IN THE HIGH COURT OF ZAMBIA **2023/HPEF/027**
AT THE ECONOMIC AND FINANCIAL
CRIMES DIVISION REGISTRY
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

IN THE MATTER OF:	**ARTICLE 1 (3) AND 1 (2) OF THE CONSTITUTION OF ZAMBIA**
IN THE MATTER OF:	**ARTICLES 11, 16, 17 AND 18 OF THE CONSTITUTION OF ZAMBIA**
IN THE MATTER OF:	**SECTIONS 52, 53 AND 58 OF THE NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 2021**
IN THE MATTER OF:	**SECTION 28 OF THE PROHIBITION AND PREVENTION OF MONEY LAUNDERING ACT NO. 14 OF 2001 OF THE LAWS OF ZAMBIA**
IN THE MATTER OF:	**SECTION 118 OF THE CRIMINAL PROCEDURE CODE ACT CHAPTER 88 VOLUME 7 OF THE LAWS OF ZAMBIA**

AND

IN THE MATTER OF:	**THE PROTECTION OF FUNDAMENTAL RIGHTS REGULATIONS, 1969**

BETWEEN:

REPUBLIC OF ZAMBIA
HIGH COURT OF ZAMBIA
ECONOMIC & FINANCIAL CRIMES DIVISION
04 FEB 2025
REGISTRY 1
P.O. BOX 50067, LUSAKA

RICHARD MUSUKWA **PETITIONER**

AND

THE ATTORNEY GENERAL **RESPONDENT**

BEFORE THE HONOURABLE MRS. JUSTICE P. K. YANGAILO, MRS. A. MALATA-ONONUJU AND MR. JUSTICE S. V. SILOKA ON THIS 4TH DAY OF FEBRUARY, 2025.

For the Petitioner : Mr. J. Zimba – Makebi Zulu Advocates

For the Respondent: *Mr. M. Chinyonga, State Advocate – Attorney General's Chambers;*
Ms. E. Mtonga, Assistant Snr State Advocate – Attorney General's Chambers

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COMBINED RULING

S. V. Siloka, J. delivered the Ruling of the Court.

CASES REFERRED TO:

1. *Denver Logistics Vs Swift Cargo Service Limited (2015/HPC/0360);*
2. *Violet Kasenge Bwalya and Others Vs Zambia Telecommunication Company and Attorney General (Comp/40/2011);*
3. *Mutale Vs Attorney General and Another (18 of 2007) (2007) ZMSC 114 (24th July, 2007);*
4. *Standard Chartered Bank (Z) Plc Vs John M. C. Banda (Appeal No. 94/2015/SCZ/8/108/2015;*
5. *Standard Chartered Bank Zambia Plc Vs Wisdom Chanda and Another (SCZ Judgment No. 18 of 2014) unreported;*
6. *Ram Auerbach Vs Alex Kafwata (Appeal No. 65 of 2000;*
7. *NFC Mining Vs Techro Zambia Limited (2009) ZR 236;*
8. *Access Bank (Zambia) Limited and Group Five ZCM Business Park Joint Venture (SCZ/8/52/2014);*
9. *Sun Country Limited Vs Kearney and Another (Appeal No. 7 of 2017 [2017]) ZMSC 230;*
10. *Intelligent Mobility Solutions Limited Vs Lamise Trading Limited (Appeal No. 214/2022);*
11. *The Republic of Botswana, Ministry of Works, Transport and Communications, Rinceau Design Consultants (sued as a Firm T/A KZ Architects Vs Mitre Limited (SCZ Judgment No. 2 of 1995);*
12. *Leopold Walford (Z) Limited Vs Unifreight (1985) ZR 203;*

13. *Harness Vs Bell's Asbestos and Engineering Limited (1966) 3 AIIER;*
14. *John Sangwa Vs Sunday Nkonde (ZMHC 284);*
15. *Hakainde Hichilema and Others Vs The Government of the Republic of Zambia (Appeal No. 28 of 2018) (2020) ZMSC 37; and*
16. *Zambia Revenue Authority Vs Jayesh Shah (SCZ 10 of 2001).*

LEGISLATION REFERRED TO:

1. *Order 2 Rule 2 of the Rules of the Supreme Court of England 1999 Edition; and*
2. *Order 3 Rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia.*

OTHER WORKS REFERRED TO:

1. *Dr. Patrick Matibini, Zambian Civil Procedure, Commentary and Cases, Volume 1.*

1.0 BACKGROUND

1.1 The Petitioner on 29th September, 2023, filed a Petition accompanied by an Affidavit verifying facts.

1.2 On the 8th of December, 2023, the Respondents filed a Cross Petition, Answer and an Affidavit in Opposition to the Petitioner's Affidavit verifying facts.

1.3 The Petitioner on the 10th of January, 2024, filed Summons to set aside the Respondent's Cross Petition and Affidavit in Opposition to the Petitioner's Affidavit verifying facts for irregularity.

1.4 On the 5th of June, 2024, the Respondent filed combined Summons for Leave to withdraw the Cross Petition and Affidavit

in Opposition to the Petitioner's Affidavit dated 8th December, 2023, verifying facts.

2.0 INTRODUCTION

2.1 This Ruling is in respect of two Applications which have been combined.

2.2 The first Application was for setting aside the Cross Petition and Affidavit in Opposition to the Petitioner's Affidavit verifying facts for irregularity.

2.3 The second Application was for Leave to withdraw the Cross Petition and Affidavit verifying facts in Support of the Cross Petition.

3.0 AFFIDAVIT IN SUPPORT OF SUMMONS TO SET ASIDE THE RESPONDENT'S AFFIDAVIT IN OPPOSITION

3.1 The Affidavit in Opposition was deposed to by Richard Musukwa, a Zambian National residing at Plot No. 11, Mopani Drive, Chililabombwe in the Copperbelt Province of the Republic of Zambia.

3.2 The Petitioner deposed that he was the Petitioner in this Matter and by reason thereof, competent to depose to the Affidavit from facts within his personal knowledge and information.

3.3 The Petitioner further deposed that on 29th of September, 2023, he filed a Petition in the High Court seeking various reliefs.

3.4 That on the 8th of December, 2023, the Respondent responded to the Petition by filing a Cross Petition, Answer and an Affidavit in Opposition to the Petitioner's Affidavit verifying Facts.

3.5 That upon perusal of the Respondent's Cross Petition and Affidavit in Opposition to the Petitioner's Affidavit verifying Facts it was established that the Cross Petition and Affidavit in Opposition were irregular in that they were not signed and commissioned as per exhibit **"RM1"** and **"RM2"**.

3.6 That he is duly advised by his Advocates on Record and verily believes the same to be true, that this Process served upon his Advocates is irregular as the Respondent's failed to commission the Affidavit and ensure that the Cross Petition is signed by the Petitioner as is legally required.

3.7 That he has been advised by his Advocates on Record and verily believing the same to be true and correct that ordinarily an un-commissioned Affidavit is not only defective but invalid and so is the Petition that is not signed by the Petitioner.

3.8 That he has been advised by his appointed Advocates and verily believing the same to be true and correct that no prejudice will be occasioned to the Respondent by setting aside the Affidavit and Cross Petition for being irregular and that the Petition be treated

as unopposed but conversely, the interest of justice shall be served.

4.0 SKELETON ARGUMENTS

4.1 It was Counsel's submission that the Court has jurisdiction to set aside this Application pursuant to **Order 2 Rule 2** of the **Rules** of the **Supreme Court of England 1999 Edition**. This Order provides:

> ***"An Application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, Judgment or Order therein shall not be allowed unless it is made within a reasonable time and before the Party applying has taken any fresh step after becoming aware of the irregularity".***

4.2 It was also Counsel's submission that the Application to set aside for irregularity shall be taken out within a reasonable time and prior to taking any fresh steps by a Party taking out such an Application.

4.3 In this regard, Counsel submitted that the Application was timely made immediately after formally obtaining instructions and upon discovery of the irregularities alluded to in the Affidavit in Support.

4.4 According to Counsel, the impugned Affidavit is irregularly before Court because it violates **Section 6** of the **Commissioner for**

Oaths Act, Cap 33 of the **Laws of Zambia** and **Order V Rule 20 (g)** of the **High Court Rules, Chapter 27** of the **Laws of Zambia**.

Section 6 provides:

> ***"Every Commissioner for Oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the Jurat or an attestation at what place and on what date the oath or affidavit is taken or made".***

4.5 **Order V Rule 20 (g)** of the **High Court Rules Chapter 27** of the **Laws of Zambia**, provides:

> ***"(g) The Jurat shall be written, without interlineation or erasure (unless the same be initiated by Commissioner), immediately at the foot of the affidavit, and towards the left side of the paper, and shall be signed by the Commissioner. It shall state the date of the swearing and the place where it is sworn. It shall state that the Affidavit was sworn before the Commissioner of the Officer taking the same".***

4.6 According to Counsel, both pieces of legislation impose a mandatory duty on every Commissioner for Oaths before whom an Affidavit is taken to state the place and date on which the Affidavit was sworn. To buttress this argument Counsel referred the Court to the persuasive case of ***Denver Logistics Vs Swift Cargo Service Limited***[1] where Chashi J., as he then was, held that failure to state the date and place where the Affidavit was sworn was fatal as it offended the mandatory provisions of both

the Commissioner for Oaths Act, as well as **Order 5/20/3 of the High Court**.

4.7 To further support his argument, Counsel referred the Court to the case of ***Violet Kasenge Bwalya and Others Vs Zambia Telecommunication Company and Attorney General***[3], wherein Honourable Mr. Justice D. Mulenga stated that:

> ***"I have observed that the Applicant's Affidavit aforesaid is not commissioned though it bears this Court's seal. I am mindful that the Attorney General does not pay filing fees, therefore the omission to commission the said Affidavit falls on the Court's Registry Clerk who received the documents on the date in issue. Ordinarily an uncommissioned affidavit is not only defective but invalid and unacceptable, the Affidavit is, therefore, fatally defective as it was not sworn in the presence of a Commissioner for Oaths".***

4.8 Moving to the Cross Petition, Counsel contended that the Cross Petition, was irregularly before Court because it was not signed by the Petitioner.

4.9 In support of this argument, Counsel relied on the case of ***Mutale Vs Attorney General and Another***[4] where the Supreme Court stated that:

> ***"...Having come to the conclusion that it is mandatory for the Petitioner to sign the Petition personally, we find that Section 96 (3) is at par with Sections 98 (3) and***

101 (1) of the same Act as the consequence of filing a Petition that is not signed by the Petitioner makes the Petition misconceived...".

4.10 It was Counsel's submission that from the holding of this case, it is clear that the Petition must be signed personally by the Petitioner and failure to do so renders such a Petition misconceived.

4.11 Having submitted that both the Affidavit in Opposition and Cross Petition, were irregular, the Court was urged to expunge the same for failure to obey the Rules of Court.

4.12 For the above argument, Counsel relied on the cases of ***Standard Chartered Bank (Z) Plc Vs John M. C. Banda***[5], ***Standard Chartered Bank Zambia Plc Vs Wisdom Chanda and Another***[6], ***Ram Auerbach Vs Alex Kafwata***[7], ***NFC Mining Vs Techro Zambia Limited***[8] and ***Access Bank (Zambia) Limited and Group Five ZCM Business Park Joint Venture*** where it was held that Rules of Court ought to be complied with and a Party who breaches them does so at his or her own peril.

5.0 AFFIDAVIT IN OPPOSITION BY THE RESPONDENT

5.1 The Affidavit in Opposition was deposed by Chibesa Mulonda, a Zambian National ordinarily resident at Plot No. 218/08, Nziwa Street in the City and Province of Lusaka in the Republic of Zambia.

5.2 The Deponent deposed that he was the Principal State Advocate in the employ of the Attorney General's Chambers and therefore competent to swear this Affidavit in that capacity and from facts within his personal knowledge.

5.3 That he has read the Petitioner's Affidavit in Support of Summons to set aside the Respondent's Cross Petition and Affidavit in Opposition to the Petitioner's Affidavit verifying facts for Irregularity.

5.4 That the contents of Paragraph 1 and 2 of the Petitioner's Affidavit in Support are within the peculiar knowledge of the Petitioner.

5.5 That the contents of Paragraphs 3 and 4 of the Petitioner's Affidavit in Support are admitted.

5.6 That the contents of Paragraph 5 of the Petitioner's Affidavit in Support are not in dispute save to add that he verily believes that the Respondent's Affidavit is defective in form, not in substance and that the failure to commission the Affidavit was unintentional and occurred in advertently.

5.7 That further to Paragraph 4 above, the Respondent states that the defect in question is curable and does not affect the substance or veracity of the statements made in the Respondent's Affidavit in Opposition to the Petitioner's Affidavit Verifying Facts and in support of the Cross Petition.

5.8 That the contents of Paragraph 9 of the Petitioner's Affidavit in Support are not true and he verily believes that the Affidavit in question which is defective in form is capable of being corrected without prejudicing the Petitioner herein.

5.9 That further to Paragraph 9 above, he verily believes the curability of the Affidavit in question will not result in any real or serious prejudice or negative consequences to the Petition herein.

6.0 RESPONDENT'S SKELETON ARGUMENTS

6.1 In his Skeleton Arguments, Counsel started by admitting that the impugned Affidavit in Opposition was defective but that the same could be relied on by the Court pursuant to **Order 44 Rule 4** of the **Rules** of the **Supreme Court of England (White Book)** which provides as follows:

> ***"An Affidavit may, with the Leave of the Court, be filed or used in evidence not withstanding any irregularity in the form thereof".***

6.2 Further, Counsel relied on **The Practice Note 41/4/1** of the **Rules** of the **Supreme Court of England (White Book)** which provides:

> ***"This rule is only permissive if the irregularity can be cured without undue hardship, or if it is not a matter of substance or affects its actual contents, then it should be put right. Any costs will fall on the solicitor***

... Leave to file an Affidavit which is defective may be obtained Ex-parte from the Practice Master".

6.3 It was Counsel's submission that even if there is a defect or irregularity in the Affidavit, the Court has the discretion to allow it to be filed or used as evidence. According to Counsel, the Court has power to overlook any irregularities in the Affidavit if it deems it appropriate to do so.

6.4 Premised on the foregoing, Counsel submitted that with permission from this Court, the Affidavit in question can be submitted or accepted as evidence even if there are irregularities in its form.

6.5 In support of the above proposition, Counsel referred the Court to the case of ***Sun Country Limited Vs Kearney and Another***[10] in which the Supreme Court of Zambia stated as follows:

"...If the defect in an instrument or document is in form, it is not a fundamental defect or irregularity and thus curable. An Affidavit afflicted by such a defect is receivable in proceedings under Order 5 Rule 13 of the High Court Rules which Counsel for the Appellant has quoted. That rule authorizes Courts to receive Affidavits despite irregularities in form".

6.6 Further, Counsel referred the Court to **Order 5 Rule 14** of the **High Court Rules**, **Chapter 27** of the **Laws of Zambia** which provides as follows:

"A defective or erroneous Affidavit may be amended and re-sworn by Leave of the Court or a Judge, on such terms as to time, costs or otherwise as seem reasonable".

6.7 With regards to irregularities in form, Counsel relied on **Section 47** of the **Interpretation and General Provisions Act**, **Chapter 2** of the **Laws of Zambia** which provides for deviation from forms as follows:

"Save as is otherwise expressly provided, whenever any form is prescribed by any written law, instrument or document which purports to be in such form, shall not be void by reason of any deviation therefrom which does not affect the substance of such instrument or document or which is not calculated to mislead".

6.8 According to Counsel, since the impugned Affidavit was only defective in form and not substance, the Affidavit was curable. Counsel referred the Court to the case of ***Intelligent Mobility Solutions Limited Vs Lamise Trading Limited***[11], wherein the Court stated that:

"...Order V Rule 14 provides a clue to what a defect in form is to the extent that it envisaged on amendment or a re-swearing of an Affidavit defective in form as the cure to the defect. For instance, if the Jurat is placed in the wrong place, it can be cured by amending or re-swearing the Affidavit. In other words, defect in form refers to an instrument containing errors or mistakes

which is capable of being corrected without prejudicing the other Party".

6.9 To further buttress his argument, Counsel argued that the defect in question is a breach of a regulatory rule and does not affect the substance or veracity of the statements made in the Affidavit. According to Counsel, the defect in question is purely procedural in nature and does not undermine the credibility or reliability of the Respondent's Affidavit.

6.10 It was Counsel's submission that the Respondent's contention was that failure on the part of the Respondent to commission the Affidavit in question is a breach of a regulatory rule which is curable. Counsel relied on the cases of the ***Republic of Botswana, Ministry of Works, Transport and Communications Rincean Design Consultants (sued As a Firm T/A Architects Vs Mitre Limited***[12], ***Leopold Walford (Z) Limited Vs Unifreight***[13] and ***Harness Vs Bell's Asbestos and Engineering Limited***[14].

6.14 It was Counsel's submission that the defect being in form and breach of a regulatory rule, the applicable laws and procedural rules governing Affidavits in the jurisdiction provide for the possibility of seeking Leave to amend or re-swear the Affidavit as long as the Petitioner would not suffer any prejudice.

7.0 APPLICATION FOR LEAVE TO WITHDRAW CROSS PETITION

7.1 The Affidavit in Support was deposed to by Chibesa Mulonda a Principal State Advocate in the employ of the Attorney General's Chambers who deposed that on 26th May, 2023, the Petitioner commenced an action against the Respondent for alleged violation of privacy and deprivation of property.

7.2 That the Respondent filed an Affidavit in Opposition and Cross Petition to the Petitioner's Affidavit Verifying Facts.

7.3 That the Petitioner in response filed an Application to set aside the Respondent's Affidavit Verifying Facts.

7.4 That the Petitioner in response filed an Application to Set Aside the Respondent's Affidavit in Opposition and Cross Petition for Irregularity.

7.5 That upon filing the said Cross Petition and Affidavit in Opposition to the Petitioner's Affidavit Verifying Facts, it was discovered that the Affidavit in Opposition was not commissioned.

7.6 That in this regard the Respondent is desirous of withdrawing the Cross Petition and said defective Affidavit in Opposition from the Court Records.

7.7 That he verily believes that the Application for Leave to withdrawal the Cross Petition and Affidavit in Opposition will not prejudice the Petitioner in any way.

8.0 SKELETON ARGUMENTS IN SUPPORT OF COMBINED SUMMONS FOR LEAVE TO WITHDRAW CROSS PETITION

8.1 It was Counsel's submission that the Application was brought pursuant to **Order 3 Rule 2** of the **High Court Rules**, **Chapter 27** of the **Laws of Zambia**. This Order provides as follows:

> ***"Subject to any particular rules, the Court or Judge may, in all causes and matters make any Interlocutory Order which it or he considers necessary for doing justice, whether such Order has been expressly asked by the person entitled to the benefit of the Order or not".***

8.2 It was Counsel's submission that the provision above confers on the Court the authority to make any Interlocutory Order which it considers necessary for administering justice. Counsel relied on the case of ***Hakainde Hichilema and Others Vs The Government of the Republic of Zambia***(15) where it was held that:

> ***"...the Courts granted what it termed as an Interlocutory Order of dismissal on the ground that it was clothed with jurisdiction to make any Order under Order 3 Rule 2 of the High Court Rules".***

8.3 Finally, Counsel submitted that the Respondent seeks from this Court an Order for the withdrawal of the defective Cross Petition and Affidavit in Opposition to enable the Respondent file a rectified Affidavit.

9.0 AFFIDAVIT IN OPPOSITION FOR LEAVE TO WITHDRAW CROSS PETITION

9.1 The Affidavit in Opposition was deposed to by Richard Musukwa, the Petitioner in this Matter.

9.2 He deposed that he has read what purports to be an Affidavit in Support of Combined Summons for Leave to withdraw Cross Petition dated 18th December, 2023 and an Affidavit in Opposition to the Petitioner's Affidavit Verifying Facts dated 8th December, 2023, deposed to by one Chibesa Mulonda (hereinafter called the Affidavit in Support) and wishes to respond as follows:

1) ***The Deponent deposed that on 29th of September, 2023, he filed a Petition in the High Court seeking various reliefs, asserting his rights and presenting his case for a fair and just resolution;***
2) ***That on the 8th of December, 2023, the Respondent responded to this Petition by filing their answer along with an Affidavit in Opposition to the Petitioner's Affidavit Verifying Facts and Supporting Cross Petition, which process was served on his Advocates on Record on the 12th of December, 2023.***
3) ***That in reaction to the said process, he instructed his appointed Advocates on Record to set aside the said process for irregularity;***
4) ***That he was aware that the Respondent in reacting to the said Application filed an Opposition wherein***

they vehemently opposed his Application to set aside their process;

5) *That the hearing date for the said Application was slated for 14th March, 2024 and after hearing both Parties, the Court in the face of Honouable Justice E. P. Mwikisa declined to render a Ruling on the issues but referred the Matter to this Court and incurred ghastly costs;*

6) *That astonishingly, on the 5th of June, 2024, his appointed Advocates on Record received the Application for Leave to Withdraw the Respondent's Cross Petition and the Affidavit in Support;*

7) *That he has been advised by his Appointed Advocates on Record verily believing the same to be true that where the Court is asked for Leave to Withdraw, the usual Order is that the discontinuing Party (the Respondent) should pay the other Party (himself) costs and that the discontinuance should not be effective until the payment of any costs ordered to be paid is settled;*

8) *That his Advocates further advised him on Record and verily believe the same to be true; that in the circumstances he can respectfully ask, that an Order be made to discontinue an action or counter claim or withdraw any particular claim made in it where either the action has been begun otherwise than by Writ or a Notice of Discontinuance or withdrawal has not been served at all or within the prescribed time or the notice was otherwise*

defective or ineffectual. On the hearing of such an Application, the Court (K) may order (I) the action or counterclaim to be dismissed or any particular claim made therein be struck out as against all or any of the Parties against whom it is brought or made on such terms as to costs...where the Court gives Leave to discontinue, the usual order is that the Plaintiff should pay the Defendant's taxed costs of the action and that the discontinuance should not be effective until the payment of any costs of the order be paid as between Party and Party (P).

10.0 SKELETON ARGUMENTS IN OPPOSITION

10.1 It was Counsel's submission that according to the learned author of **Zambian Civil Procedure, Commentary and Cases, Dr. Patrick Matibini, Volume 1** at Page 294 – 295 aptly states:

"Discontinuance or withdrawal of a claim is not a bar to commencement of another suit on the same facts as the discontinued suit. The subsequent claim must of course be issued within the relevant limitation period. All that a Plaintiff is required to do is to pay the costs of the discontinued suit or withdrawn claim before commencing a subsequent suit or resurrecting a withdrawn claim".

10.2 It was Counsel's submission that according to the **Explanatory Note** under **Order 21/5/11** of the **White Book**, the Court has the discretion to allow a matter to be discontinued. This Order states as follows:

"The Court has a wide discretion as to the terms upon which it may grant Leave to a Plaintiff or Defendant, as the case may be to discontinue or withdraw the whole or part of the action or Counterclaim. It may impose terms as to costs as the bringing of a subsequent action or otherwise as it thinks just.

(1) As to costs – the Order should provide for the payment of the costs of the action.

10.3 Finally, Counsel submitted that the authoritative sources referred to align on the principle that when a Party seeks to withdraw a claim with the Leave of Court, it is customary for the Court to Order the payment of costs incurred by the defending Party up to the point of withdrawal.

10.4 It was Counsel's submission that this practice safeguards against the misuse of discontinuance to avoid financial liability and ensures that the defending Party is compensated for the legal expenses.

10.5 It was Counsel's submission that any Party seeking to discontinue a claim should be prepared to bear the costs incurred by the opposing Party.

11.0 ISSUES FOR DETERMINATION

11.1 From the outset, we state that the issues for determination will be split into two. The first will deal with the first Application, while the second will address the second Application.

11.2 (1)ISSUES FOR DETERMINATION IN THE FIRST APPLICATION

i. *Whether the Affidavit in Opposition filed by the Respondent can be set aside for Irregularity;*

ii. *Whether the Affidavit in Opposition filed before Court was Irregular;*

iii. *Whether if we find that the Affidavit in (ii) is irregular, Leave can be granted to Amend; and*

iv. *Whether the Cross Petition filed by the Respondent was properly before Court.*

(2) ISSUES FOR DETERMINATION IN THE SECOND APPLICATION

i. *Whether the Respondent can apply to withdraw the Affidavit and Cross Petition without Leave of the Court; and*

ii. *Whether costs must follow the Application to withdraw?*

(3) ISSUES FOR DETERMINATION IN THE FIRST QUESTION

(i) *Whether the Affidavit in Opposition filed by the Respondent can be set aside by the Court for Irregularity.*

11.3 **Order 2 Rule 2** of the **Rules** of the **Supreme Court of England (White Book) 1999 Edition** states:

"An Application to set aside any proceedings or document, Judgment or Orders therein shall not be allowed unless it is made within a reasonable time and

before the Party applying has taken any fresh steps after becoming aware of the irregularity".

11.4 As guided by the above cited Order, this Court has the discretion to set aside any proceedings for Irregularity.

11.5 For the Court to exercise this discretion, the Court must be moved correctly and timely. In *casu*, this Court has been moved timely and as such the Court can exercise its discretion to dismiss the said Affidavit if it is established that it is irregular.

(ii) Whether the Affidavit in Opposition filed before Court was irregular.

11.6 It was the submission of Counsel for the Applicant that the Affidavit in Support of the Cross Petition was irregular because it was not commissioned. On the other hand, Counsel for the Respondent admitted that the Affidavit was irregular but that the said Affidavit can be relied on by Leave of the Court because the irregularity is in relation to the form.

11.7 As a starting point, we acknowledge that the use of Affidavit evidence in our jurisdiction is regulated by **Section 6** of the **Commissioner for Oaths Act Cap 33** of the **Laws of Zambia**. This Section provides:

"6. Every Commissioner for Oaths before whom any Oath or Affidavit is taken or made under this Act shall

state truly in the Jurat or attestation at what place and on what date the Oath or Affidavit is taken or made".

11.8 Further **Order V Rule 20 (g)** of the **High Court Rules Chapter 27** of the **Laws of Zambia** states:

"(g) The Jurat shall be written, without interlineation, alteration or erasure (unless the same be initiated by the Commissioner), immediately at the foot of the Affidavit, and towards the left side of the paper, and shall be signed by the Commissioner. It shall state the date of the swearing and the place where it is sworn. It shall state that the Affidavit was sworn before the Commissioner of the Officer taking the same..."

11.9 In our reading of the two pieces of legislation cited above, our understanding is that it is mandatory for an Affidavit to be sworn before a Commissioner for Oaths before whom the Affidavit is taken. This is in conformity with the holding in ***Denver Logistics Vs Swift Cargo Services Limited***[1] (cited for persuasive purposes only) where Chashi J., as he then was, held that failure to state the date and place where the Affidavit was sworn was fatal as it offended the mandatory provisions of both the **Commissioner for Oaths Act**, as well as **Order 5/20/3** of the **High Court Rules**.

11.10 Further, the case of ***Violet Kasenge Bwalya and Others Vs Zambia Telecommunication Company and Attorney***

General[2] is instructive on this point. In that case the Court stated:

> ***"I have observed that the Applicant's Affidavit aforesaid is not commissioned though it bears this Court's Seal. I am mindful the Attorney General does not pay filing fees, therefore the omission to commission the said Affidavit falls on the Court's Clerk who received the documents on the date in issue. Ordinarily uncommissioned Affidavit is not only defective but invalid".*** (Emphasis ours)

11.11 In *casu*, we note that the impugned Affidavit was not commissioned as required by **Section 6** of the **Commissioner for Oaths Act** and **Order V Rule 20 (g)** of the **High Court** cited above, hence irregular. The impugned Affidavit is accordingly set aside.

(iii) Whether if we find that the Affidavit in (ii) is irregular, Leave can be granted to Amend.

11.12 Under this argument, Counsel for the Respondents urged us to grant Leave to Amend if we find that the impugned Affidavit was irregularly before Court. Counsel referred the Court to the case of ***Sun Country Limited Vs Kearney and Another***[9] in which the Supreme Court of Zambia stated:

> ***"...if the defect in an instrument is in form, it is not a fundamental defect or irregularity and thus curable, an Affidavit afflicted by such a defect is receivable in***

proceedings under Order 5 Rule 13 of the High Court Rules which Counsel for the Appellant has quoted. That Rule authorizes Courts to receive Affidavits despite irregularities in form..."

11.13 In further urging the Court to grant leave to Amend the Affidavit, Counsel referred the Court to **Section 47** of the **Interpretation and General Provisions Act**, **Chapter 2** of the **Laws of Zambia** This Order provides:

"Save as is otherwise expressly provided whenever any form is prescribed by any written law, instrument or documents, which purports to be in such form, shall not be void by reason of any deviation therefrom which does not affect the substance of such instrument or documents or which is not calculated to mislead".

11.14 Counsel for the Respondent in further persuading us to amend the Affidavit referred us to the case of ***Intelligent Mobility Solutions Limited Vs Lamise Trading Limited***[10] where the Court stated:

"Order V Rule 14 provides a clue to what a defect in form is to the extent that it envisages an amendment or a re-swearing of an Affidavit defective in form as the cure to the defect. For instance, if the Jurat is placed in the wrong place, it can be cured by amending or re-swearing the Affidavit. In other words, defect in form refers to an instrument containing errors or mistakes which is capable of being corrected without prejudicing the other Party".

11.15 Stretching his argument further, Counsel for the Respondent vehemently submitted that Leave to Amend the Affidavit should be granted because the failure to commission the impugned Affidavit was a breach of a regulatory law. Counsel relied on the case of ***The Republic of Botswana, Ministry of Works, Transport and Communications, Rinceau Design Consultants (sued as a Firm T/A KZ Architects) Vs Mitre Limited***[11] and the case of ***Leopold Walford (Z) Limited Vs Unifreight***[12] for the proposition that a breach of a regulatory rule is curable and not fatal.

11.16 We have considered the arguments of both Parties.

11.17 We must state that **Order 5 Rule 14** of the **High Court Rules**, **Chapter 27** of the **Laws of Zambia** gives discretion to the Court to allow Parties to amend defective Affidavits. This Order provides:

> ***"A defective or erroneous Affidavit may be amended and re-sworn by Leave of Court or a Judge, on such terms as time, costs or otherwise as seem reasonable".***

11.18 It is not in dispute that the impugned Affidavit before us was not commissioned. The failure to commission this Affidavit violates **Section 6** of the **Commissioner of Oaths Act** and **Order V Rule 20 (g)** of the **High Court Rules Chapter 27** of the **Laws of Zambia**.

11.19 We must emphasize that since it is a mandatory requirement that an Affidavit must be commissioned before a Commissioner of Oaths, failure to do so makes the said Affidavit invalid (see ***Denver Logistics***[1] cited about).

11.20 Having found as above, the argument to Amend falls off because a document that is invalid cannot be amended.

11.21 In our considered view, a document that is invalid is technically dead and nothing can be done to breathe life in it. The Affidavit in issue cannot be resurrected because the defect is in substance and not form (see the case of ***Sun Country***[9] cited above).

11.22 Coming to the argument that failure to commission an Affidavit is a breach of regulatory law, our position is that the said argument is misplaced. It is misplaced because as shown above **Section 6** of the **Commission for Oaths Act**, puts it in mandatory terms that every Affidavit must be commissioned before being used.

11.23 Therefore in our considered view, breach of a mandatory requirement cannot be regulatory. Such a breach is fatal.

11.24 From the foregoing, the impugned Affidavit also cannot be amended because failure to commission an Affidavit is a mandatory requirement which is fatal if not complied with.

(iv) Whether the Cross Petition filled by the Respondent was properly before Court.

11.25 As regards the Cross Petition, Counsel submitted that the Cross Petition was incorrectly before Court because it was not signed by the Petitioner.

11.26 Counsel referred the Court to the case of ***Mutale Vs Attorney General and Another***[14] where the Supreme Court stated that:

> ***"...having come to the conclusion that it is mandatory for the Petitioner to sign the Petition personally we find that Section 96 (3) is at par with Sections 98 (3) and 101 (1) of the same Act as the consequence of filing a Petition that is not signed by the Petitioner makes the Petition misconceived..."***

11.27 As a result of the said breach, Counsel submitted that the Cross Petition should be dismissed for breaching the Rules of Court. Counsel relied on the case of ***Standard Chartered Bank (Z) Plc Vs John M. C. Banda***[4], where the Court stated that we have stated in several cases that rules of Court ought to be complied with and a Party who breaches them does so at his or her own peril.

11.28 Counsel further referred the Court to the case of ***Standard Chartered Bank Plc Vs Wisdom Chanda and Another***[5] where it was stated:

"We have stated in a plethora of cases that, any reason, no matter how well articulated, cannot of its own, cure a defect. The Party concerned must take out an appropriate Application seeking to cure a defect; and that the Court has no mandate to choose to ignore the defect and, of its own motion, proceed as if the defect never existed".

11.29 It was Counsel's submission that the Cross Petition was irregularly before Court as such the same must be set aside. Counsel referred the Court to the case of ***Ram Auerbach Vs Alex Kafwata***[6] where it was held that:

"Litigants default at their own peril since any rights available as of course to non-defaulter are usually jeopardized".

11.30 Further Counsel referred the Court to the case of ***NFC Mining Vs Techro Zambia Limited***[7] where the Supreme Court held that:

"Rules of the Court are intended to assist in the proper and orderly administration of justice and as such must be strictly followed".

11.31 In response, Counsel for the Respondent admitted that the Cross Petition was not signed by the Petitioner, therefore irregular but that the reliefs the Respondent is seeking in the Cross Petition have been overtaken by events due to the Petitioner's arrest.

11.32 We have considered the arguments of both Parties. In so doing we also note that the Application to set aside the Cross Petition was not opposed.

11.33 In answering this question, we state from the outset that the guidance in ***Mutale Vs Attorney General***[3] cited above was in relation to an Election Petition, where the **Electoral Process Act** requires that the Petitioner personally signs a Petition.

11.34 In *casu*, the Cross Petition was brought pursuant to the **Protection of the Fundamental Rights Rules 1969**, where it is not mandatory that the Petitioner signs the Petition. This was the guidance given in the persuasive case of ***John Sangwa Vs Sunday Nkonde***[14] where it was held that:

> ***"From the Protection of Fundamental Rights Rules 1969, it is clear that there is no requirement that a Petition brought under Article 128 of the Constitution should be signed by the Petitioner. The issue raised by the Respondents to the effect that it is mandatory for the Petition to be signed by the Petitioner is thus not supported by law".***

11.35 Therefore, for the avoidance of any doubt, we state that it is not a mandatory requirement that a Petition/Cross Petition brought under the **Protection of the Fundamental Rights Rules 1969** must be signed by the Petitioner. We therefore find that the Cross Petition was correctly before us.

12.0 ISSUES FOR DETERMINATION IN THE SECOND QUESTION

(i) *Whether the Respondent can apply to withdraw the Affidavit and Cross Petition without Leave of Court.*

12.1 It was Counsel's submission that this Application was brought before Court pursuant to **Order 3 Rule 2** of the **High Court Rules**, **Chapter 27** of the **Laws of Zambia**. This Order provides:

> ***"Subject to any particular rules the Court or Judge may, in all causes and matters make any interlocutory Order which it or he considers necessary for doing justice whether such Order has been expressly asked by the person entitled to the benefit of the Order or not".***

12.2 Relying on the above Order, Counsel submitted that this Court has authority to make any Interlocutory Order which it considers necessary for administering justice.

12.3 Counsel further relied on the case of ***Hakainde Hichilema and Others Vs The Government of The Republic of Zambia***[15]. Where the Supreme Court held that:

> ***"...the Court granted what it termed as an Interlocutory Order of dismissal on the ground that it was clothed with jurisdiction to make an order under Order 3 Rule 2 of the High Court Rules".***

12.4 It was Counsel's submission that the Respondent seeks from this Court an Order for withdrawal of the defective Affidavit in Opposition to enable the Respondent file a rectified Affidavit.

Further, the Respondent seeks an Order to withdraw its Cross Petition because the same has been over taken by events.

12.5 In opposing, Counsel submitted that the Respondent can only withdraw with Leave of Court. In support of this assertion, Counsel referred the Court to Dr. Patrick Matibini, the learned author of **Zambian Procedure Commentary and Cases, Volume 1 at pages 294 – 295** where it is stated:

> ***"Discontinuance or withdrawal of a claim is not a bar to commencement of another suit on the same facts as the discontinued suit. The subsequent claim must of course be issued within the relevant limitation period. All that a Plaintiff is required to do is to pay the costs of the discontinued suit or withdrawn claim before commencing a subsequent suit or resurrecting a withdrawn claim."***

12.7 It was Counsel's submission that the case of ***Zambia Revenue Authority Vs Jayesh***(16) relied on by the Respondent has never given a licence to a Party to flout the Rules of the Court. According to Counsel, the ***Jayesh***(16) case dealt with a mere anomaly while this matter is dealing with an incurable defect and therefore the principle in ***Jayesh***(16) should not be applied in this case.

12.8 We have considered the arguments of both Parties. Indeed, we agree with Counsel for the Petitioner that the Respondent needed Leave for them to make an Application to withdraw the matter

before us. In the interest of justice, we will grant Leave and allow the Respondent to withdraw the impugned Affidavit in Opposition and Cross Petition.

(ii) Whether costs must follow the Application.

12.9 In support of the Application, Counsel for the Respondent prayed that the Application to withdraw the Cross Petition be allowed and that costs be in the cause. Counsel relied on the case of ***Jayesh***[16] cited above. On the other hand, Counsel for the Petitioner argued that if this Court allows the Respondent to withdraw the defective Affidavit and Cross Petition then costs must be for the Petitioner.

12.10 As properly elucidated in **Zambian Procedure Commentary and Cases** cited above, the Court has the discretion to allow the Respondent to withdraw the Application as long as costs are paid.

12.11 In conformity with that guidance, we do hereby grant Leave to the Respondent to withdraw the defective Affidavit. Though the Cross Petition is not irregularly before us, we grant Leave to have the same withdrawn as prayed by Counsel for the Respondent.

13.0 CONCLUSION

13.1 Having considered the arguments of both Parties we agree with Counsel for the Petitioner that the Affidavit in Support of the Cross Petition was irregularly before Court because it was not commissioned. As for the Cross Petitioner, we find that the same

was correctly before us because it is not mandatory that a Petition brought under the **Protection of Fundamental Rights 1969** should be signed by the Petitioner.

13.2 Having found that the Affidavit in Support of the Cross Petition was irregularly before Court and that the Respondent has applied to withdraw the Cross Petition as it has been over taken by events, we grant Leave to the Respondent to withdraw the two documents but condemn the Respondent with costs which are to be taxed in default of agreement.

DELIVERED AT LUSAKA THIS 4TH DAY OF FEBRUARY, 2025.

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P. K. YANGAILO
HIGH COURT JUDGE

.....
A. MALATA-ONONUJU
HIGH COURT JUDGE

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S. V. SILOKA
HIGH COURT JUDGE