THE ESTATE LATE GODFREY MADAMOMBE
(Represented by Angela Madamombe, Executrix Dative)

and

TAWANDA MIKE MATANI

And

THE REGISTRAR OF DEEDS BULAWAYO

IN THE HIGH COURT OF ZIMBABWE
NDUNA J
BULAWAYO 13 FEBRUARY 2025

J Sibanda for the Applicant
L Nkomo for the first Respondent

NDUNA JA:

This is an opposed chamber application in which the applicant, Angela Madamombe, is cited in her capacity as executrix dative of the estate of the late Godfrey Madamombe. The applicant is the daughter of the late Godfrey Madamombe. The first respondent is a buyer of the property in dispute. The second respondent is cited in his official capacity as the Registrar of Deeds, Bulawayo.

The applicant has filed the present application seeking for the cancellation of Deed of Transfer No. 184/2018 in respect of Lot 10 of Gwelo Small Holding 23, measuring 9,279 square metres and situated in Harben Park, Gweru. The deed of transfer is currently in favour of the first respondent. The applicant challenges the validity of that transfer on grounds of fraud, lack of lawful causa, and procedural irregularities.

The applicant challenges this transfer as the Deed of Transfer (No. 184/2018) was only registered on 22 February 2018, nearly seven months after Godfrey Madamombe's death on 25 July 2017.

The applicant, argues that a power of attorney becomes void upon the death of the grantor. Thus, any actions taken afterward, including the finalization of the transfer, were legally invalid. She alleges that the first respondent unlawfully proceeded with the transfer despite knowing of the seller's death, effectively deceiving the Deeds Office. The initial agreement was for one acre (USD 18,000**)**, yet the final transfer reflected the entire property (USD 50,000), raising suspicions of fraud. At the hearing of the application, 3 points *in limine* were raised. These are as follows:

Points *in limine* by Applicant

1. First respondent failed to adhere to rule 58 and 59 of high court rules

The applicant, contends that the first respondent failed to adhere to rule 58 and 59 of the *High Court Rule, 2021*. According to the applicant, the first respondent filed his notice of opposition outside the stipulated ten-day period prescribed under *Rule 59(6)* without first seeking indulgence or applying for condonation, rendering the filing irregular and invalid. The applicant further argues that when the first respondent eventually sought condonation, he incorrectly relied on *Rule 39(4),* which pertains to the upliftment of a bar, rather than *Rule 59(7),* which deals with extensions of time. This misapplication, the applicant asserts, invalidates the subsequent condonation order granted by Chivayo J, as it was based on an incorrect legal premise.

The applicant relied on the case of *Ahmed v Dorking Station Safaris* SC70/2018, where the Supreme Court ruled that an application brought under the wrong rule is a nullity. Additionally, the applicant maintains that even if condonation was granted for the late filing of the notice of opposition, the first respondent's heads of argument were filed on the basis of an invalid notice, leaving him effectively barred from the proceedings. Consequently, the applicant submits that the matter should proceed as unopposed.

By First Respondent

1. Condonation order remains binding

Mr Nkomo for the first respondent in turn raised the following submissions. Firstly, he asserted that the condonation order issued by Chivayo J remains binding and cannot be disregarded unless

formally set aside. He referenced the cases of *Feigenbaum v Germanis 1998(1) ZLR 286 (H) pp 301* and *Mutare City Council v Mawoyo* 1995 (1) ZLR 258 (H) pp 263 para-G-I, which affirm that a court cannot revisit its own orders except under limited circumstances. He invoked Section 164(3) of the Constitution, which mandates compliance with court orders, emphasizing that the current court is obligated to respect Chivayo J's ruling.

Per Contra, the first respondent disputes the claim that he was barred, arguing that Rule 59(6) allows additional time for respondents located far from the court specifically, one day for every 200 kilometers. Given that the first respondent's address was over 400 kilometers from Harare, he contended that he was entitled to 3 more extra days to file his notice of opposition and thus his filing was timely.

2. Applicant did not properly serve in terms of Rule 15(22)(e)

Thirdly, the first respondent challenges the validity of the applicant's proof of service, asserting that it fails to comply with Rule 15(22)(e), which requires a copy of the email used for service, including the date and time of delivery. Without this, he argues, there is no valid proof that the applicant served the application within the required timeframe. Additionally, the first respondent points to Rule 58(14) and (15), which state that if proof of service is not filed with the Registrar within five days, the application is deemed abandoned and dismissed. He argues that since the applicant failed to meet this requirement, the application no longer exists. In support of this proposition, he cited the Supreme Court case of *Gazi v Mbalabala Properties* SC24/23 at para 19 -22;

ISSUES FOR DETERMINATION

To determine the matter they are only two issues before me

1. Whether the first respondent is properly before the court
2. Whether the application is deemed to have been abandoned due to failure to adhere with rule 15 (22)(e) of the High Court Rules 2021 by the applicant

Application of the Law to facts

Whether or not the first respondent is properly before the court.

A key preliminary issue is whether the first respondent is properly before the court, given the procedural irregularities surrounding the filing of his notice of opposition and the condonation obtained under Rule 39(4). Central to this determination is the principle of *functus officio,* the legal doctrine that once a court has pronounced a final judgment or order, it cannot revisit or revise that decision, except under narrowly defined circumstances.

The applicant challenges the propriety of the first respondent's participation in these proceedings on the basis that the condonation order granted by Chivayo J in case number HC 1039/24 was made under the incorrect procedural rule 39(4) of the High Court Rules 2021, which concerns removal of bar, rather than Rule 59(7) the High Court Rules 2021, which specifically addresses the extension of time to file a notice of opposition. Relying on the case of *Ahmed v Dorking Station Safaris*, the applicant contends that an order granted under the wrong rule is a nullity and, therefore, that the 1st respondent remains barred and is not properly before this court.

However, this court is not at large to disregard a subsisting court order simply because it may have been granted on what is perceived to be a misapplication of the rules. The doctrine of *functus officio* precludes such an approach. As stated in *Ndlovu v Gutherless and Another* HB 42/10 at page 3 where it was held. It is clear from the order being sought that the applicant is asking this court to make a declaratory order against its own decisions. He relied on section 14 of the High Court Act [*Chapter 7:06*] which provides that:-

> "The High Court may, in its discretion, at the instance of any interested person inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination."

The above provisions do not enjoin the High Court with the powers to make declaratory orders in respect of its own decision. It cannot sit as a review court over its own judgment. It is *functus officio.*

The High Court cannot review its own decisions or make declaratory pronouncements effectively overturning its earlier final orders. In that case, the court declined to issue a declaratory order which would, in substance, have reversed a previous decision of the same court. The rationale is clear: allowing the court to re-open matters it has already conclusively decided would undermine the finality of judicial proceedings and legal certainty.

The Supreme Court reinforced this position in *Matanhire v BP Shell Marketing Services (Pvt) Ltd* 2005 (1) ZLR 140 (S) at 146C-F, where it held that once a matter has been determined by a court the court becomes *functus officio.*

> "The law on this point is very clear in that once a matter has been finalised by a court that court becomes *functus officio*. It has no authority to adjudicate onthe matter again. The only jurisdiction that a court has is to make incidental or consequential corrections.

The court retains only limited jurisdiction to make incidental or clerical corrections, but not to revisit the merits or legality of its earlier decision. Similarly, in *Rodgers v Chiutsi* SC 25/22, the Supreme Court held that once a final order is given, it is dispositive of the issues in dispute and has no return date. The issuing court cannot revisit the same issues at a later stage. The finality of an order, even if arguably based on a procedural misstep, binds the parties unless it is formally set aside on review or appeal.it was held on p 9 as follows:

> "Thus, unlike a provisional order, a final order is conclusive and dispositive of the dispute. It finally settles the issues in dispute and has no return date. Once a final order is given the court issuing the order becomes *functus officio* and cannot revisit the same issues at a later date."

Applied to the present matter, it is not the role of this court to question whether the Rule 39(4) was applied correctly. The order granted in **HC 1039/24** stands as a final judicial act and, therefore, must be given full effect. The applicant's contention that the wrong rule was used does not afford this court the authority to disregard the order or to proceed as if it were a nullity. The appropriate course for the applicant had she wished to challenge that condonation order would have been to

seek an appeal in terms of the rules governing judicial oversight, rather than seeking to indirectly invalidate it within these proceedings.

As a result, and consistent with the *functus officio* principle articulated in the aforementioned cases, this court cannot revisit or undermine the final condonation order granted by a judge of concurrent jurisdiction. The first respondent, having been granted condonation is properly before this court.

Whether the application is deemed to have been abandoned due to failure to adhere to rule 15 (22)(e) of The High Court Rules

The first respondent submitted that the applicant is deemed to have abandoned application as she failed to adhere to rule 15(22)(e) of the High Court rules which states

> (22) "Where service of any process has been effected by—
>
> (e) electronic mail referred to in sub rule (20), proof of service shall be by copy of the mail in question showing date and time of delivery".

In *Pulserate Investments (Private) Limited v Zuze and 5 Others* HH 656-23 the court dealt with the issue of using an incorrect form for initiating an application. The applicant used Form 25 instead of the prescribed Form 23. The court acknowledged the error but held that the application was not fatally defective, especially since the applicant admitted the mistake and there was no prejudice to the respondents. This case illustrates that not all procedural defects render an application invalid, particularly when there is substantial compliance and no prejudice. The court specifically held that on pp9:

> "The above *ratio dicidendi* puts to rest the complaint by the appellant about the use of the wrong procedure. From the above it is apparent that the rule was designed to ensure that justice delivery prevails. It also has the added advantage of curbing the associated problem of dismissing or striking off matters which may have merit solely on the basis of procedural mishaps. The rule gives the court discretion to allow access to a party who has not approached the court in the proper form provided there is no prejudice to an interested party. In exercising its discretion the court must have regard to the exceptions set out under r 58 (13) (c) and (d). It follows that the bringing of an application either as a chamber

> application or a court application does not automatically in itself amount to a basis for the dismissal of the application unless there is prejudice. The court must consider whether the wrong procedure will prejudice an interested party and if such prejudice cannot be cured by giving directions for the service of the application on that party with or without an appropriate order of costs."

The logic in *Pulserate* is instructive here. Even assuming there was a failure to file the formal proof of service within the five-day window, the first respondent was demonstrably not prejudiced: he received the application, filed a detailed opposition, and participated through counsel. The misstep, if any, did not frustrate the procedural intent of Rule 58(14) and (15), which is to avoid stale applications lingering in the registry. This one proceeded without delay or prejudice.

In *Maphisa v Sibanda N.O. (in his capacity as executor dative of the Estate of the late Melusi Sibanda) and Others* SC 10/24 pp9 , court emphasized that minor defects in addressing documents do not invalidate service if the recipient acknowledges receipt and suffers no prejudice. Turning to service of process, in the *Maphisa* case*, supra,*. addresses whether a defect in proof of service is fatal when the recipient has actual notice. In this case, the Supreme Court held that minor defects in the manner or proof of service such as an improperly addressed notice do not invalidate service if the recipient in fact received the document and suffered no prejudice.

> "In *casu,* the appellant's contention was not that the 2nd respondent had failed to act within the *dies induciae* but that the notice of opposition filed was not properly addressed to him. The alleged infraction as noted by the court *a quo* was that the applicant's name and address were hand-written and not in typed form. The appellant having admitted to receiving the notice of opposition, did not allude to any prejudice he suffered as a consequence of his address being handwritten as opposed to being typewritten. It was such an infraction that the court *a quo* held as not fatal and condoned it in the interest of justice".

Here, the first respondent challenged the applicant's proof of service on the ground that it did not include the full email transmission log required by Rule 15(22)(e). However, that challenge falls on the respondent's own admission that he received the chamber application on the date it was

filed. The respondent neither denies having seen the application nor suggests that the alleged omission impeded his ability to prepare and file his opposition. As in *Maphisa*, case, *supra* the actual receipt of process cures any technical defect in the proof of service.

Disposition

In light of the foregoing, and having found that:

1. The first respondent is properly before the court, having obtained a valid condonation order under HC 1039/24, which stands until set aside, and which this court cannot disregard in terms of the *functus officio* principle;
2. The application is not deemed abandoned, as the applicant effected actual service of the application on the 1st respondent, who received and responded to it timeously, and any technical irregularity in filing proof of service does not vitiate the proceedings, particularly in light of Rule 7 of the High Court Rules, 2021, which permits the court to depart from strict compliance with procedural rules in the interests of justice;

Accordingly, the following order is made:

1. The points *in limine* raised by both parties are hereby dismissed.
2. The matter shall proceed to be determined on the merits.
3. Costs shall be in the cause.

……..applicant's legal practitioners

……respondent's legal practitioners