submissions from counsel, the court upheld the point *in limine* that the first to third respondents' opposing papers were invalid. The court struck out the said notice of opposition and opposing affidavits and proceeded to deal with the matter as an unopposed application. The court subsequently issued the following order:

> "1. The instant application be and is hereby granted.
> 2. The respondents' action under Case No. HCH 304/24 be and is hereby dismissed on the ground that it is frivolous and vexatious.
> 3. The respondents shall pay the costs of suit on a legal practitioner and client scale jointly and severally, the one paying, the other to be absolved."

On 19 March 2025, the respondents' legal practitioners filed a letter requesting written reasons for the court's decision. These are they.

BACKGROUND FACTS

[2] The applicant, a registered company, is in the business of public advertising and does so through billboards. The applicant averred that sometime in 2012 it entered into a lease

agreement with Falcon Golf Club for the portion of the land where it erected its advertising billboard. The portion of the land in question is situated on Falcon Golf Club grounds at the corner of Airport Road and Harare Drive in Harare. In terms of the existing lease agreement between the applicant and the said Falcon Golf Club which was renewed occasionally, the applicant has been paying monthly rentals to Falcon Golf Club.

[3] In September 2023, the respondents approached the applicant alleging that the applicant's billboard was erected on their property, stand 857, Airport Road, Hatfield, Harare. On 22 November 2023, the respondents through their legal practitioners wrote to the applicant demanding payment of rent they alleged was due in the sum of US$198,000.00 for the applicant's billboard.

[4] The applicant denied liability to pay rentals to the respondents insisting that it was in a contractual relationship with Falcon Golf Club to whom they had been paying rentals. It was further stated that if there was any claim, it should be directed to Falcon Golf Club, their lessor.

[5] On 19 January 2024, the respondents issued summons against the applicant under Case No. HCH 340/24 seeking payment of the sum of US$198,000.00 or equivalent in local currency. The amount claimed was for outstanding rentals due to the respondents (the plaintiffs therein) for the use of their property for advertising billboards from the applicant (the defendant therein) together with interest and costs of suit on a legal practitioner and client scale. The respondents pleaded that the defendant erected the advertising billboards on their property, stand number 857 Airport Road, Hatfield, Harare "without the plaintiffs' permission and has not been paying any rentals." It was further claimed that as of June 2018 to December 2023 the defendant owed the total of US$198,000.00 in arrear rentals.

[6] On 9 February 2024, the applicant entered an appearance to defend. The applicant subsequently filed a plea on 26 February 2024. In the plea, the applicant denied being liable for arrear rentals to the respondents. It contended that there was no landlord-tenant relationship between the applicant and the respondents. It was stated that the applicant has a lease agreement with Falcon Golf Club whom they believed was the owner of the piece of land where their billboard was erected.

[7] The applicant further disputed that it owed any rentals to the respondents as there was no contract of lease concluded between them. In the alternative, the applicant contended that the claim should be directed to Falcon Golf Club; that the plaintiffs were estopped from making any claim against it and that in any case, a portion of the debt predating 30 January 2021 had prescribed.

[8] On 12 April 2024, the applicant filed this application seeking the dismissal of the action in Case No. HCH 340/24 for being frivolous and vexatious in terms of rule 31(1). It was submitted that the claim by the respondents was frivolous and vexatious for the main reason that the respondents were claiming arrear rentals where they admitted that the applicant was occupying the property without their permission. That this averment negated the existence of a contractual relationship.

[9] It was further stated that in the absence of a lease agreement or a landlord and tenant relationship a claim for arrear rentals cannot be legally sustainable. The applicant also submitted that the allegations in the declaration failed to establish any recognisable cause of action against the company. This is so as there is an admission by the plaintiffs that there was no agreement between them making the claim for rentals impossible to sustain.

[10] The other averments in the defendant's plea were further restated that the claim should be directed to Falcon Golf Club, that the respondents are estopped from making any claim against the applicant and that the portion of the debt, in any event, predating 30 January 2021 had prescribed. Another argument was that, in any event, the claim had been converted into local currency by virtue of the provisions of SI 33 of 2019.

[11] On 26 April 2024, the respondents filed their notice of opposition and opposing affidavits. They contended that they owned the piece of land where the applicant's billboard was erected. It was further reiterated that the applicant erected the billboard on their land without their permission or knowledge. As owners, they further contended, they were entitled to receive the rentals and not Falcon Golf Club which had fraudulently leased their land to the applicant. They insisted that the summons matter to recover the arrear rentals was not frivolous and vexatious and, therefore, the application ought to be dismissed with costs on a punitive scale.

[12] In the answering affidavit, the applicant raised a point in *limine* that the respondents' notice of opposition was invalid as the opposing affidavits thereof were fatally defective for having been improperly commissioned. This issue had to be determined first before the court considered the merits.

POINT *IN LIMINE*

ISSUE FOR DETERMINATION

WHETHER OR NOT THE RESPONDENTS' OPPOSING AFFIDAVITS WERE FATALLY DEFECTIVE

SUBMISSIONS MADE BEFORE THIS COURT

[13] Mr *Rusike* submitted that the applicant's point *in limine* was premised on the invalidity of the notice of opposition. He argued that it is invalid because the opposing affidavit does not disclose the identity of the commissioner of oaths. He also submitted that there was no affidavit. An affidavit has been defined in *Mandisayika* v *Sithole* HH 798/15. It is trite that legal practitioners are commissioners of oaths in their capacity as legal practitioners. Because the opposing affidavit does not clearly identify the commissioner of oaths, the questions arising are whether he is registered and was able to administer oaths.

[14] Mr *Rusike* further argued that it is a matter of practice established in our case law that any stamp that is used should clearly identify the name of the commissioner of oaths and the capacity in which he acts as commissioner of oaths. It remains unclear who this person is and if he had the capacity to administer an oath for the affidavit presented. The effect of this is that there is no notice of opposition. There being no valid opposing affidavit consequently the respondents are barred. The applicant moved the court to strike out the opposing papers and treat the matter as unopposed.

[15] On the contrary, Mr *Zhuwarara* submitted that the applicant had not enunciated a basis for the court to strike out the notice of opposition. The applicant did not say that the person who signed as a commissioner of oaths was not a commissioner of oaths. The applicant has not availed a factual basis to say the person who commissioned the affidavit is not a legal practitioner. The requirement for the identity of the commissioner of oaths is only a rule of practice. The affidavit is valid because the first respondent had complied with what had been stated in *Ariston Management Services* v *Econet Wireless Zimbabwe Ltd* SC 123/23.

On p 55 there is the opposing affidavit that is signed. It is illegible but there is one who signed it.

[16] It was further submitted that the court could invoke rule 59(26)(b) of the court rules to allow for oral evidence on the issue. The matter can be postponed so that the court invites the legal practitioner to come and testify. He also submitted that he would move for a postponement in line with the case of *Grain Marketing Board* v *Muchero* 2008 (1) ZLR 216 (S) in which the Supreme Court said that if the court finds a party barred it can grant a postponement to allow a party to apply for the removal of the bar.

[17] In reply, Mr *Rusike* submitted that the issue is that we do not know who that person is and the first respondent does not even say who this person is. The applicant and the respondents do not even know the identity of that person. The first respondent admitted that the signature does not legibly identify the person. This flies against the rule that the person must be clearly identified.

[18] He also argued that the respondents were not ambushed on this issue. This was stated in the answering affidavit and the heads of argument. Had they been sincere they could have communicated the identity of the person. The respondents persisted with what is clearly a defective notice of opposition. The respondent could have withdrawn, sought condonation and applied to file a proper notice. The issue is not novel and cannot trigger the leading of evidence. It further submitted that counsel conceded that the identity of the commissioner of oaths is not established. The identity of the person is not legible.

THE APPLICABLE LAW

[19] What constitutes a valid affidavit has been settled by binding precedent. Thus, in *Mandishayika* v *Sithole supra*, the court authoritatively stated as follows:

> "An affidavit is a written statement made on oath before a commissioner of oaths or other person authorised to administer oaths. The deponent to the statement must take the oath in the presence of the commissioner of oaths and must append his or her signature to the document in the presence of such commissioner. Equally the commissioner must administer the oath in accordance with the law and thereafter must append his or her signature onto the statement in the presence of the deponent. The commissioner must also endorse the date on which the oath was so administered. These acts must occur contemporaneously."

[20] The Supreme Court has confirmed that this court is bound by the *Mandishayika* judgment as it is a judgment of two judges and that the judgment was correctly decided. See *Ariston Management Services* v *Econet Wireless Zimbabwe Limited supra* at p 3.

[21] Further, it is now settled that any stamp used by the person who administers an oath must clearly identify the person and the office or capacity he or she acts as the commissioner of oaths. This position was aptly put in *Firstel Cellular (Pvt) Ltd* v *Netone Cellular (Pvt) Ltd* SC 1/15 where PATEL JA (as he then was) had this to say:

> "It is common cause that there is no specific legislation regulating the issue in this jurisdiction and that the matter is one that is governed by practice. In that regard, what is required is that any stamp that is used to designate a commissioner of oaths should clearly identify the person before whom an affidavit is deposed and the office or capacity in which he or she acts as a commissioner."

[22] Non-compliance with the requirement that the person administering the oath as commissioner of oaths must be clearly identified renders the affidavit invalid. The court in the *Firstel Cellular* judgment thus concluded in the context of that case as follows:

> "In *casu*, it is not disputed that Raymond Moyo is a legal practitioner and a notary public and, as such, a recognised commissioner of oaths. The respondent has therefore verified its cause of action in an affidavit, deposed by its functionary duly authorised thereto, before a clearly identified commissioner of oaths. That, in my view, suffices for the intended purpose of adducing evidence under oath and renders the validity of the respondent's founding affidavit manifestly impervious to challenge."

APPLICATION OF THE LAW TO THE FACTS

[23] Applying the above principles, the opposing affidavits filed of record are fatally defective and, therefore, invalid. It is apparent from the last pages of those affidavits at pp 56 and 58 of the record that the stamp used does not clearly identify the person before whom the affidavits were commissioned. While the stamp states the office or capacity of the alleged commissioner as that of a legal practitioner who is by law an *ex-officio* commissioner of oaths, the name or identity of the said commissioner is not indicated. Mr *Zhuwarara* conceded that the identity of the commissioner of oaths is not clear. Indeed, it is not clear who the commissioner of oaths was. It is, therefore, beyond any doubt that the said opposing affidavits do not clearly identify the commissioner of oaths. Accordingly, the purported affidavits are null and void. This court restated the legal position in *Prosecutor-General* v *Makarichi & Ors* HH 502/23 as follows:

> "11. In this jurisdiction, a decision of the Supreme Court binds this court. Accordingly, in line with *Firstel Cellular* (*supra*) it follows that the person before whom the affidavit was signed (the Commissioner of Oaths) should be clearly identified as should be the office or capacity in which he or she acts as a Commissioner of Oaths.
> 12. To similar effect is this court's decision in *Muzanenhamo* v *Gadaga and Ors* HH 65/2006. There, at p 3 of the cyclostyled judgment, GOWORA J (as she then was) said:
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> > "The applicant contends that the document is an affidavit. An affidavit must be sworn before a person competent to administer an oath. The applicant in his affidavit makes the averment that the document was sworn to before a magistrate. The document bears the stamp of the magistrates court. The person who signed as Commissioner of oaths is not identified, nor is he described as commissioner of oaths. There is, in fact, no indication that the document was signed by a commissioner of oaths. In the circumstances the document is not an affidavit. What it is in fact a written statement not made on oath."
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> 13. That only documents satisfying the legal requirements as to their nature should be accepted into evidence and acted upon by the Court was underscored by the case of *Tawanda* v *Ndebele* 2006 (1) ZLR 426(H)."

[24] Given the above-settled position of the law, I do not agree with Mr *Zhuwarara*'s argument that the requirement that the stamp identifies the person administering an oath does not affect the validity of an affidavit. It does. To constitute a valid affidavit, the commissioner of oaths must be clearly identified as well as his capacity or office in which he acts as commissioner of oaths. Also, by seeking that there be oral evidence in terms of rule 59(26)(b), Mr *Zhuwarara* was accepting that there was a defect as he said the issue required that the legal practitioner be called to give evidence. Surely, if the affidavit was valid there would not have been such argument. However, the power of the court to allow oral evidence under rule 59(26)(b) is not meant to salvage a nullity.

[25] The law is clear that once a purported affidavit is found to have been improperly commissioned it is invalid or a nullity. Nothing can flow from it. This renders the notice of opposition in this case a nullity. See *Ariston Management Services* v *Econet Wireless supra*. 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."

[26] There was no legal basis, therefore, to resort to rule 59(26)(b) to save an invalid pleading. The respondents' notice of opposition was incurably bad and beyond repair. It is a settled principle of the law that a nullity cannot be condoned or amended. See *Dombodzvuku* v *CMED (Pvt) Ltd* SC 31/12 at p5 & *Ahmed* v *Docking Station Safaris (Pvt) Ltd t/a CC Sales* SC 70/18 at p. 4.

[27] This court has already warned against the dangers of not demanding strict compliance to the proper methods of commissioning affidavits. In *Zinyemba* v *Nyakamha & Ors* HH 108/24 it was emphatically stated as follows:

> "There is a plethora of cases on the dangers of accepting an improperly commissioned affidavit. In *Ndoro & Anor* v *Conjugal Enterprises (Pvt) Ltd & Anor* HH 814/22 DEME J ruled that:
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> > "Thus, there are many dangers of accepting an improperly commissioned affidavit. It is apposite that there must be strict adherence to the proper methods of commissioning affidavits. Any compromise would bring justice into disrepute." (see also *Tawanda* v *Ndebele* HB27/06)."

[28] The notice of opposition being invalid it had to be struck out of the record. There was no reason for the court to call for oral evidence as suggested by counsel for the respondents. I rejected the request. Further, there was no application for condonation made for the respondents to file a valid notice of opposition and for the removal of the bar. It is a settled position in our law that condonation cannot be granted where it is not sought. See *Forestry Commission* v *Moyo* 1997 (1) ZLR 254 (S).

[29] There was a half-hearted and bald submission that a postponement should be granted to allow the respondents to seek the removal of the bar. It is settled law that a postponement is an indulgence which is not there for the taking. It is not a right that a litigant should demand from the court. The court exercises a discretion based on the established factors which include *inter alia*, the existence of good reasons for the postponement, the prejudice to be suffered by the other party and the convenience of the court. See *Stonewell Searches (Pvt) Ltd* v *Stone Holdings (Pvt) Ltd & Ors* SC22/21. Mr *Zhuwarara* did not motivate his application for postponement but adopted an erroneous stance that it is a right which the respondents must simply demand to be given by the court. Such an indulgence is not there for the mere asking. The court could not grant such a request as no good cause was shown.

[30] In any case, the issue of the validity of the notice of opposition was raised first in the answering affidavit filed on 24 May 2024. The same issue was argued in the heads of argument by counsel. The respondents had sufficient time to remedy the situation by seeking condonation and the removal of the bar to properly file a valid notice of opposition. I agree that they ignored all warnings and refused to withdraw their invalid pleading. They continued to be argumentative on a point where the law was settled.

[31] In the premises, after having found the opposing affidavits and consequently the notice of opposition fatally defective and, therefore, a nullity I upheld the point *in limine*. I struck out the respondents' opposing papers. The court proceeded to deal with the application as an unopposed matter.

THE UNOPPOSED APPLICATION

[32] The application was for the dismissal of the action in Case No. HCH 340/24 on the ground that the action is frivolous and vexatious. The application is provided for under rule 31(1) which reads:

> "**Application for dismissal of action**
> 31. (1) Where a defendant has filed a plea, he or she may make a court application for the dismissal of the action on the ground that it is frivolous or vexatious and such application shall be supported by affidavit made by the defendant or a person who can swear positively to the facts or averments set out therein, stating that in his or her belief the action is frivolous or vexatious and setting out the grounds for such belief and a deponent may attach to his or her affidavit documents which verify his or her belief that the action is frivolous or vexatious and whereupon the court may—
> (a) grant the application in which event it shall dismiss the action and enter judgment of absolution from the instance; or
> (b) dismiss the application in which event the action shall proceed as if no application was made; and
> (c) make such order as to costs as it considers necessary in the circumstances."

[33] The law is settled as to what constitutes a frivolous and vexatious action. In *Mushangwa & Anor* v *Makandiwa & Ors* SC 95/21 the legal position was restated as follows:

> "In *Rogers* v *Rogers and Anor* 2008 (1) ZLR 330(S) at 337E-G the court dealing with an appeal against a decision dismissing a claim and granting absolution from the instance in terms of Order 11 r 79(2) on the ground that it was frivolous, accepted the following definition of frivolous:
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> > "In *S* v *Cooper & Ors* 1977(3) SA 475 at 476D BOSHOFF J said that the word "frivolous" in its ordinary and natural meaning connotes an action characterized

> by lack of seriousness, as in the case of one which is manifestly insufficient. An action is in a legal sense "frivolous or vexatious" when it is obviously unsustainable, manifestly groundless or utterly hopeless and without foundation. See also *Western Assurance Co* v *Caldwell's Trustee* 1918 AD 262 at p 271; *Corderoy* v *Union Government* 1918 AD 512 at p 517; *Wood NO* v *Edwards* 1968(2) RLR 212 at 213 A-F; *Fisheries Development Corporation* v *Jorgensen & Anor* 1979 (3) SA 1331 at 1339 E-F; *Martin* v *Attorney General & Anor* 1993(1) ZLR 153(S). It appears to me that a plaintiff who commences action in a Court of law when he or she has no reasonable grounds to do so has no cause of action. An action without a good cause is baseless and obviously unsustainable."

> Dismissal under r 75 is therefore a drastic remedy intended to resolve actions that are baseless and unsustainable."

[34] In *casu*, I was satisfied that the action in Case No. 340/24 was frivolous and vexatious. It was not based on any valid legal cause of action. It was completely baseless and unsustainable. The respondents claimed for payment of arrear rentals in the sum of US$198,000. In para 4 of the declaration the basis of this claim for arrear rentals was pleaded as follows:

> "The defendant erected advertising billboards on the plaintiff's property sometimes in 2018 **without the plaintiffs' permission** and has not been paying any rentals." [my emphasis]

The plaintiffs admitted that there was no contractual relationship between the parties. What they set out is that the applicant was in unlawful occupation of their property. They could only sustain a claim for damages for the unlawful occupation of their property and not a claim for arrear rentals. There was no contractual relationship of landlord and tenant between them to give rise to a claim for arrear rentals. It is trite that rent is an essential element of a lease. See *Estate Ismail* v *Sayed 1965* (1) SA 393 (C) at 397 A-B.

[35] Our law is very clear that in return for the right to the use and enjoyment of the property, the lessee has an obligation to pay rent timeously, failing which they will be in breach of contract. See *Arjun Investmentts (Pvt) Ltd* v *Mutambirwa & Ors* HB 64/11. The entitlement to rentals arises out of a contract of lease between the landlord and the tenant. The obligation to pay rent is contractual. In other words, there must exist a contract of lease for the obligation to pay rent to arise. In the case of *Fort Group Enterprises (Pvt) Ltd* v *Bright Investments (Pvt) Ltd* HB 48/11, the court outlined the essential elements of a valid lease agreement and stated that:

> "The question of rent should be agreed upon… There has to be consensus. Agreement may be express or implied."

Rent is, therefore, due *ex contractu*.

[36] In this case, the applicant was only in a landlord-and-tenant relationship with Falcon Golf Club. Their lease has been in existence from 2012 to date. The lease agreement and the receipts for the payments of rent were attached to the application establishing that the contract of lease only existed between the applicant and the said Falcon Golf Club. There was no lease agreement between the respondents and the applicant. The respondents in para 4 of the declaration also unequivocally confirmed this position. In the face of all this, it was reckless for the respondents, who have been legally represented, to file and pursue a claim for arrear rentals in a case where there is no existing lease agreement. The claim was completely without any legal foundation.

DISPOSITION

[37] I found the action to fit squarely in the definition of what constitutes frivolous and vexatious action as set out in *Mushangwa & Anor* v *Makandiwa & Ors supra*. The action was "manifestly groundless or utterly hopeless and without foundation." It ought to be dismissed.

[38] On the issue of costs, there was no reason to depart from the general principle that costs should follow the cause. There were also exceptional circumstances justifying an order for costs on a legal practitioner and client scale. The applicant must be able to recover the costs it had been made to suffer unnecessarily for a claim that is frivolous and vexatious. The action was utterly groundless. The respondents recklessly abused the court process. The respondents further wasted the court's time by being argumentative on a point resolved by settled law. They simply ought to have withdrawn the invalid pleading well before the hearing and sought condonation and the removal of the bar to file a valid notice of opposition. They could only wait until the hearing date and again adopted a cavalier approach seeking to save an incurably bad pleading. This application was unassailable given the completely hopeless and groundless action for arrear rentals. Costs on a legal practitioner and client scale were, therefore, warranted in the circumstances.

[39] The court acknowledges that there was an error in the terms of the final order granted. There was an error in omitting as part of the order that judgment granting absolution from

the instance in favour of the applicant is entered. I realise that this is what rule 31(1) requires the court in peremptory language to do upon dismissing the action. That is also what the applicant had sought in its draft order but this was erroneously deleted at the hearing. I invoke my powers in terms of rule 29(1) to correct the error in para (2) of the operative order by adding that judgment was entered for absolution from the instance in favour of the applicant.

[40] In the result, the operative order, as corrected, shall read as follows:

1. The instant application be and is hereby granted.
2. The respondents' action under Case No. HCH 304/24 be and is hereby dismissed and judgment for absolution from the instance is entered in favour of the applicant on the ground that the action is frivolous and vexatious.
3. The respondents shall pay the costs of suit on a legal practitioner and client scale jointly and severally, the one paying, the other to be absolved."

DEMBURE J: ……

Zvobgo & Attorneys, applicant's legal practitioners
Venturas & Samkange, respondents' legal practitioners