FIDELITY LIFE ASSURANCE OF ZIMBABWE
Versus
CFI HOLDINGS LIMITED
And
JUSTICE NOVEMBER T. MTSHIYA N.O (RETIRED)

HIGH COURT OF ZIMBABWE
COMMERCIAL DIVISION
CHILIMBE J
HARARE 17 July & 4 September 2023

Interlocutory application

T.R. Mafukidze with *K.T. Madzedze* for applicant
T. Mpofu with *T.S. Nyawo* for first respondent
No appearance for second respondent

CHILIMBE J

BACKGROUND

[1] An interlocutory matter arose in the main application filed in terms of Article 13 (3) of the Arbitration Act [*Chapter 7:15*]. In that main matter, applicant sought an order for the recusal of second respondent who was seized with the office and mandate of arbitrator in a dispute between applicant and first respondent.

[2] I mention the second respondent`s status as arbitrator in the past tense. This is because the second respondent, Retired Judge Honourable Mr.N.T. Matshiya, a former judge of this Court, passed away on 28 August 2023.May his soul rest in eternal peace. Second respondent's passing will invariably impact the primary proceedings before the court. I explain why.

[3] The applicant and first respondent`s respective prayers, (in the main and opposition) sought the second respondent`s recusal or continuation as arbitrator. Either quest has, to that effect, now been rendered largely inconsequential. Such is the call of providence. The prerogative on how to progress the matter now lies exclusively with the parties[1].

[1] See rule 32 (7) and (8) of the High Court Rules SI 202-21, as read with Articles 14 and 15 of the Arbitration Act. It must also be noted that this application was brought in terms of Article 13 (3) which obliges this court to "...*decide on the challenge*". In my view, the question is; -what does "*decide on the challenge*" mean? That question should be answered by the basic old

THE FIVE POINTS *IN LIMINE*

[4] Meanwhile, a more immediate controversy remains extant before me and requires resolution. That controversy was generated by an interlocutory application. Mr. *Mpofu* for first respondent, raised five (5) preliminary points at commencement. The court must rule on these point raised because the parties require an answer on them. I outline the points hereunder, as counsel framed and contextualised them; -

i. The first point *in limine* went as follows; - the applicant`s ire, under these present proceedings HCHC 106-22, was directed at the arbitrator. Applicant alleged bias on the part of the arbitrator. According to its papers, such impartiality was to applicant`s prejudice and first respondent`s undue advantage.

ii. Applicant`s further case was that the arbitrator`s bias tainted the series of decisions rendered during the arbitral proceedings. That position had to be corrected. The removal of the arbitrator was the solution. The present application, filed on 20 April 2023 under case number HCHC 106- 23, sought such vacation.

iii. Mr. *Mpofu* submitted that the main issue in contention before the arbitrator was whether or not applicant could be permitted to lead evidence before the tribunal. The last ruling on this point was rendered by the arbitrator`s award dated 10 May 2022. This award dismissed applicant`s prayer to lead evidence.

iv. Counsel drew the court`s attention to another matter. Prior to instituting the present proceedings, applicant had filed in this court, an earlier application, HCHC 60-22, on 23 June 2022. Applicant sought, under that suit, to offset the arbitrator`s award of 10 May 2022 in terms of Article 34 (2) (b) (ii) of the Arbitration Act. The basis of the application was that the award offended the public policy of Zimbabwe.

v. Mr. *Mpofu* then drew attention to an important development regarding HCHC 60-22. This very court had, on 29 June 2023, per my brother NDLOVU J, dismissed

considerations of (i) what the causa, (ii) what was pleaded (iii) what was the prayer and (iv) what was the opposition. In short, what were the triable issues that now require decision? Were these issues simply confined to whether or not second respondent should continue or retire as arbitrator? Or they dilated beyond that primary challenge? The core quarrel herein is whether or not applicant should be permitted to lead evidence. [See also *Veronica Nyoni v Bernadette Ndoro N.O* SC 79-22 on that point.]

HCHC 60-22 in the decision *Fidelity Life Assurance Of Zimbabwe Limited v CFI Holdings Limited & Justice November T. Mtshiya (Retired) N.O*, judgment number HH 400-23.

vi. This development was telling, according to Mr. *Mpofu*. Its net effect was to render the present application pointless. This court had, by HH 400-23, confirmed the validity of the latest ruling by the arbitrator. This being one of the rulings which applicant sought to persuade this court, under the present proceedings, to condemn as having been blemished by the arbitrator`s bias.

vii. Counsel argued that such a position was untenable. The decision by my brother NDLOVU J in judgment number HH 400-23 estopped applicant from persisting with its attacks on the arbitrator. How could the same court that had validated the award of 10 May 2022 on one hand, proceed to condemn its author as having been biased? All in one breath? Judgment HH 400-23 had effectively deleted applicant`s causa before the court in the present proceedings. As such, the present application had to fall.

viii. It mattered not, according to Mr. *Mpofu*, that applicant had filed a notice of appeal against this court`s dismissal of its application in HCHC 60-22. The rules of this court said so[2] .And this court`s judgment in HH 400-23, had merely issued a dismissal rather positive relief. Counsel urged the court to recognise the inimical effect of applicant`s duplicitous quarrels. These had obstructed all effort to resolve the dispute which had dragged on for five years.

ix. <u>The second point *in limine*</u> was that the court had to consider applicant`s persistent contestations against almost each and every finding made by the arbitrator. There were three challenges to the arbitrator`s decision over applicant`s request to lead evidence. These were capped by another over the arbitrator`s jurisdiction. All these protests failed.

[2] Rule 44 (2) of the Commercial Court Rules 2020 provides that; - (2) *An appeal from the decision of the court shall not suspend the operation of the decision appealed against, unless the court or judge directs otherwise on application by the aggrieved party.*

x. Applicant had even attempted to offset the arbitrator`s decision by approaching this court [ under HC 7666/20]. He however later abandoned that enterprise. The subsequent dismissal of applicant`s second attempt before this court under HCHC 60-22 was hardly surprising. It merely reinforced the lack of merit and fruitlessness of its endeavours. This accretion of argumentative interlocutory applications amounted to a clear abuse of process.

xi. The third point *in limine* was that applicant had proffered no plausible causa before the court. Adverse decisions made by a tribunal against a party to proceedings before it could not validly sustain the allegations of bias on the part of that tribunal. Applicant had recycled the same unsustainable applications which met similar and deserved fate. This fact being fortified by the decision in HCHC 60-22 supportive of the tribunal`s ruling.

xii. The fourth point *in limine* was that the application was based on a false basis. The arbitrator did not stop applicant from leading evidence. Applicant elected to, and deliberately so, not to lead evidence. It did not put its case to first respondent`s witnesses, it deigned to present a bundle, its counsel clearly declined to lead evidence. But inexplicably, applicant made an about turn. Instead of requesting for an opportunity to lead evidence, applicant embarked upon a crusade to attack the tribunal and first respondent.

xiii. The fifth point *in limine* was that Mr. Reginald Shingirai Chihota, contained hearsay evidence. As such, the affidavits were inadmissible.

THE UNDERLYING DISPUTE

[5] Before relating Mr. *Mafukidze* (for first respondent) `s response to the points *in limine*, I outline the underlying dispute as well as the key arbitral events. I will refer to applicant and first respondent henceforth as “Fidelity” and “CFI” respectively. Fidelity`s core business is life assurance.CFI on the other hand, is in the production and retailing of agro foods. The two parties` have also diversified into property development. Both are listed on the Zimbabwe Stock Exchange (ZSE). The ZSE regulates certain corporate activities of the two entities in terms of the ZSE`s by-laws especially its “Listing Rules”.

[6] The dispute between the parties emanates from the sale by CFI of a piece of land to Fidelity for US$16 million by written agreement dated. At a more granular level; - CFI entered into an asset-for-debt swap with Fidelity. Fidelity acquired 80 % of CFI`s shares in a land-holding company, Langford Estates (1926) (Pvt) Ltd. As consideration for the shares, Fidelity assumed CFI`s bank debts amounting to about US$16 million.

[7] The piece of land, 834 hectares in extent, was located in Harare South. It greatly suited Fidelity`s strategy at the time. The company had, diversified quite aggressively into property development. It had established the eponymously named Fidelity Park, a residential suburb in an area known as Manresa in Harare. Fidelity followed up that success with another project; - Fidelity Life Southview Park. This being a 5,300-stand suburb located in Harare South.

[8] The newly acquired piece of land was conveniently adjacent to Southview Park. That proximity delivered a number of advantages to Fidelity. Principal among these was the feasibility of Fidelity expanding Southview Park by an additional 12,000 stands. Similarly, CFI stood to gain immensely from the sale. It was reeling from a series of debts. Assumption of CFI`s bank debts would abate the obligor burdens thus freeing CFI to pursue strategy.

[9] Unfortunately, a dispute arose between the parties. There were disagreements over the fulfilment of formalities associated with the deal. The main issue emanated from allegations of conflict of interest. The parties resorted to arbitration. The arbitral proceedings commenced but the parties soon fell into serious disagreement over procedure. This application arose out of the procedural quarrels before second respondent.

[10] I take a moment or two, to say a word or two. This court, as the Commercial Division of the High Court of Zimbabwe must, from time to time and within dictate of jurisdiction, opine on various specific and general matters. All in aid of the greater good of commerce. I find the root cause of the present dispute bordering on the worrisome. Fidelity and CFI are corporates of considerable repute and stature. They set out to structure what appears here to be a prototype corporate deal. A significant deal it may have been, but one hardly fitting the description of a complex transaction in ordinary parlance.

[11] From the papers before me (and consistent with practice) the two entities fulfilled the formalities pre-requisite to the deal. Circulars outlining the transactions were drawn up and published. Shareholders were engaged, resolutions procured, regulatory approvals put in place and the agreement executed. Experts and advisors were commissioned.

[12] This formidable battery of specialists ranged from accountants, auditors, valuers, brokers as well as the inevitable legal practitioners. Regulators also cast their sharp eye over the deal. Even the generality of the Zimbabwean public was acquainted with what was afoot. Many must have been elated. Residential stands were on the way. The dream of owning a home now appeared feasible! How then did the transaction run aground?

[13] To err is human, it may be said. But so is to be curious. My question is not so much on who or what or where things went wrong. It lies on how the entire machinery within and without these two entities collectively failed to (a) rescue the deal or (b) manage a dignified and non -acrimonious exit process. The result of such failure, in either respect is dismaying. Tenaciously contested is the litigation now before us. It is accompanied by a considerable hanging of the proverbial dirty loin-cloths in public.

[14] Allegations of "incest", "incestuous", or "frivolous" and "vexatious" have been blown back and forth in discordant verbal gusts. It is sad that these ill winds now blight the commercial aristocracy of the land. Especially where the allegations target, not corporate minions, but seniority at director level. Commerce must not become inured to such conflicts. Nonetheless, all may not be lost. The parties can (a) still reconstitute and secure an amicable settlement, failing which, (b) the courts stand ready to ultimately address the disputes.

THE ARBITRAL PROCEEDINGS

[15] On that note, I return to the matter at hand. The parties held a pre-arbitration meeting on 25 June 2018.Consistent with the provisions of Article 19, the parties set out the rules to govern the conduct of their arbitral proceedings. The disputes which eventually blighted the proceedings are traceable to this pre-arbitration charter. Especially paragraphs 4 (d), 7 and 8 thereof paraphrased below; -

i. Paragraph 4 (d) directed the parties to file; -(a) a comprehensive list of agreed or undisputed facts which arose from the pleadings, (b) a list of agreed factors which the arbitrator was required to rule on, and (c) a single bundle of relevant documents; -indexed, paginated, and "in date order", to be used at the hearing.
ii. Paragraph 7 provided, under the heading "record of proceedings, that "*It was agreed that, if necessary, parties would lead evidence*".

iii. Paragraph 8 on further directions; granted the parties leave, where necessary, to approach the arbitrator for further directions on the conduct of arbitral proceedings including the inability to meet timelines earlier set.

[16] The issues placed before the arbitrator are not immediately visible on the papers before me. I believe however, that the below extract[3] forms a dependable if not cogent synthesis. The contention revolved around allegations of undisclosed and unmanaged conflict of interest; -

i. Whether the sale of shares/debt swap agreement was validly concluded,
ii. Whether the resolution passed by CFI as required by regulatory and ZSE Listing Rules was validly procured.
iii. Whether the conflict of interest matters raised by CFI on the part of those of its directors at the time the resolution was made, impugned the final resolution of the shareholders,
iv. Whether the requisite disclosures were made regarding the affected directors' perceived conflict of interest.

[17] The parties converged to address the issues before the arbitrator. We need not tick through this checklist in [16] above, for purposes of determining the points *in limine.* What is important is that the proceedings commenced with CFI leading evidence from its chief executive, Mr. Shingirayi Norman Chibhanguza. CFI had incidentally filed a separately compiled bundle. Another key development which subsequently sponsored much disagreement is whether or not Fidelity dispensed with its right to lead evidence. CFI insists that it did, but Fidelity spiritedly disputes that contention.

[18] Nonetheless, at the closure of CFI`s case, Fidelity indicated an intent, on 16 September 2020, to now call "an unnamed witness from the ZSE" to testify. CFI was alarmed by this request. It sprang up in protest. The testimony of this ZSE witness would, so argued CFI, imperil its case through incurable prejudice. It opposed the proposal and the parties argued and consulted over the matter. With no consensus reached, the arbitrator made a ruling on 10 December 2020.He dismissed the request to adduce further evidence by Fidelity. One major reason furnished by the arbitrator was that Fidelity`s quest failed because there was no proper (safely interpreted as written) application before him.

[3] See paragraph 2.4 (i) to (v) of annexure "A" [page 199 of the record] to respondent`s opposing affidavit, being a witness statement compiled for CFI`s witness SHINGIRAYI NORMAN CHIBHANGUZA.

[19] Fidelity was aggrieved by this ruling. It attempted to secure the vacation of this decision in the High Court. It eventually had a change of heart, withdrew the High Court application and returned to process its misgiving before the arbitral tribunal. Fidelity therefore filed, on 21 June 2021, a written application for leave to lead evidence.

[20] This application was founded on an affidavit sworn to by Mr. Reuben Tinei Java, Fidelity's chief executive officer. CFI objected to that application. The arbitrator largely upheld the objection and dismissed the application by a ruling rendered on 6 October 2021. One of the reasons given for such dismissal being that Mr. Java's affidavit which founded the application, was based on hearsay.

[21] Fidelity took a simple step to cure that noted defect. It filed a second application on 1 November 2021.This time, backed by the affidavit of a different deponent. Its argument in re-filing the application was based on a finding made in the earlier ruling by the arbitrator. This being to the effect that since the (first) affidavit was based on hearsay, the first application amounted to a non-application.

[22] And Fidelity reasoned that since its first application had been ruled a non-event, it could still file a proper application. This time the founding affidavit was deposed to by Fidelity`s Managing Director for Group Investments-Mr. Ernest Masvasvike. This attempt met no success. It was resisted by CFI and again dismissed by the arbitrator via a ruling handed down on 10 May 2022.

[23] Irked by a series of rulings against it, Fidelity then requested the arbitrator to recuse himself and abdicate office. The basis of the request was that the arbitrator had lost objectivity. He was, in the mind of Fidelity, now biased in favour of CFI and to Fidelity`s obvious prejudice. The application was opposed by CFI and eventually dismissed by the arbitrator.

[24] Further aggrieved by this ruling, Fidelity approached this court under HCHC 60-22 and the present proceedings HCHC 106-23. In the earlier case HCHC 60-22, Fidelity sought to have the arbitrator`s 10 May 2022 decision, the one dismissing its prayer to lead evidence, set aside. That application was vigorously contested by CFI. It was dismissed by this court per my brother NDLOVU J who upheld two points taken before him *in limine*. That decision is now under appeal as noted above. I will advert to this decision in disposing of the points *in limine* raised by Mr. *Mpofu*.

RESPONSE TO THE POINTS *IN LIMINE.*

[25] I commence by setting out the contra arguments on the points *in limine* by Mr. *Mafukidze*.Counsel argued that the locus classicus on arbitration in this jurisdiction, *Zesa v Maposa* 1992 (2) ZLR 45 (S), was predicated on a simple principle-fairness in proceedings. He submitted that this was the fundamental motivation for Fidelity`s various pursuits. It was therefore incorrect to construe such efforts as inconvenient and quarrelsome.

[26] Fidelity was merely pursuing the assertion of its right to just and fair proceedings. For as long as legitimate grievances existed, Fidelity was properly placed to seek recourse. Counsel reiterated that on that basis, Fidelity was invested with a valid causa before the courts. Central to Fidelity`s spectrum of applications was its insistence on the right to be heard. He further submitted that the arbitrator had lost his objectivity. His decisions were subject to a review. Even prior to conclusion of proceedings.

[27] Mr. *Mafukidze* urged the court to recognise that the impugned affidavit relayed factual matters drawn properly from factual sources such as company documents. For that reason, it was incorrect to conclude, as had been suggested, that the affidavit was inadmissible. The short tale behind Mr. *Mafukidze*` s argument, as I heard it, was that the points *in limine* formed part of the matters to be traversed on the merits.

ANALYSIS OF THE POINTS *IN LIMINE*

[28] The purpose of raising points *in limine* has been articulated with both emphasis and clarity in the jurisdiction. See *Muchakata v Netherburn Mine* 1996(1) ZLR 153 (S); *Gold Driven Investments (Private) Limited v Tel One (Pvt) Limited & Anor* SC 9-13 as well as the emphatic diction of MATHONSI J (as he then was) in *Telecel Zimbabwe (Pvt) Ltd* v *POTRAZ & Ors* HH 446/15. In summary, the following becomes relevant when considering points of law[4]; -

i. “A point of law must not be one that must, by a definitive law, be specially pleaded.

[4] See *Dig Dump Earthmoving and Plant Hire (Pvt) Ltd v Acturus Stone Quarries (Pvt) Ltd & 2 Ors* HH 347-23

ii. Alternatively, it must address the procedural deficiency created by the absence of clear provisions governing procedures in particular proceedings.

iii. It must not be utilised to usurp, circumvent, obviate or conflate existing explicit. provisions of the law meant to address such issue.

iv. It must percolate to the root of the matter and be potentially dispositive of it.

v. It must cause neither unfairness nor prejudice to the other party."

[29] I paused on this trite position given the manner in which the points *in limine* were framed. The first issue that came to mind as Mr. *Mpofu* advanced argument was that counsel would round off by pleading *res judicata*, issue estoppel or even *res litigiosa*. Counsel did not do so. I was somewhat puzzled. In its backbone, the argument *in limine* stood on the premise that the matters presently prosecuted by Fidelity had been addressed and or resolved by the court. My view is that it would have been both convenient and relevant to frame the points *in limine* under the heads of *res judicata* or issue estoppel. Such approach would have simplified the analysis by directing the inquiry through the specific requirements under either head[5].

[30] I do recognise however that it may be but a matter of form versus substance. I will proceed to address the points argued *in seriatim*. It was argued firstly that the controversy before the court had been substantially resolved under proceedings in HCHC 60-23 and judgment HH 400-23 per NDLOVU J. I have had sight of the learned judge`s decision and comment thus; -

[31] The matter before the court in HCHC 60-23 was an application by Fidelity to set aside the arbitral award of 10 May 2022. issued by. This application was brought in terms of Article 34 (2) (b) (ii) of the Arbitration Act. Article 34 (2) (b) (ii) deals with recourse against an award on the basis that the award offends the public policy of Zimbabwe. In other words, when Fidelity approached this court in HCHC 60-22 its attack was that, for all intents and purposes, the award: -

> "…goes beyond mere faultiness or incorrectness and constitutes a palpable inequity that is so far reaching and outrageous in its defiance of logic or accepted moral

[5] See on res judicata; - *Kawondera v Mandebvu 2006 (1) ZLR 110 (S); Flowerdale Investments (Pvt) Ltd & Anor v Bernard Construction (Pvt) Ltd & Others 2009 (1) ZLR 110 (S)* and *Chawasarira Transport (Pvt) Ltd v Reserve Bank of Zimbabwe 2009 (2) ZLR 112 (H)* and on issue estoppel see *George Katsimberis & Anor v Sharpe & 5 Ors HH 842-22.*

> standards that a sensible and fair-minded person would consider that the conception of justice in Zimbabwe would be intolerably hurt by the award."[6]

[32] Herein, Fidelity has approached the court brandishing a different spear. Its application is brought in terms of Article 13 (3) of the Arbitration Act.This Article provides that; -

> (3) If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this article is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the *High Court* to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award. [underlined for emphasis].

[33] Quite clearly, the respective causa in HCHC 60-22 and this matter are different. It may be a matter crowing from the same roost, but by different roosters. There was a compelling argument by Mr. *Mpofu*; - that this court cannot, proceed to entertain the current application in the light of HH 400-23. My simple response to that position is the test of res judicata and its sub-specie of issue estoppel should have illuminated the way out of this question.

[34] Those principles were neither raised, argued nor ventilated. I am reluctant, in the circumstances, to bar a party from exercising its right to be heard in the absence of a clear process justifying such disentitlement. I would thus not be persuaded by the same point *in limine* that this court has already addressed the matters raised herein under HCHC 60-22. There are two additional reasons why I reach this conclusion.

[35] Firstly, under HCHC 60-22 the nature of relief sought was entirely different from that sought presently. Article 34 (3) (2) (b) (ii) limits the court`s power to either setting aside or confirming the award. This point was argued and noted in HCHC 60-22. It in fact formed part of the learned judge`s *ratio decidendi*. Herein, the court`s mandate is different. It goes beyond giving a mere "yes" or "no". The court is accorded a wider latitude in dispensing with an application under Article 13 (3).

[35] Additional to that point is the relative principle discussed by the Supreme Court in *Rio Zim Limited & Anor v Maranatha Ferrochrome (Pvt) Ltd & Anor* SC 30-22 where a distinction

[6] *Zesa v Maposa (supra)*`s definition of an award that offends the public policy of Zimbabwe at 466 F.

was made between "a *ruling"* and *"an award"*. Herein, Fidelity seeks to contest an interlocutory ruling. It has brought its application under Article 13 (3). This is one of the provisions which permit a litigant to resort to this court in order to seek correction of perceived procedural irregularities. A comparison of the cause of action, relief sought and procedure followed by Fidelity under HCHC 60-22, to that in the present proceedings instantly reveals the clear distinctions between the two matters.

[36] Secondly, it is important to recognise that in HCHC 60-22, this court decided the matter on technicalities rather than on the merits. It upheld two out of the six points in limine raised by CFI.These include the first point to the effect that the application had been brought out of time. Which brings us into the territory of *Chimpondah & Anor v Muvami* 2007 (2) ZLR 326 (H). And I refer to the remarks of MAKARAU JP (as she then was) when she disallowed a plea of *res judicata* at 330 C; -

> "A judgment founded purely in adjectival law, regulating the manner in which the court is to be approached for the determination of the merits of the matter does not in my view constitute a final and definitive judgment in the matter. It appears to me that such a judgment is merely a simple interlocutory judgment directing the parties on how to approach the court if they wish to have their dispute resolved." [Underlined for emphasis].

[37] In relying on the above decision, I recognise two factors which slightly distinguish it from the present matter. Firstly, in Chimpondah, the court dealt with the same matter between the same parties and on the same issue. Herein, we have two different matters brought under different heads or causes of action. Secondly, the court had, per CHATUKUTA J (as she then was) declined to go into the merits of the matter. In that regard, the learned judge "impliedly" left the door open for the applicant therein to re-institute after addressing the defects in their papers.

[38] Herein, the order of NDLOVU J was final. It dismissed the application before the court. Notwithstanding these noted distinctions, I remain persuaded that Chimpondah` s authority enjoins the court to take appropriate considerations of whether a matter was disposed of on the merits or not. For the above reasons, the first point *in limine* is therefore dismissed. To my mind, it is this first point *in limine* that potentially carried the greatest potency.

[39] The rest of the points raised by counsel were inexorably intertwined with the merits. To that extent, I found them unsustainable. I explain this conclusion hereunder starting with the second point *in limine*. This being the complaint of persistent and baseless protestations on the part of Fidelity. I took the trouble to outline the (impugned) endeavours by Fidelity before the arbitrator in paragraphs [17] to [24] above. The reason being to set out the picture characterising Fidelity`s version of the contested series of events.

[40] Mr. *Mpofu* argued further that in addition to those unsuccessful forays before the arbitrator, this very application too, formed part of that suite of frivolous attempts by Fidelity. Counsel thus advanced further his earlier argument in condemnation of Fidelity`s faulty cause of action. This argument is well noted. But the veracity of a party`s causa can only be determined by ventilating the matter on the merits. That is unless that causa stumbles over a procedural impediment.

[41] Additionally, Fidelity must account for its several interlocutory applications before the arbitrator and this court. It must offset the allegations that its actions amount to a frivolous abuse of process. This onus will be borne out in the case which Fidelity makes in the present application. And that case will be viewed against the opposition which CFI has mounted against it. It must further be remembered that Fidelity has approached the court making the specific allegations of bias as justification for seeking the arbitrator`s recusal. In examining its attack on the presiding officer, its own conduct will be evaluated.[7] These are matters firmly anchored in the merits.

[42] Further the definition of what amounts to frivolous action was discussed in the Constitutional Court decision of *Makoto v Mahwe* N. O & Anor CCZ 3- 20. Whilst that matter obviously dealt with constitutional standards, I believe the below *dicta*, cited with approval [at page 6 of that decision], carries universal application and stands relevant to our present inquiry; -

> "In *S* v *Cooper and Ors* 1977 (3) SA 475 at 476D, BOSHOFF J said that the word 'frivolous' in its ordinary and natural meaning connotes an action or legal proceeding characterised by lack of seriousness as in the case of one which is manifestly insufficient. The raising of the question for referral to the Supreme

[7] See *Associated Newspapers of Zimbabwe (Pvt) Ltd & Anor v Diamond Insurance Company (Pvt) Ltd* 2001 (1) ZLR 226; and *Mupungu v Minister of Justice & 5 Ors* CCZ 7-21.

> Court under s 24(2) of the Constitution would have to be found on the facts to have been obviously lacking in seriousness, unsustainable, manifestly groundless or utterly hopeless and without foundation in the facts on which it was purportedly based.
>
> In *Martin* v *Attorney General and Anor* 1993 (1) ZLR 153 (S) it was held that the ordinary and natural meaning of the words 'frivolous or vexatious' in the context of s 24(2) of the Constitution had to be borne in mind and applied to the facts by the person presiding in the lower court to form the requisite opinion. GUBBAY CJ at 157 said:
>
> 'In the context of s 24(2) the word "frivolous" connotes, in its ordinary and natural meaning, the raising of a question marked by a lack of seriousness; one inconsistent with logic and good sense, and clearly so groundless and devoid of merit that a prudent person could not possibly expect to obtain relief from it. The word "vexatious", in contra–distinction, is used in the sense of the question being put forward for the purpose of causing annoyance to the opposing party in the full appreciation that it cannot succeed; it is not raised *bona fide* and a referral would be to permit the opponent to be vexed under a form of legal process that was baseless ….'" [Underlined for emphasis].

[43] Further guidance on baseless versus merited applications is issued by the Constitutional Court. And again per MAKARAU JCC writing for that court, one discerns the principle that a litigant will be rightly before a court; - even persistently so, for as long as its cause remains justified. In the court observed thus [at page 3] in *Qedisani Silas Machine v The Sheriff of Zimbabwe & 3 Ors* CCZ 8-23; -

> "Dismissing the first respondent's contentions, the High Court upheld, and correctly so in my view, the applicant's right to challenge the second sale. It found that the applicant's right to object to any sale of his property in execution was not limited by the certain number of objections he had taken. For as long as there was a sale in execution against his property, the applicant had the right to object to any such sale on the grounds given in the law." [Underlined for emphasis].

One must of course remain alive, in recognising the above principle, that the court was here speaking to a specific set of circumstances.

[44] I proceed to the third point *in limine*. Mr. Mpofu reiterated an earlier argument that Fidelity lacked a viable causa before the court. It had merely "recycled" purported causes of action out of matters conclusively disposed of by the arbitrator (and in the latest instance, by this court in HCHC 60-22). I believe my remarks in the preceding paragraphs on causa and frivolity adequately address this third point. I am therefore unable to find for CFI on its objection on its third point.

[45] The fourth point *in limine* derived from an attack on Fidelity`s version of what transpired before the arbitrator regarding the leading of evidence. This point, like the second and third was effectively an offshoot or elaboration of its predecessors. I note that Fidelity filed a total of three sworn statements, These affidavits were in support of Fidelity`s contention that it never waived the right to lead evidence before the arbitrator. That version was fiercely contested by CFI. It is not possible to make a ruling on the point without examining the matter on the merits. That fourth point *in limine* must therefore fail.

[46] CFI`s fifth point *in limine* raised issue with the founding affidavit deposed to by Mr. Reginald Shingirai Chihota. I note in particular that CFI directs its complaint against this affidavit`s content (as hearsay) rather than its form. It has not been suggested that the affidavit was unsigned, undated, uncommissioned or lacked in one or other formal standard. Such an objection would have placed itself closer to acceptance.

[47] Further, these concerns raised against Mr. Chihota`s affidavit generate a number of other considerations. Our law, in both statute and precedent[8] ,has pronounced extensively on evidentiary matters placed before the court via sworn statements. It will be necessary to consider the requisite principles in evaluating the content of Mr. Chihota`s impugned affidavit. As an example, in *Johnstone v Wildlife Utilization Services (Pvt) Ltd* 1966 RLR 596 (GD), [cited with approval by this court per MAKARAU JP (as she then was) in *Jean Hiltunen v Osmo Hiltunen HH 99-2008*], it was held thus at 597I- 598A: -

> "It is accepted, in our practice, that the rules of Such evidence, given in affidavit form in such applications, is not necessarily excluded because it is hearsay,

[8] See sections 20 and 27 of the Civil Evidence Act [Chapter 8:01] which deal with affidavits and hearsay evidence respectively. Further, the Rules of Court across the various judicial hierarchies detail the nature and requirements of valid affidavits.

> provided the source of the information is disclosed. As I understand our practice, it is this: first, the court must examine the evidence given in this form and ascertain the prejudice which might result to the opposite party, if the evidence is later shown to be incorrect, would be irremediable; second, the court must examine the passages to see whether there is some justification, such as urgency, for the evidence being placed before it in hearsay, and not in direct form." [Underlined for emphasis].

The last point *in limine* meets the fate of its peers and is hereby disallowed.

DISPOSITION AND COSTS

[48] With all the points *in limine* moved by CFI finding no favour, the preliminary objection must fail. I am of a different mind, however when it comes to costs which I will reserve for the main matter. I take that approach because the arguments raised herein suggest that further considerations be taken into account in determining the issue of costs.

It is therefore ordered; -

1. That the five (5) points raised *in limine* by first respondent be and hereby dismissed.
2. That the question of costs be and is hereby reserved for the main matter.

Mawere-Sibanda Commercial Lawyers -applicant`s legal practitioners
Nyawo and Ruzive-first respondent`s legal practitioners.

CHILIMBE J_____ [4/9/23]