MAYOR LOGISTICS (PRIVATE) LTD
and
JUSTICE MAYOR WADYAJENA
versus
ZIMBABWE ANTI-CORRUPTION COMMISSION
and
PROSECUTOR GENERAL OF ZIMBABWE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 30 January; 7 February; 5 March & 8 May 2024

Opposed Court Application

T L Mapuranga, for the applicant
N M Phiri, for the 1st respondent
A Chogumaira, for the 2nd respondent

CHITAPI J: The parties are named in the heading to this court application. The first applicant is a duly incorporated company in terms of the laws of Zimbabwe. The second applicant is a director of the first applicant. The second applicant has petitioned the court on behalf of the first applicant duly authorised thereto by a resolution of the first applicant's board of directors. The second applicant also petitions the court in his personal capacity.

The first respondent is a statutory body established and incorporated in terms of s 254 of the Constitution of Zimbabwe. The first respondent's operations are governed by the Anti-Corruption Commission Act [*Chapter 9:22*]. The functions of the first responded are set out in s 255 of the Constitution. The functions are further added to or supplemented by other functions listed in s 12 of the Anti-Corruption Commission Act.

The second respondent is the National Prosecuting Authority. It is a statutory body established by s 258 of the Constitution. The second respondent's operations are fully set out and directed in terms of the National Prosecuting Authority Act [*Chapter 7:20*]. The principal function of the National Prosecuting Authority is to institute and conduct criminal proceedings on behalf

of the State and carry out necessary functions which are incidental to the instituting and conduct of the prosecuting functions. These and other functions of the National Prosecuting Authority are set out in s 12 of the National Prosecuting Authority Act.

The first and second respondents seek the following relief in this application:

> "WHEREUPON after reading documents filed of record and hearing counsel:
> IT IS ORDERED THAT:
> 1. Applicant's property seized from them by virtue of and in terms of the property seizure order given on the 22nd of August, 2022 in HACC 18/22 shall with immediate effect, be returned to them.
> 2. There shall be no order as to costs."

The background to the application is that the second respondent in the exercise of prosecution power reposed in it and carried out through the Prosecutor General instituted criminal charges against the applicants and five other accused persons in the Harare Magistrates Court on 16 August 2022. The other six accused were Pius Manamike, Maxmore Njani, Fortunate Molai, Chiedza Danha and Pierpoint Monroix (Pvt) Ltd. They were, under case number HACC 393-399/22, charged on three counts of offending s 8(3) of the Money Laundering and Proceeds of Crime Act [*Chapter 9:24*]. In very broad terms the accused persons were alleged to have acted in common purpose and to have created false purchase transactions relating to orders for the supply of cotton ties for or on behalf of a statutory company, Cotton Company of Zimbabwe. Thereafter it was alleged that the applicants caused payments to be made on false invoices. They then laundered the money for their benefit. The transactions alleged involved several millions of United States dollars which resulted in a loss to Cottco as the alleged transactions for which payment was made were fraudulent. The accused were also under case number ACC 400-406/22 charged with three counts of fraud related to the same transactions. The intricate details of the criminal charges do not require resolution and are marginally relevant to the relief sought herein. Consequently this judgment does not deal with the details of the charges in any great detail.

Subsequent to the appearance of the accused in court and their placement on remand, the second respondent in the discharge of its lawfully authorised ancillary functions to prosecution of criminal cases filed a chamber application *ex-parte* under case number HACC 18/22 in the High Court on 19 August 2022 against the applicants as respondents. The application was made in terms of s 47 of the Money Laundering and Proceeds of Crime Act, [*Chapter 9:24*]. Section 47 provides

for seizure of property orders. It is necessary to quote the whole of s 47 because of its relevance to the determination of this application. It reads as follows:

> "**47. Property seizure order under Chapter IV**
> 1) The court may, on application by the Prosecutor-General make an order in conformity with sub-section (7) (called a "property seizure order") to search for and seize specified property that is the subject of an interdict, or property which the court reasonably believes is tainted property or terrorist property, if the court is satisfied that –
> *(a)* in the case of specified property that is the subject of an interdict, an interdict has not been effective to preserve the property; or
> *(b)* in the case of property that the court reasonably believes is tainted property or terrorist property, there is a reasonable likelihood of dissipation or alienation of the property if the order is not granted.
> 2) A property seizure order shall also grant power to a person named in the order to enter any premises in Zimbabwe to which the order applies and to use all necessary force to effect such entry.
> 3) If during the course of searching under a property seizure order, an authorized officer finds any property or thing that he or she believes on reasonable grounds –
> *(a)* will afford evidence as to the commission of an offence; or
> *(b)* is of a kind which could have been included in the order had its existence been known of at the time of application for the order;
>
> he or she may seize that property or thing and the seizure order shall be deemed to authorize such seizure.
>
> 4) Property, other than evidence of other crimes, seized under a property seizure order, may only be retained by or on behalf of the Prosecutor-General for thirty days.
> 5) The Prosecutor-General may subsequently make application for an interdict in respect of such property.
> 6) If the authorised officer is an inspector who believes that the execution of an order under this section may give rise to a breach of the peace or other criminal conduct, the inspector may request that he or she be accompanied by one or more police officers who will assist in execution of the order.
> 7) A property seizure order shall specify –
> *(a)* the purpose for which the order is issued, including the nature of the relevant offence; and
> *(b)* the kind of property authorised to be seized; and
> *(c)* the date on which the order shall cease to have effect; and
> *(d)* the time during which entry upon any land or premises is authorised.

The aforesaid *ex-parte* application made by the second respondent was successful and resulted in KWENDA J issuing the following order on 22 August 2022:

> "**IT IS ORDERED THAT**:
> 1. Victoria Masimba, an Investigating Officer in the employ of the Zimbabwe Anti-Corruption and or other law enforcement Officers of the law proper to the execution of warrants be and are hereby authorized to enter into the business and residential

precincts of 1st & 2nd respondents for the purpose of identifying, seizing and securing the following property;

i. A Lamborghini (SUV) vehicle registration number "Mayor"
ii. A Freightliner (Horse) Vehicle registration number AEZ 6137
iii. A Freightliner (Horse) Vehicle registration Number AEZ 6136
iv. A Freightliner (Horse) Vehicle registration number AEZ 9244
v. A Freightliner (Road Tractor) Vehicle registration number AEZ 6255
vi. A Freightliner (Road Tractor) Vehicle registration number AEZ 6256
vii. A Freightliner (Horse) Vehicle registration number AEZ 6139
viii. A Freightliner (Horse) Vehicle registration number AEZ 6138
ix. A Freightliner (Horse) Vehicle registration number AEZ 6116
x. A Freightliner (Horse) Vehicle registration number AEZ 6114
xi. A Freightliner (Road Tractor) Vehicle registration number AEZ 6134
xii. A Freightliner (Horse) Vehicle registration number AEZ 9247
xiii. A Freightliner (Road Tractor) Vehicle registration number AEZ 6254
xiv. A Freightliner (Horse) Vehicle registration number AEZ 9245
xv. A Freightliner (Horse) Vehicle registration number AEZ 9246
xvi. A Freightliner (Horse) Vehicle registration number AEZ 9243
xvii. A Freightliner (Horse) Vehicle registration number AEZ 6115
xviii. A Freightliner (Horse) Vehicle registration number AEZ 6121
xix. A Freightliner (Horse) Vehicle registration number AEZ 6125
xx. A Freightliner (Horse) Vehicle registration number AEZ 6126
xxi. A Freightliner (Road Tractor) Vehicle registration number AEZ 6133
xxii. A Freightliner (Horse) Vehicle registration number AEZ 6135
xxiii. A Freightliner (Road Tractor) Vehicle registration number AEZ 6134

2. The purpose of this property seizure order is to preserve the said property from dissipation or alienation pending investigations into allegations of fraud and money laundering as defined in terms of section 136 of the Criminal Law (Codification & Reform) Act and Section 8 of the Money Laundering and Proceeds of Crime Act [*Chapter 9:24*].
3. The property seizure order shall be executed between 0800 hours and 1600 hours.
4. This order shall remain in force for thirty days during which period this seizure order must be executed and thereafter any such property needed for future criminal proceedings or liable for confiscation in terms of the Money Laundering and Proceeds of Crime Act [*Chapter 9:24*] may further be dealt with in accordance of the law.
5. There shall be no order as to costs."

An analysis of the order shows that it authorised a named officer of the first respondent, Victor Masimba, described as an investigating officer and other law enforcement officers authorised to execute warrant to enter the business places and residences and precincts thereof of the first and second respondents "for the purpose of identifying, seizing and securing the property listed (i) to (iii)." Critical to this application is para 4 of the court order. It clearly gave the order a life span of thirty days for its execution calculated from date of issue of the order. Thereafter any

property from the listed property which is required for future criminal proceedings or liable to confiscation in terms of the Money Laundering and Proceeds of Crime Act, [*Chapter 9:24*] had to be dealt with in accordance with the law.

The limitation of time of thirty days during which the order would remain in effect unless the seized property was dealt in accordance with the law was not a coincidence because it was deliberately inserted by the learned judge to conform with the provisions of subss 4 and 5 of the Money Laundering and Proceeds of Crime Act. The two subsections are highlighted by reference. It suffices to simply mention that the seized property may only be retained by the second defendant for no more than thirty days from the date that the court grants a seizure order unless the second respondent applies for an interdict in respect of the property or if the property affords evidence of other crimes.

The gravamen of this application is that the respondents have continued to hold on to the property beyond thirty days and that it is their intention to continue holding on to the property. The applicants averred that the reason for the *ex-parte* application was to afford investigations to be carried out on the charges for which the applicants had been arrested and appeared in court for and were placed on remand. It is common cause that the charges against the applicants were withdrawn before the plea on 6 February 2023 which meant that there were no criminal proceedings pending before the courts against the respondents as at the date. The withdrawn charges had led to the *ex-parte* application before KWENDA J being made. The applicants therefore seek a release of the seized trucks arguing that no legal basis now exists to justify the continued withholding of the trucks.

The applicants contended that they made due demand to the first respondent for the release of the trucks by letter dated 8 February 2023. A copy of the letter was attached to this application as Annexure 'F'. In that letter the applicant's legal practitioners requested that the trucks should be released to them since the applicants had been removed from remand. The letter aforesaid was responded to by the first respondent by letter dated 28 February 2023 given under the hand of its Executive Secretary, S. Tongogara. The letter reads as follows in material part:

"Reference is made to the above matter and your letter dated 08 February 2023.

> Kindly note that the Commission is conducting Parallel Financial Investigations being carried out to which your client was removed from remand. These proceedings are in terms of the Money Laundering and Proceeds of Crime Act, [*Chapter 9.24*] and are conducted separately from criminal investigations.
> Accordingly, please be advised that the Commission cannot release the said property to your client as the same was seized legally through a Property Seizure Order HACC 18/22 by Justice Kwenda…"

In response to the application both the first and second respondents filed opposing affidavits. Both affidavits raised preliminary points and also addressed the merits of the application. The first respondent raised two points *in limine* which were firstly that the applicants' founding affidavit was fatally defective because the deponent Justice Major Wadyajena did not date the affidavit when he swore to and signed it before a commissioner of oaths. The first respondent on that argument averred that there was no application before the court and that the application should be dismissed with costs. Note is made for the benefit of the first respondent's counsel that once the argument made is that there is no application before the court on account of a fatal defective as alleged, then there is no application before the court and consequently nothing to dismiss. The correct prayer should in such circumstances be a prayer for the defective application to be struck off the roll. See *Vanledge Investments (Pvt) Ltd & 3 Ors* v *Chemical Procurement Services Africa (Private) Limited* SC 5/24 where at para 20 of the judgement BHUNU JA stated:

> "20. It is trite that where an application is fatally defective, it is a nullity that must be struck off the roll. Costs follow the result…"

The second point *in limine* taken by the first respondent was that the applicants' draft order was defective in that it did not identify the goods which the applicants seek to have released to them. It was averred that it was not sufficient for the applicants to simply state that they claimed the release of property seized by order dated 22 August 2022. It was contended that the property whose release was sought should have been clearly identified in the draft order. It was also contended that the application itself did not identify the property. It was contended further that the applicants ought to have set out the property which was actually seized and to identify it. On

account of this perceived defect, the first respondent prayed that the application be dismissed, this time, with costs on the punitive scale of legal practitioner and client.

I consider it convenient to dispose of the issue of the scale of costs at this stage. It is trite that costs on the legal practitioner and client scale are punitive in nature. The litigant who seeks costs on such scale is required to justify them. In the case *of Grief Investments (Pvt) Ltd & Anor* v *Grand Home Centre (Pvt) Ltd* HH 12/18 MUSHORE J discussed the subject of legal practitioner and client costs and when they may be awarded. Notably the learned judge stated as follows on p 2 of the cyclostyled judgment:

> "In essence, the cases establish a position that courts should award costs at a higher scale in exceptional cases where the degree of irregularity, bad behaviour and vexatious proceedings necessitates the granting of such costs and not merely because the winning party requested for them. Costs should not be a deterrent factor to access justice …"

I should therefore observe at this stage that the prayer for costs on the higher scale pleaded without being clothed with facts to justify them is anomalous and an indication of bad pleading by the pleader. Thus, in my judgment on this point, whatever the result of the application, costs either way will be considered and if merited as being proper to award, the scale of the costs will be the party and party scale.

Turning to the substance of the first point *in limine* the applicants and in response to the attack on the validity of the applicants founding affidavit, the second applicant firstly took objection to the opposing affidavit and averred that the deponent to the first respondent's affidavit, Sukai Tongogara who described herself as the first respondent's executive secretary had no authority to represent the first respondent. In particular it was averred that there was no evidence that the first respondent was aware of the litigation or that it had authorised that it be instituted. The applicants prayed for the striking off of the application with costs. In relation to the issue of the second applicant's affidavit being invalid for want of a date when the affidavit was sworn to, the applicants averred that the founding affidavit was properly commissioned and dated. What the parties did was akin to the biblical saying, one should not seek to remove a speck in the others eye when one has a log in their eye. One removes the log in their eye first. The applicants in answer to the attack on the applicant's affidavit was to attack the first respondent's affidavit in turn on the basis of want of authority on the part of the deponent to represent the first respondent.

Argument arose between counsel as to whose point *in limine* should be heard first, that is whether it should be the one on the invalidity of the founding affidavit or the one on the *locus standi* of the deponent to the first respondent's affidavit. Mr *Phiri* argued that the first respondent's objection should be heard first and a ruling given thereon first because it is the first respondent who first raised its objection even by date of filing. The applicant's argument was that both points *in limine* should be decided simultaneously.

In my view, the argument on which point is decided first is hair splitting and is easily determined by application of logic and common sense applied to rules of practice and procedure. The first consideration should be for the court to appreciate that is has before it an opposed court application. For such application to be deemed complete it must comprise constituent documents as provided by the rules. Significantly it must comprise at least three sets of affidavits being the founding, opposing and answering affidavits, the last being filed at the discretion of the applicant if the applicant is advised to answer the opposing affidavit. The court therefore runs through the application to determine whether the application is properly constituted and this is the starting point. Thus, where any of the constituent affidavits are attacked for validity, the approach of the court with respect should be to determine all the objections of form and validity at the same time so that the court determines after ruling on each of the filed documents whether it has a valid application or valid opposition as the case may be. The nature of the objections in this regard boil down to the first respondent saying there is no valid founding affidavit and the applicants saying there is no valid opposition. The court if it upholds the objection that there is no valid founding affidavit depends for this finding upon considering the opposing affidavit which is also challenged as being invalid. It appears to me that bearing in mind that the three affidavits must all be valid in form and efficacy, the determination of the validity of the founding affidavit is that if it is invalid the question is, what was the source of the challenge. If the source was the opposing affidavit which itself is challenged for validity in the answering affidavit then it appears that the court should not rely on the opposing affidavit unless its validity is also determined because a failure to do so would mean that the court in upholding the objection raised in the opposing affidavit pre-supposes that the opposing affidavit itself is valid without determining the validity of the challenge made against it. I therefore posit that in the case of opposed court applications, where both parties attack

the affidavit(s) of the other for validity and form the court must determine the challenge in respect of each affidavit because determining one on the basis of a challenge raised in the other's affidavit, which is also challenged puts the court in a quandary in that unless it also rules on the validity of the challenged affidavit which has raised the objection it would then have determined the objection using facts or allegations from an affidavit which may be a legal nullity.

The issue of which challenge must be dealt with first was in my view hairsplitting because the parties are supposed to file valid affidavits as to form and substance, the content being a different issue. Therefore, I had a novel situation whereby the first respondent alleges invalidity of the founding affidavit and the applicant when served with the first respondent's affidavit also challenges the opposing affidavit for validity. The question for the court is a simple one. Have the parties filed valid affidavits. It cannot be a question of who filed the first invalid affidavit because the objection will be based on an alleged invalid affidavit as well. Thus the validity of that party's affidavit must likewise be determined. The approach in my judgment, will be that, where challenges are made to the validity of the affidavits which comprise a court application the court must determine the validity of each of all the challenges to the form and validity before considering the merits of the issues raised therein.

In regard to the determination of the objections, on the first respondent's objection that the founding affidavit was not dated, it turned out that the one which the court was using was dated and signed before the commissioner of oaths. The first respondent's counsel Mr *Phiri* averred that the one which was served on the first respondent was not dated. The application *in casu* was filed on 5 July 2003 before the electronic filing system took effect. Filing and service was done physically. The parties were advised to check with the registrar on the status of the pleadings filed in the application. Mr *Phiri* had appeared to suggest that the copy on the record which the court was using could have been doctored before the record was referred to the judge. The submission presented itself to me as preposterous but not an impossibility. However, there was also another safety net in that even before the electronic filing system was introduced, documents filed at court were scanned. The hearing was postponed to allow the parties to approach the Registrar together on 2 February 2024 for authentication of the court record by reference to the one placed before me and the scanned record.

On resumption of the hearing on 7 February 2024, the parties advised that they had inspected the record and noted that the founding affidavit on record was properly executed by the deponent. Mr *Phiri* abandoned the objection after however protesting that the applicant needed to have ensured that the copy served on the first respondent was properly executed. Mr *Phiri* was justified to protest because a party which is served with a document filed at court is justified to presume that the copy served upon such party is similar in all respects to the one filed. I however caution that when a party is served with a pleading which appears not to be in order, the party should at least investigate that the copy filed at the court is not similarly defective and should further alert the other party who may if advised withdraw the defective pleading or take other remedial action and serve the parties from incurring further costs.

It is acknowledged that whilst in relation to action proceedings there is need to first complain by letter before filing any exception to a pleading as provided for in r 42(3), there is no bar to a party doing so in relation to application procedure where the form and or substance of an affidavit or other document is to the challenging party objectionable. I must however make it clear that the suggestion I make herein is advisory and informed by considerations of the role which the court may play to ensure that there is minimal delay in disposing of cases filed before it. This notwithstanding, it remains imperative that parties to an application must ensure that they are meticulous in preparing their affidavits and executing them. The court may not easily condone without application properly made for its consideration infractions of rules especially where peremptory rules have been flouted. In this regard, the dicta of MUSAKWA J (as then he was) in the case of *Tawengwa Mukuhlani* & *14 Ors* v *Sports and Recreation Commission* & *9 Ors* HH 469/19 where the learned judge noted that a litigant should not adopt a wrong form and only reawaken after a point is taken by the party is a guide. The same observation applies in my view to the filing of defective affidavits.

The next objection which Mr *Phiri* persisted in was a new one not previously raised in the opposing affidavit. Counsel submitted that there was no resolution of the first respondent to defend this matter filed of record although the founding affidavit and index referred to the resolution as an attachment, annexure 'A' to the founding affidavit. Mr *Phiri* indicated that it was only upon the scrutiny of the court record as directed by the court when parties were asked to examine

whether the founding affidavit filed of record was dated that he noted that annexure 'A' listed as the resolution of the first respondent nominating the second applicant as its agent to execute the affidavits of the first respondent was not attached. Mr *Mapuranga* objected to the raising of this point of law on the basis that it was improper to raise the point of law in heads of argument, the first respondent having filed supplementary heads of argument, again without leave. It is trite that whilst a point of law can be raised by a party at any stage of the proceedings, there are requisites to be followed in raising the point of law. Of most significance is that the point of law must arise from the pleadings – see *Zimasco (Private) Limited* v *Maynard Farai Farikano* SC 06/14 at p 7 of the cyclostyled judgment wherein GARWE JA (as he was then) stated:

> "It is settled law that a question of law can be raised at any time, even for the first on appeal, as long as the point is covered in the pleadings and its consideration involves no unfairness to the party against whom it is directed. See *Ahmed* v *Manufacturing Industries (Pvt) Ltd* SC 254/96 at p 17 of the cyclostyled judgment and *Muchakata* v *Nitherburn Mine*."

The party that wishes to raise the point *in limine* must *inter alia* give notice to do so. The raising of the point of law must not cause prejudice to the other party's case. Mr *Mapuranga* strenuously objected to the raising of the point in law and submitted that the point of law did not arise from the affidavits constituting the court of application and further that no proper notice was given. Mr *Mapuranga* also submitted that the nature of the point of law to the extent that it did not arise from the affidavits could only be introduced by way of application to file a further affidavit raising the new issue. To the credit of Mr *Phiri* after appreciating the difficulties which faced him in relation to how the first respondent had sought to raise the point, counsel abandoned the point.

There was then left one point *in limine*. On this one the first respondent was joined by the second respondent. The point *in limine* was that the draft order was defective because it did not identify the goods whose release the applicant was seeking. The first respondent accepted that the applicants had in their draft order sought an order of release of property seized in terms of the property seizure order dated 22 August 2022. The first respondent averred that the draft order should have identified the property which was actually seized. In other words the first respondent was attacking the initial draft order for lack of specificity or individual details of the property because the applicants referred to the draft order which the court had granted in seeking relief.

The second respondent in taking the same objection averred that there was no cause of action against it as warranting the relief sought. It was averred that the property whose release is sought was not identified nor the quantities. It was averred that the application should be dismissed because of want of the property description. It was also averred that the applicants had not highlighted the law on which they relied for their application thus rendering the application defective at law. In a perfunctory approach and somewhat typical of what litigants do as a matter of course, the second respondent prayed that costs be awarded on the legal practitioner client scale in the event that the application is dismissed. No justification for punitive costs was pleaded. The same criticisms I made of the first respondent's prayer for costs on the higher scale apply to the second respondent's prayer and are applied by reference to avoid repeating the same issues.

The applicant responded that the cause of action was clear on the papers because all that the applicants were seeking was the release or vindication of their property attached pursuant to a court order which had lapsed by operation of law. In relation to the draft order the applicants averred that the draft order was simply an expressed wish of the applicants and did not bind the court. The applicants argued that the court was entitled to grant an order which was not necessarily the same as that prayed for in the draft order.

The first respondent's counsel cited in the heads of argument the case of *Matarisi T* v *United Family International Church & Anor* HH 445/12 at p 6 of the cyclostyled judgment wherein the court stated:

> "Litigants are reminded that while the draft order is only a draft and does not bind the court, it must be based on the case pleaded. It is not a mere formality for applicants to file draft orders in application proceedings. The draft order must properly assist the court as to the relief being sought by the applicant."

Reference was also made to the case of *CRG Quarries (Pvt) Ltd* v *Provincial Mining Director N.O. & Ors* HH 700/200 wherein the court made a similar dicta in substance. The simple position appears to me to be that albeit a draft order being a draft and is not binding on the court, it must be meticulously drawn. Whilst the court is at large to issue an order disposing of the case without being bound to the draft order the amended draft order must not be based on matters not pleaded in the application. The same applies to the parties when they seek an amendment to the draft order. The amendment must be in line with the facts averred in the affidavits.

Ms *Chogumaira* for the second respondent stood by her two points *in limine* which were firstly that there was no cause of action disclosed in the application and secondly that the applicant's draft order was defective. Counsel did not motivate the objections beyond what was stated in her heads of argument which also dealt with the issue that the application should have cited the relevant provisions of the law under which it was brought. Reliance was placed by counsel on my judgment in the case of *Bushu* v *GMB* HH 326/17 in which in the dicta therein, I posited that albeit the rules did not specifically provide for the formality, where a court application is made on the basis of a statutory provision, the provision or rule should be cited *ex facie* the application or at least a reference to it be made in the founding affidavit to enable the court to easily refer to the provision and attune to its jurisdiction and not have to shuffle through the papers to find out the statutory provision or rule on which reliance is made for the application or counter application as the case may be. An application cannot however be dismissed on the basis of the non citation of the statutory provision or rule because the rules do not make this peremptory. I must also observe that Mr *Mapuranga* submitted that it is not permitted to plead law in the affidavits but facts. The submission must be explained. There is a world of difference between pleading the law, that is, stating what the law is and seeking to apply it to the facts and citing a provision. To state that an application is made in terms of a cited provision or rule of the law is an allegation of fact. The court on reading such allegations then looks for the cited law appreciate its import before ravaging through the application.

In casu, the applicants essentially seek a declaratur and consequential relief. There is reference in the founding affidavit to the court order issued by KWENDA J and a copy of the application which led to the granting of that order. The applicants also referred to ss 47(4) and (5) of the Money Laundering and Proceeds of Crime Act, [*Chapter 9:24*]. It was not difficult to appreciate the law which the court was being called upon to acquaint with as the one to apply to the application. The second respondent did not allege that it was prejudiced in manner nor that it was unable to properly respond to the applicant's claim on account of the alleged omission. In any event as already noted the dicta in the *Bushu* case has to do with good practice expected of an astute and discerning legal practitioner who appreciates the intricacies of dispute adjudication by

the courts. The second respondent's objection had no merit because the applicants sufficiently identified in the founding affidavit, the law which was at play.

In relation to the objection on the draft order, it appeared to me that the objection on its validity was not well taken. It only needed one to appreciate the paper trial as set out in the founding affidavit. It was simple and clear. The founding affidavit chronicled the background to the application. The applicants attached a copy of the application pursuant to which KWENDA J granted a seizure order. A copy of the order granted by KWENDA J was attached to the founding affidavit. The order dated 22 August 2022 listed the applicants' trucks whose seizure was authorised. It follows that the draft order refers to an order which lists the property whose release is sought. To argue that the applicants ought to have listed which of the trucks had been seized after the order was granted would have amounted to a smarter and discerning pleading. In substance however, the application concerns a declaration that the continued seizure of the applicants trucks have become illegal because the order which led to the seizure had lapsed or superannuated so to speak. In such a case the itemisation of individual trucks as argued by the applicants became superfluous because in essence whatever was seized must be released if the order authorising the seizure has ceased to have the force of law. The way in which the draft order was couched is fine. The respondents did not apart from objecting to it argue that the draft order did not relate to issues raised in the founding affidavit nor did they allege any prejudice to their defences caused by what they perceived as inelegant draftsmanship of the draft order. One must bear in mind, as much as the parties are *ad idem* on the issue that in the final analysis, the court gives the final order as the justice of the case demands and not as the applicant or respondent's demand unless the party's draft order coincides with the courts perceived order.

The above reasons on points *in limine* justify the order of dismissal of the points *in limine* which I granted on 5 March 2024 and intimated that the reasons for the dismissal would be contained in the final judgment. I must in passing express my concern that the points *in limine* raised by the respondents were hairsplitting, niggling and an exercise in fault finding as opposed to being motivated by the desire to have the case dealt with to finality. They related to issues which the parties could have dealt with themselves like checking the court records for the authenticity of attested affidavits and exchanging resolutions of the juristic bodies to be represented by deponents

to affidavit. The legal practitioners already appreciated the approach of the court to the issue of objections on the authority of an agent to represent the principal where a corporate body is litigating. It amounts to grandstanding on the part of counsel to come to court and raise the issue of a resolution and immediately abandon the point when a resolution is produced. It would make sense if the argument was that counsel had demanded for a resolution and the request was refused. Objections should always be aimed at promoting the litigation process and should at least conduce to the determination of the matter in substance. The case of *Telecel Zimbabwe Ltd* v *Portraz* HH 447/15 is authority that it is an issue of unethical conduct by a legal practitioner to raise points *in limine* for the sake of it and that points *in limine* must have merit and in addition carry a likehood that they will dispose of a case.

On the merits, the matter has no disputes of fact of note. The background and the respondents contentious have been dealt with already. The first respondent did not dispute that it seized or attached the applicants' trucks pursuant to the order of KWENDA J. The applicants do not have pending charges related to the seizure of the trucks as was alleged in the application made before KWENDA J. The first respondent in the opposing affidavit in para 22 stated that the applicants are currently facing criminal proceedings of money laundering and fraud and have not been acquitted. This of course is not true because the charges against the applicants were struck off and a further remand refused. The implication of the withdrawal of the criminal charges was and is that the applicants do not have a pending case before the court. Investigations may well be going on in the background. However that would not detract from the fact that the applicants are no longer before the courts for the charges for which they were brought before courts, being the same charges which informed the basis of the application for seizure of the trucks which are the subject of this application.

The crisp issue for determination is whether or not there is still legal justification for the first respondent to continue to hold the trucks and whether the trucks should be released to the applicants as prayed in the draft order. The starting point is obviously the order of KWENDA J. It is common cause that the order had a life span of thirty days. The order explicitly provided that its execution should be carried out within that thirty day period. The order was duly executed within

the thirty days. The purpose of the order was set out by the learned judge in para 2 thereof as follows:

> "2. The purpose of this property seizure is to preserve the said property from dissipation or alienation pending investigations into allegations of fraud and money laundering as defined in terms of s 136 of the Criminal Law (Codification & Reform) Act and section 8 of the Money Laundering and Proceeds of Crime Acts [*Chapter 9:24*].

Paragraph 4 of the order was also expressed in clear terms as follows:

> "4. This order shall remain in force for thirty days during which period this seizure order must be executed and thereafter any such property needed for future criminal proceedings or liable for confiscation in terms of the Money Laundering and Proceeds of Crime Act [*Chapter 9:24*] may further be dealt with in accordance of (sic) the law."

The import of the order was that the first respondent acting through its investigating officer Victor Masimba and/or other law enforcement were authorised to seize the property listed in the order. The investigating officer and other law enforcement officers with an interest were given a thirty day window to investigate the fraud and money laundering allegations against the applicants. Beyond the thirty days, the seizure if still required by the first and/or second respondent had to be sanctioned in terms of the law. The order cannot be holding in perpetuity. To do so would offend s 68 of the Constitution which entrenches the rights to property and its use and possession.

Simply put, the purport of para 4 of the order was that the respondents had thirty days within which to decide if any seized property was or would be required for future criminal proceedings or would be liable for confiscation in terms of the Money Laundering and Proceeds of Crime Act. Where any such property was determined by the respondents to be necessary for future criminal proceedings or as being liable to be confiscated in terms of the Money Laundering and Proceeds of Crime Act, the respondents had to deal with such property according to law.

The first respondent in the opposing affidavit averred that the investigations against the applicant were on going. In para 16 of the affidavit, the first respondent averred that it was "carrying out investigations into the alleged financial activities by the applicants, which is in pursuance of paragraph 2 of the court order." Indeed the first respondent was authorised to seize the trucks and to investigate the allegations of fraud and money laundering. What both the first and second respondents did not address is the purport of para 4 of the order. It seems to me that therein lies the crux of the matter. The issues of the removal of the applicants from remand are a secondary

consideration. This issue is could the first and/or second respondents be lawfully entitled to hold seized, the trucks in question beyond the period of thirty days without having decided on which of the seized property was needed for future proceedings or liable to confiscation in terms of the Money Laundering and Proceeds of Crime Act and seeking to deal with such property in accordance with the law. The first and second respondents appear to have simplistically interpreted para 4 of the order of KWENDA J to mean that for as long as there were ongoing investigations of whatever nature against the applicants which could have something to do with the seized trucks, the trucks would remain seized without question. Such thinking or reasoning is wrong.

The applicants counsel in the heads of arguments correctly propounds the position and the law and in a salutary gesture, I propose to and hereby adopt and incorporate the submissions made in para(s) 3.1 – 3.3 and 37 – 38 *ex tenso*. Counsel wrote as follows:

> "3.1 The order of KWENDA J contemplates that circumstances may exist on the basis upon which it may become important for the property to be held beyond the thirty day period. It accordingly provides in its paragraph 4 that if the property is to be required for "future criminal proceedings" or is otherwise liable to forfeiture, it must be dealt with in terms of the law.
>
> 3.2. The law contemplated by the order is section 47(5) of the Money Laundering Act which provides that a property seizure order having been granted, the Prosecutor General may subsequently make an application for an interdict in respect of the same property. Such an application must be brought in terms of section 40(1) of the Money Laundering Act. Any interdict granted by the court may itself not be in perpetuity but is subject to clear time lines provided for in section 49(1) of the Money Laundering Act.
>
> 3.3 The State had the right to continue its detention of the property. It however, ought to have brought an application for an interdict as required by law. In such an application, it would have been required to satisfy all the requirements bearing on the grant of an interdict- **Setlogelo v Setlogelo 1914 AD at 227, PTC Pension Fund v Standard Chartered Merchant Bank, Zimbabwe Ltd & Anor 1993 (1) ZLR 55 (H) at 63A-C**. This it has not done.
>
> 3.7 The result is that the continued detention of the property is not on the authority of any law. It could have been legalized but has not been. What is required of respondents is to show that they sought the extension of the order. This they have not done.
>
> 3.8 It is also submitted that the extension of the order can only be sought before the expiry of the 30 day period. Upon the lapse of the 30 day period, continued detention becomes unlawful."

From the above, it is clear that the respondents had a window to return to court to apply for a continued seizure of the property. They did not do so. The seizure is no longer backed by any lawful order. The first respondent submitted on the authority of the dicta in the judgment of

KWENDA J in the case of *Manamike* & *Anor* v *Prosecutor General* HH 29/23 to argue that the continued seizure of the trucks was justified. The learned judge stated as follows:

> "The fourth complaint is that the court order contains an error in that it allowed the seized property to be held for more than 30 days which is in excess of the period prescribed by law. The applicants may have misread s 47(4) of the Act. It is only property, other than evidence of other crimes, seized under a property seizure order which may not be retained by or on behalf of the Prosecutor General for more than thirty days."

Section 47(4) of the Money Laundering and Proceeds of Crime Act provides as follows:

> "Property other than evidence of other crimes, seized under a property seizure order, may only be retained by or on behalf of the Attorney General for thirty days."

There is no ambiguity in the provision quoted. "The key words are …other than evidence of other crimes …." The respondents who seek to justify the continued seizure of the property held under a seizure order beyond thirty days have the onus to prove on a balance of probabilities that the property provides evidence of other crimes. The question that must be addressed is "what other crimes" and how does the property provide evidence of the particular other crime(s). In this jurisdiction crimes are well defined. The Criminal Law (Codification & Reform) Act [*Chapter 9:23*] codified the criminal law crimes. To be added thereto are crimes created by other enactments. Therefore the respondents are required to state the specific crimes for which the seized trucks would afford or provide evidence to support the crimes and to indicate the connection between the seized goods and the particular crimes(s).

The first respondent through the affidavit of its Executive Secretary Sukai Tongogara did not really address the issues that arise upon the application of s 47(4). She stated in para 10 of her opposing affidavit as follows:

> "10. AD PARA 10
> No issues arise save to state that the criminal proceedings against the applicants are still pending. There are extra-terrestrial investigations involving multiple jurisdictions, which co-operation from these governments has been sought. The criminal investigations are still ongoing. The applicants have not yet been acquitted of the alleged crimes made reference to in paragraph 7 which led to the seizure of the property."

Quite clearly Ms Tongogara was stating that the investigations were ongoing in respect of the same crimes for which the seizure order was made after the applicants had been placed on remand. If the trucks as evident from the above were still required in the continued investigation

as stated, then the respondents were advised to follow the provisions of s 47(5) of the Money Laundering and Proceeds of Crime Act. They did not seek an interdict for the continued seizure of the trucks. They cannot rely on KWENDA J's order whose life span lapsed.

On the other hand, whilst the respondents could rely on s 47(4) as quoted wherein the onus to justify the continued seizure of the trucks lies upon them, they did not discharge the onus and if it can be said that they tried, then it was only by word of mouth that they stated that they were other investigations going. In this regard, the letter dated 28 February 2023, already referred to, generated by Ms Tongogara speaks to the first respondent:

> "…conducting Parallel Financial Investigations which are different from the criminal investigations being carried out for which your client was removed from remand …"

The above quote does not state what other crimes the first respondent is investigating. There is also no mention of the evidence which the trucks will provide. For posterity, where reliance is sought upon the provisions of s 47(4) the respondent should be guided by what the section says. The crimes for which investigations are said to be continuing must be named as well as the alleged connection between the seized property and the crime. Short of that, the onus to justify the continued seizure on the basis that there are other crimes being investigated for which the property seized affords evidence will not have been discharged. That is the situation *in casu*. The first respondent made a bold assertion that there are parallel investigations different "from criminal investigations". The Money Laundering and Proceeds of Crime Act deals with criminal investigations. The continued seizure of the property based on the s 47(4) cannot apply to investigations other than related to a recognised crime.

It is the court's finding that on the facts and circumstances of this case, the continued seizure of the applicants' property is unlawful. In consequence thereof, the seized property must be released to the applicants. An order to that effect will ensue. That leaves the issue of costs.

The general rule is that costs follow the event subject to the discretion of the court to grant them. The applicants in their draft order did not seek costs. The first respondent did not only pray for costs but prayed that the costs be granted on the punitive scale of legal practitioner and client. No justification for claiming punitive costs was stated. Special costs must be specially pleaded and specially justified by the party seeking costs on the special scale prayed for. The second respondent

was not to be outdone and also prayed for costs on the same punitive scale as did the first respondent. Seeking costs on the punitive scale has become unwritten practice and the in thing with legal practitioners. The question of costs must not be approached perfunctorily. It is a difficult branch of law which litigants and the court must deal with meticulously. A litigant who prays for a special order of costs must acquaint with the principles which inform the discretion of the court to grant costs on the special scale. The litigant must then engage these factors and address them to justify the special costs award. Where this is not done, should the court be inclined to make a costs award, it will grant costs on the party and party scale. *In casu*, it being the applicants' prayer that the respondents are not mulcted with a costs order, there will be no order of costs.

Accordingly the following order is made:

IT BE AND IS HEREBY ORDERED THAT:

1) The continued seizure of any of the applicants trucks as listed in the order of KWENDA J dated 22 August 2022 granted in case number HACC 18/22 is declared to be unlawful.
2) The respondents or whoever retains under seizure all or any of the trucks as aforesaid shall release them to the applicants upon service of this order.
3) There is no order of costs.

Tabana & Marwa, applicants' legal practitioners
Muvingi & Mugadza, 1st respondent's legal practitioners
National Prosecuting Authority, 2nd respondent's legal practitioners