IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

REVENUE DIVISION

REVENUE CAUSE NUMBER 59 OF 2021

BETWEEN:

MALAWI COLLEGE OF HEALTH SCIENCES BOARD GOVERNORS — CLAIMANT

-AND-

BLANTYRE CITY COUNCIL — DEFENDANT

CORAM: HONOURABLE JUSTICE JOSEPH CHIGONA

MR. BRIGHT THEU, OF COUNSEL FOR THE CLAIMANT

MR. MPHATSO MATANDIKA, OF COUNSEL FOR THE DEFENDANT

MR. FELIX KAMCHIPUTU, COURT CLERK

ORDER

INTRODUCTION

[1] The claimant commenced this action by writ of summons seeking several declarations against the defendant. The claimant *inter alia* claimed for an interim *ex parte* interlocutory injunction restraining the defendant from sealing the claimant's premises at Plots Nos. BE342A and BE342B

in the city of Blantyre pending determination of an *inter partes* application for a like order or further order of the Court. The Court granted the *ex parte* interlocutory injunction until the hearing of the *inter parte* application.

[2] On 25th October 2021, the matter came for *inter partes* hearing for the continuation of the interlocutory injunction granted *ex parte*. However, it transpired that both parties did not finalise the filing of the court processes. The Court adjourned the matter to the 17th day of November 2021. However, upon discussing with the parties, it was agreed by the parties that the 17th November 2021 hearing on the continuation of the interlocutory injunction be turned into hearing of the substantive issue on a point of law and ordered the parties to file necessary documentation in support of the point of law. The parties duly filed the necessary documentation on the point of law in support of their arguments on the point of law. I have to reiterate that this position was arrived at by the parties after noting the issues can as well be dealt with through this avenue.

[3] This Court was called upon to determine on the following preliminary questions on a point of law:

1. Whether or not the claimant as an education institution operates on a commercial basis within the meaning of that term in section 83 (1) (3) of the Local Government Act Cap 22:01 of the Laws of Malawi;

2. In the event that the answer to the first question is in the negative, i.e. that the claimant does not operate on a commercial basis, whether rates demanded by the defendant ought to be remitted in full;

3. In the further event that rates demanded by the defendant ought to be remitted in full, whether an account for rates paid hitherto should be taken and any sums paid by the claimant ought to be recompensed with interest as claimed;

4. Whether the claimant's claims attendant upon the above three issues ate statute-barred under section 76 of the Local Government Act;

5. Whether the claimant having previously paid rates to the defendant without raising any objection is now estopped from raising the claims in this action; and

6. Whether the claimant must prove both in and fact that is entitled to full remission of rates under section 83 of the Local Government Act.

[4] Subsequently, the claimant filed a notice on preliminary objection on the ground that the sworn statement filed by the defendant in support of its argument on a point of law is incurably substantially defective for containing inadmissible matters. This court heard the parties' oral arguments on the preliminary objection on 14th January 2022. It is against this background that I am now called upon to make a ruling whether the defendant's sworn statement in support of arguments on points of law should be struck out and expunged from the record.

The Claimant' s Case

[5] The claimant raised a preliminary objection against the sworn statement of the defendant' s witness, Mr. Dennis Stanley Chinseu. In summary, the claimant argues and submits that said sworn statement is incurably defective for containing inadmissible matters. The claimant's prayer is that the said sworn statement by Mr. Chinseu should be struck out and expunged from the record. In both its oral and written submissions, the claimant argued and submitted that it is trite and elementary that the purpose of a sworn statement is to state factual evidence, primarily facts which the deponent is able to prove with his own knowledge. Counsel cited Order 18 rule 6 (1) of the Courts (High Court) (Civil Procedure) Rules (hereinafter to be referred to as Civil Procedure Rules) stipulates, among others, that a sworn statement shall contain facts. Counsel cited the case of **Gleeson v. J. Wippell & Co. Ltd.**[1] where the Court succinctly put the point that the "purpose of affidavits is to provide evidence". In the Case of **A.J.C vs. R.C**[2], cited by counsel as well, the British Columbia Supreme Court stated the rule in the following terms:

> "Deponents to affidavits should only state facts. They should not add their opinions, descriptive adjectives or include submissions in the guise of evidence."

[1] [1977] 3 ALL ER 54 at 63
[2] 2006 BCSC 828

[6] Further, claimant argued that in the sworn statement of Mr. Chinseu, there are the following inadmissible statements. In paragraph 7, the deponent makes an argument and proposition of law on what the law would have stated had it been intended that the claimant should operate on a non-commercial basis. He also cites a repealed statutory provision and goes further to exhibit the provision. The issue as to whether the claimant operates on a non-commercial basis is at the centre of the present proceedings. The claimant argues that clearly, Mr. Chinseu is not a legal expert to testify on the law and its meaning as he purports to do. But even if he were one, neither does the point require expert testimony, and more importantly, the court cannot take expert testimony on what the law of its own jurisdiction is or means: See **Gleeson v. J. Wippell & Co. Ltd**[3]. Therefore, paragraph 7 is accordingly inadmissible and makes the sworn statement substantially defective for containing inadmissible material.

[7] The claimant further submitted that in paragraph 8 thereof, Mr. Chinseu provides his own understanding and interpretation of the evidence given by the claimant's witness. He then proceeds to advance a proposition and argument of law as to what ought to have been done to comply with a cited provision of the Local Government Act. Clearly, this is inadmissible material and makes the sworn statement substantially defective: the claimant cited cases of **Gleeson v. J. Wippell & Co. Ltd; Bell Canada v Canada Human Rights Commission**[4], **Hi-Seas Marine Ltd. v. Boelman**[5], and **Chamberlain v School District No. 36 (Surrey)**[6] (1998) 60 B.C.L.R (3d) 311 (S.C) at para 28.

[8] The claimant then attacked paragraphs 9, 10 and 11 of the sworn statement that it blatantly avers Mr. Chinseu's opinion, and advances his arguments on what complying with the law would have entailed. Counsel submits that this too is manifestly inadmissible material and makes the sworn statement substantially defective on the authorities cited above. Furthermore, it was submission of the claimant that in paragraphs 12 and 13, the deponent once again boldly states his view and proposition of law as to the import or legal implication of section 76 of the Local Government Act regarding the right to raise the issue; and also, as to legal liability to pay rates

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[3] supra
[4] 2002 BCSC 546 Parag. 30
[5] (2006) 17 B.L.R. (4th) 240, Parag 58
[6] (1998) 60 B.C.L.R. (3d) 311 (S.C) at para 28

supposedly under section 85 of the same Act. Counsel submits that the deponent also makes a proposition of law and argument as to the legal capacity of the claimant. To counsel, all these are inadmissible material. The sworn statement is also substantially defective in this respect.

[9] The claimant submits thus that the sworn statement is so pervasively defective in substance, that the only appropriate action on the part of the court is to strike it out and expunge the same from the record. The claimant cited *inter alia* **Kennedy v. Kennedy**[7],where the Supreme Court of British Columbia stated that:

> "A court has the discretion to strike inadmissible portions from the affidavits or, where the admissible and inadmissible portions are interwoven, to strike the whole affidavit."

[10] The claimant also cited the case of **Porchetta v Santucci**[8],the same Court said that:

> "It is not the duty of the court to act as a censor going through an affidavit with a blue pencil and deleting those portions which the judge considers offends the rules of evidence."

[11] In **Kour Estate v Bhandar**[9], the court said as follows

> Where there are numerous instances of inadmissible evidence in an affidavit, it is not the responsibility of the trial judge to examine the affidavit and struck out the admissible evidence from the inadmissible. At his or her discretion the judge may ignore the whole of the affidavit.

[12] In conclusion, the claimant submits that in the case at hand, the defendant has filed a substantially defective sworn statement against elementary rules of evidence as to what is admissible or inadmissible. This has necessitated the present preliminary objection by the claimant. In the circumstances, counsel prays for the striking out of the same with costs to the Claimant.

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[7] 2006 BCSC 190 Parag. 10
[8] (1998) B.C.J. 348 (S.C) Parag. 12
[9] (1996) 6 R.P.R. (3d) 173 (S.C.) Parag. 29-30

The Defendant Case

[13] The defendant opposes the preliminary objection. However, whilst admitting that the sworn statement of Mr. Chinseu had some flaws, counsel for the defendant argues that a perusal of the sworn statement of the claimant's witness reveals the same flaws, which the claimant accuses the defendant of. Counsel submits that the flaws are however understandable on the basis that the parties in trying to advance their legal arguments they have called for aid of witnesses who in their work interact with the law whose aspects is the subject of these proceedings.

[14] The defendant further argues and submits that in order to assist the court to arrive at a just and fair decision on how the law applies to the case at hand, the defendant in this matter invited its Director of Commerce and Industry, Mr. Chinseu, who in his work applies provisions of the Local Government Act, to levy rates on behalf of the Council. Counsel avers that all issues that are before the court in this application are mainly legal issues or a mixture of legal and factual issues. It is, therefore, as per counsel, inconceivable that the issues in this matter can be decided on without looking at how the law is applied every day to levy rates.

[15] The defendant on the issue of expression of opinions in sworn statements, submits that both the claimant and the defendant are guilty, but the defendant did not raise an objection as it understood that the opinions expressed in the claimant's sworn statement were necessary for the court to arrive at the right decision. If therefore the court is to decide that the statements filed by the parties ought not to contain opinions, then some paragraphs of Mr. Mulilima ought to be expunged too or allowed to stand as expert evidence. The defendant argued that in paragraph 10 of the sworn statement by Mr. Mulilima in support of the claimant arguments on a point of law, the deponent states that health workers trained by the college form a "vital" component of Government plan to improve the health of Malawians. The use of the adjective "vital" gives the opinion of the deponent on the importance of the school to health services in Malawi. That in itself offends the rule expressed in the case of **A.J.C. vs R.C.**[10] cited by the claimant in its preliminary objection. The said rule states that, 'Deponents of affidavits should only state facts. They should not add their opinions, descriptive adjectives or include submissions in the guise of evidence'.

[10] supra

[16] Furthermore, it is argued by the defendant through counsel that in paragraph 16 of the sworn statement by Mr. Mulilima, makes a conclusion which in essence is an opinion that he forms (after discussing finances of the College) that "there is not enough money to meet the ideal cost structure for training a student in a year." The words "not enough" and 'ideal' are all qualifying words and therefore expressive of an opinion and the rule in **A.J.C. vs R.C**[11] would apply to them. The deponent is not at the outset introduced as an accounting expert. He however after talking about the College's finances draws a conclusion in paragraph 18 that the College "does not generate any profits". The expert opinion that he draws is impugnable under the rule expressed in the case cited by the claimant of **Chamberlain v School District No. 36 (Surrey)**[12], where the rule says that 'in general, opinion evidence is no admissible except when authored by an expert witness.'

[17] The defendant further submits that in the peculiar nature of this application, the said statements could be made by Mr. Chinseu. The same even applies to statements made by Mr. Mulilima. Mr. Chinseu in his sworn statement testifies on how he applies the law in levying rates. Mr. Charles Samuel Mulilima testifies on how the College is run financially and, in that regard, draws conclusions of financial nature that the College does not make profits. Looking at the nature of work of the deponents, it was inevitable that they would express opinions and draw conclusions on issues before the court from the perspective of their work and experience. Admittedly, both the claimant and the defendant should have foreseen this and in that regard should have applied for permission under Order 17 Rule 19 of the Courts (High Court) (Civil Procedure) Rules to call the two witnesses to express facts but also their expert opinions based on their experience in dealing with issues that are before the Court.

[18] As to whether the evidence of the witnesses in this matter could be treated as expert evidence, authorities abound which affirm this position. Someone with no professional qualification but with experience and knowledge of a subject matter can be allowed to give evidence on that subject. The defendant cited **R v Ibrahima**[13] and **R v Edwards**[14]. The defendant thus admits that there was need to get the court's permission to include expert evidence in the sworn statement of Mr. Chinseu. However, counsel argues that such failure to obtain the said permission can be cured

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[11] supra
[12] supra
[13] [2005] Crim LR 887, CA
[14] 2011 EWCA Crim 2185

under Order 2 Rule of 2 of the Civil Procedure Rules. Counsel submitted that under Order 2 Rule 3 of the Civil Procedure Rules, the Court has discretion to make various orders as regards the irregularity. Counsel stated that in all respects, in exercising the discretion under Order 2 Rule 3 of the Civil Procedure Rules, the aspect that the Court has to consider most is whether the irregularity has caused any prejudice to the other party complaining of the irregularity. Counsel cited the case of **Costellow v Somerset County Council**[15].

[19] Finally, the defendant submitted that in this case, apart from pointing out that the sworn statement of Mr. Chinseu is irregular; the claimant has not stated how the irregularity has prejudiced its case. Counsel submitted that on the premises, the Court may allow the sworn statement of Mr. Chinseu to stand as that of an expert witness or may expunge only those parts of the witness statement which the claimant has managed to show how they offend rules of evidence. In any case, counsel argues, the claimant is also guilty of the same offence it is accusing the defendant of with regard to the sworn statement of Mr. Mulilima as the said statement also advances opinions instead of simply laying down facts. It is the prayer of the defendant that the decision, which the court makes on the sworn statement of Mr. Chinseu, should apply to the sworn statement of Mr. Mulilima. The defendant thus submitted that both parties should pay their costs for this preliminary objection, as they are both guilty of the same offence.

ISSUES FOR DETERMINATION

[20] I am of the considered view that two issues are prominent in this application requiring resolution of this court. These two issues are:

(a) Whether the sworn statement by the defendant (Mr. Chinseu) is substantially defective warranting this court to strike it out or as put by the claimant, to be expunged from the record.

(b) Whether the evidence of Mr. Chinseu contained in the sworn statement can be treated as expert evidence in the absence of permission from this court.

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[15] (1993) 1 WLR 256

THE LAW AND ANALYSIS

[21] Let me deal with the second issue on whether the evidence of Mr. Chinseu can be treated as expert evidence in the absence of permission from this court. Order 17 rule 19 (1) of the Civil Procedure Rules provides as follows on expert evidence:

> "A party may not call an expert or put in evidence an expert's report without the permission of the court."

Order 17 rule 19 (2) provides as follows:

> "Where a party applies for permission to call for an expert, he shall identify-
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> (a) The matter or issue which requires expert evidence, and
> (b) Where applicable, the name of the proposed expert."

[22] The defendant applied to this court to treat the evidence of Mr. Chinseu as expert evidence. The defendant however admitted non-compliance of Order 17 rule 19 (1) of the Civil Procedure Rules since no permission was sought from this court to use the evidence of Mr. Chinseu as expert evidence. Order 17 rule 19 (2) of the Civil Procedure Rules gives guidance as to what the application for permission must include. The matter or issue which requires expert evidence and where applicable the name of the proposed expert are the issues to be addressed by the application.

[23] The defendant has not demonstrated to this court the issue that requires expert evidence. I am at pains to accept the argument of the defendant that Mr. Chinseu's evidence be treated as expert evidence in the absence of the matter or issue well delineated as requiring expert evidence. I agree with counsel for the claimant that the nature of the application before this court does not require expert evidence. The matter before this court is to decide the issues on a point of law. I do not think that I need an expert to assist me on what the law provides on those issues. The issue to be decided is purely on what the law is and not on how the defendant applies the law in their day-to-day activities. In my considered view, the court does not require expert evidence.

[24] In conclusion, it is therefore my finding that the evidence of Mr. Chinseu cannot be treated as expert evidence in the absence of permission from this court. I am also of the considered view that the matter before me does not require expert evidence. Further, the issues or matter requiring expert evidence has not been demonstrated by the defendant as demanded by Rules of Procedure. I am of

the considered view that the present non-compliance cannot be cured under Order 2 of the Civil Procedure Rules as prayed by the defendant. Let me also mention that Rules of procedure serve a purpose in the administration of justice. The Rules of Procedure, in the first place, need to be complied with. Parties should not rely on the fact that the same Rules provide for a mechanism of curing the non-compliance as an excuse.

[25] In these circumstances, I am of the view that the court needs to assess the nature of the non-compliance and determine to what extent that non-compliance impacts on the interest of justice before invoking Order 2 of the Civil Procedure Rules. I also believe that the court needs to assess whether the non-compliance is prejudicial to the other party. To that extent, every case needs to be treated as such. The court must exercise its discretion judiciously at the end of that process. Otherwise, I am afraid that the Rules of Procedure will continue to be defiled and, in the end, they will not serve their intended purpose. All in all, in the present case, I do not think that the non-compliance can be cured by invoking Order 2 of the Civil Procedure Rules.

[26] Now, let me deal with the first issue, on whether the sworn statement of Mr. Chinseu is substantially defective. The starting point is Order 18 rule 6 of the Civil Procedure Rules that provides as follows:

> "(1) Subject to sub rule (2), a sworn statement shall only contain facts that the deponent is able to prove with his own knowledge."

[27] In **Mustapha Raphael vs East African Gold Mines Ltd**[16], the High Court of Tanzania puts it rightly as follows:

> "An affidavit is not a kind of superior evidence. It is simply a written statement on oath. It has to be factual and free from extraneous matters such as hearsay, legal arguments, objections, prayers, and conclusions. See the case of *Uganda vs Commissioner of Prisons, ex-parte Matovu* [1966] EA 514".

[28] My generous interpretation of order 18 rule 6 of the Civil Procedure Rules is that sworn statement are to contain facts only that the deponent is able to prove with his knowledge. As per **MUSTAPHA RAPHAEL V EAST AFRICAN GOLD MINES LTD**[17], sworn statements are to

[16] Civil Application No. 40/98 CAT, HC, Tanzania.
[17] supra

be strictly factual and devoid of extraneous matters such legal arguments, hearsay, objections, prayers and conclusions. I may add opinions on that list.

[29] Reverting to the present case, counsel for the defendant admitted that the sworn statement of Mr. Chinseu contains legal arguments, conclusions and opinions contrary to Order 18 rule 6 (1) of the Civil Procedure Rules. The only defence advanced by counsel for the defendant is that both parties did not comply with the Rules as the sworn statement of Mr. Mulilima contains opinions as well. In other words, counsel admits that the sworn statement is bad in law and therefore a nullity. Perusing through the sworn statement of Mr. Chinseu, one observes that paragraphs 7, 8, 9, 10, 11, 12 and 13 are contrary to Order 18 rule 6 (1) of the Civil Procedure Rules as they contain legal propositions and arguments. I totally agree with counsel for claimant that these paragraphs cannot stand.

[30] My conclusion is that expunging the evidence contained in these paragraphs means that the sworn statement of Mr. Chinseu will have nothing tangible as factual issues. In other words, the sworn statement of Mr. Chinseu is grossly defective. I do not think that I can now choose what should remain from that sworn statement. It is bad in law and therefore a nullity. I so order.

[31] On the defence by the defendant that the sworn statement of Mr. Mulilima is also faulty, I am of the view that counsel for the defendant could have raised an objection as well. This was not done. I am at pains to accept the approach taken by counsel for the defendant in raising those issues. It is tantamount to ambushing the court and the claimant. It defeats the "All cards on the table" principle. I also believe that it was an afterthought on the part of the defendant. I therefore hold that the defence or objection cannot stand as it was improperly raised.

[32] Having decided on the sworn statement, it is worth noting that whilst I have the preliminary objection at hand, the genesis of the application on preliminary issues must be not elude my mind. This Court is in agreement with both Counsel that this case would be disposed on points of law under Order 16 rule 6 (1) of the Civil Procedure Rules. My understanding was that there was little to argue on factual issues. In any event, in the sworn statement by the claimant and defendant, the main issue to dispose was whether or not the claimant as an education institution operates on a commercial basis within the meaning of that term in section 83 (1) (3) of the Local Government Act and if the claimant does not operate on a commercial basis, whether rates demanded by the defendant ought to be remitted in full.

[33] Order 16 rule 6 of the Civil Procedure Rules provides as follows:

> (1) The Court may hear arguments by the parties in a proceeding on preliminary issues of fact or law between the parties where it appears likely that, if the issues are resolved, the proceeding or part of the proceeding will be resolved without a trial, or the costs of the proceeding or the issues in dispute are likely to be substantially reduced.
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> (2) Where the parties have agreed on the facts but there remains a question of law in dispute, the Court may hear arguments from the parties about the question of law. (My Emphasis supplied)

[34] I formed the opinion that at the very least looking at the claimant's sworn statement in support of the interlocutory injunction and the sworn statement in opposition to continuation of order for interlocutory injunction, the facts were not largely in dispute. The fact that the parties agreed to pursue this matter on a point of law, pursuant to Order 16 rule 6 (2) of Civil Procedure Rules, meant that factual issues were not in dispute at all. I am of the considered view that where facts are in dispute, parties may not raise questions on a point of law. For a court to decide a matter on a point of law, facts need not be in dispute.

[35] In the present matter, by the very fact that parties agreed on the point(s) of law to be addressed by this court, it meant that facts were not in dispute. I therefore wonder what purpose will the sworn statements serve in these circumstances. The parties were only to present their arguments on point of law. I do not think that parties require sworn statements, that as a general rule, contain facts only, to assist them argue the point on law herein.

CONCLUSION

[36] In conclusion, it is my finding that the sworn statement of Mr. Chinseu is grossly defective. It is therefore bad in law and a nullity. It is also my finding that the parties herein are to argue their cases on a point of law by making arguments before this court without reliance on sworn statements.

[37] Costs are in the discretion of the court. Looking at the nature of the application and my findings above, I make no order as to costs. Each party should bear its own costs.

MADE IN OPEN COURT THIS 18TH DAY OF FEBRUARY 2022 AT PRINCIPAL REGISTRY, BLANTYRE.

JOSEPH CHIGONA

JUDGE.