GEORGINA DADIRAYI SAVANHU
versus
HERBERT SYLVESTER MASIYIWA USHEWOKUNZE VI (N.O.)
and
ESTATE LATE DUNCAN WILLIAM KONA
and
NOMSA HAZEL NCUBE N.O.
and
TARUBEREKERA NETSAI MAKHOSAZANA
and
DHLAMINI TOWNSHIP RESIDENCE ASSOCIATION
and
THE TRUSTEES FOR THE TIME BEING OF THE
and
RIVERSIDE ESTATES TRUST
and
AMBROSE NZEWI
and
NONOTI PROPERTIES (PRIVATE) LIMITED
and
BULAWAYO CITY COUNCIL
and
THE REGISTAR OF DEEDS N.O. (BULAWAYO)
and
THE SURVEYOR-GENERAL N.O. (BULAWAYO)
and
THE SHERIFF FOR ZIMBABWE N.O. (BULAWAYO)
and
THE SHERIFF FOR ZIMBABWE N.O. (HARARE)
and
THE MASTER OF THE HIGH COURT N.O. (BULAWAYO)

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE, 14 December 2022

Opposed application

Z T Zvobgo, for the applicant
T Taruvinga, for the first respondent
T K Hove, for the 2nd and 3rd respondents
Mr *G Nyoni*, for the 5th and 6th respondents

CHINAMORA J

Background facts

The facts of this matter require mentioning with a bit of detail. The applicant and the late Dr Herbert Sylvester Masiyiwa Ushewokunze ("Dr Ushewokunze") were in a love relationship from 1981 to 1983. Dr Ushewokunze purchased and registered in the applicant's name three properties (on 16 February 1983), namely:

(1) A certain piece of land measuring 3,6832 hectares, being the Remainder of Lot 7 Riverside Estates Agricultural Lots, of Subdivision "A" of Willsgrove situate in the district of Bulawayo ("Lot 7").

(2) A certain piece of land measuring 30.0628 hectares, being the Remainder of Lot 8 Riverside Estates Agricultural Lots, of Subdivision "A" of Willsgrove situate in the district of Bulawayo ("Lot 8").

(3) A certain piece of land measuring 5,2603 hectares, being Subdivision "A" of Lot 9A Riverside Estates Agricultural Lots of Subdivision "A" of Willsgrove situate in the district of Bulawayo ("Lot 9A").

At the end of her relationship with Dr Ushewokunze, the properties were in the applicant's name, and the applicant contends that they had been purchased for her benefit as a gift. On the other hand, the first respondent argues that the properties were registered in the applicant's name in order for Dr Ushewokunze to circumvent the ZANU-PF leadership code. This code prohibited senior members of the party from acquiring a lot of wealth. Unbeknown to the applicant, Dr Ushewokunze tried without success to transfer the three properties to the fourth respondent (his daughter), although he seemed to have believed that transfer had been done. Dr Ushewokunze then sold the properties to the late Duncan William Kona ("Mr Kona"), who was made to believe

that the properties were registered in the name of the fourth respondent. An agreement of sale between the fourth respondent and Mr Kona dated 4 June 1987 was prepared by Lazarus & Sarif, which is disputed by the fourth respondent who denies contacting Mr Kona. The fourth respondent's affidavit states that she was in the United Kingdom at the time of the alleged agreement of sale, and that she never owned the properties in dispute. Until Dr Ushewokunze's death on 10 December 1995, no legal proceedings to recover or transfer ownership of the properties from the applicant were instituted and title remains in her name. The applicant avers that the agreement dated 4 July 1987 purportedly signed between her and Mr Kona is fraudulent, since Mr Kona did not even know of her existence until early to mid-90s. She contends that this agreement was fraudulent. There is no document other document that Mr Kona produced that creates a contract between him and the applicant vis-à-vis the immovable properties in dispute. It is the applicant's further averment that, under HC 6048/00, executors of Dr Ushewokunze's estate instituted proceedings against her seeking to compel her to transfer Lot 7 to the executors. There was no mention of Lot 8 and Lot 9A in the summons. She proceeds to aver that a default judgment was improperly obtained despite her lawyer declining service.

I also need to mention that, under HC 11729/00, the applicant applied for rescission of the default judgment. Unbeknown to the applicant and the executors of Dr Ushewokunze's estate, Mr Kona instituted proceeding against the fourth respondent at the High Court in Bulawayo under HC 1716/02 relying on the fraudulent agreement of sale between himself and the applicant, and he obtained a default judgment to transfer the three properties. However, he astonishingly got a default judgment against the applicant who was not a party to that lawsuit. Mr Kona took transfer of the properties on 9 July 2003 under Deed of Transfer No 1431/2003, and the first respondent's attempt under HC 432/04 to prevent execution of the default judgment came too late. He went on to sell unregistered subdivisions of the three properties which had since been consolidated to third parties (including the seventh respondent). The first respondent, under HC 2557/19, obtained a default judgment for cancellation of the title deed registered in Mr Kona's name. This effectively restored title of the three properties into the applicant's name. However, the applicant was not aware of these proceedings in the Bulawayo High Court. She then filed the present application seeking the relief captured in the draft order. When this matter was set down for hearing, both the applicant and the respondents raised several preliminary points.

The preliminary points

The applicant raised three preliminary points, namely that;

i. The first Respondent lacks the requisite *locus standi in judicio* to depose to the opposing affidavit *in casu* on behalf of the deceased estate of the late Dr. Ushewokunze, in his capacity as the sole surviving executor of the deceased estate;
ii. The second and third Respondents' notice of opposition, having been filed without an address for service that is within five kilometres of the High Court registry, is invalid; and,
iii. The notice of withdrawal and affidavit of withdrawal that was filed by the 4th Respondent in which she withdrew her supporting affidavit to the applicant's application, is invalid and should be struck out from the record.

On the other hand, the first, second and third, and fifth and sixth respondents, raised the following preliminary points:

i. That the application, which pertains to a default judgment obtained in the year 2000 constitutes a grave abuse of court process;
ii. That there are material disputes of fact which cannot be resolved on the papers
iii. That the applicant is guilty of material non-disclosure
iv. That the matter is *lis alibi pendens*
v. That para(s) 1, 2 and 3 (b) – 3 (e) of the applicant's draft order are irrelevant and unnecessary,
vi. That the hybrid application is defective as it seeks declaraturs and consequential relief in terms of section 14 of the High Court Act coupled with rescission of default judgments in terms of r 449 (1) (a) of the High Court Rules, 1971 (*"the old rules"*);
vii. That there is material non-joinder;
viii. That the relief sought is incompetent and self-defeating;
ix. That the relief sought deprives the respondents of the right to be heard; and,
x. That the answering affidavit should be struck out by reason of being replete with legal comments, and because it raises new issues that are not raised in the founding affidavit.

I heard argument on points in *limine* and reserved judgment. Having fully considered the arguments placed before the court, I now hand down my judgment. I shall firstly address the points *in limine* raised by the applicant and then turn to those raised by the respondents.

The applicant's preliminary points

The applicant's first point *in limine* arises from a provision of the last will and testament of the late Dr. Herbert Sylvester Masiyiwa Ushewokunze (*"Dr. Ushewokunze"*). Clause 7 thereof provides that:

> "…there shall never be less than two Executors or Trustees in office as such at any time provided nevertheless that a sole surviving or continuing Executor or Trustee may act as such for the purpose only of appointing an additional Executor or Trustee..."
> **[My own emphasis]**

The applicant contends that the first respondent, in his capacity as the sole surviving executor of Dr. Ushewokunze's deceased estate is proscribed from carrying out any legal actions on behalf of the deceased estate except to appoint an additional executor. On this basis, the applicant contends that the first respondent lacks the *locus standi* to represent the deceased estate in these proceedings, and that therefore, the first respondent's opposing affidavit is a nullity.

The point is merited. Clearly, Dr. Ushewokunze's last will and testament requires that there be a minimum of two executors acting for the deceased estate at any time. The only singular action that may be taken by the sole surviving executor is limited to the appointment of an additional executor. At first, the first respondent makes the suggestion that the applicant ought to have applied to the Master of the High Court for the appointment of a second executor. I see no logic in that proposition and dismiss that argument. It was only after I asked the first respondent's Counsel why they had not approached the Master for appointment of a second executor, and Counsel finally admitted for the first time that they had done that. The first respondent requested an opportunity to furnish the new letters of administration to the Court. I enquired from applicant's Counsel whether he had any objection to this, given the importance of the matter, and he advised that he had none. I also enquired whether he would want the letters of administration to be furnished by way of a supplementary affidavit, but he indicated that he would be happy even if they were submitted by way of a letter. Having perused the new letters of administration, I note that a certain Ndaizivei T. N Ushewokunze was appointed as a second executor to Dr. Ushewokunze's estate. Since it has now been ascertained that a second executor was appointed,

and since the relief sought by the applicant against first respondent binds his successors in title, it appears that the complaint raised by the applicant has been addressed, the applicant's first point *in limine* therefore falls away.

The applicant's second point *in limine* is that the second and third respondents' notice of opposition is invalid by reason of the fact that it does not provide an address for service that is within five kilometres of the High Court registry as required by r 227 (2) (c) of the High Court Rules 1971 ("the old rules"). Counsel for the second and third respondents accepted that the notice of opposition indeed violated the aforementioned provision of the rules. She proceeded to make an oral application for condonation and removal of bar, which was not opposed by the applicant's counsel. Having granted the application for condonation by consent, the applicant's second preliminary point falls away.

The applicant's third preliminary point was taken against the validity of the notice of withdrawal and affidavit of withdrawal that were filed by the fourth respondent after pleadings had become closed. The fourth respondent deposed to a supporting affidavit which forms part of the applicant's application. In that supporting affidavit, she supports the applicant's application. According to the certificates of service on record, the forth respondent personally received service of the application. She did not oppose the application at all and therefore became barred. After the applicant had filed her answering affidavit to the notices of opposition filed by the first, second, third and fifth and sixth Respondents, the fourth respondent then filed a notice of withdrawal and affidavit of withdrawal in which she purported to withdraw the supporting affidavit which she deposed to in support of the application. Needless to say, the fourth respondent has no right of audience, given that she is barred for her failure to file a notice of opposition. She has not applied for condonation and removal of bar, therefore she is not permitted to file any processes. (See *Forestry Commission* v *Moyo* 1997 (1) ZLR 254 (S) and *GMB* v *Muchero* 2008 (1) ZLR 216). In any event, I agree with the applicant's Counsel that there is no procedure which allows for withdrawal of a supporting affidavit in the manner sought to be done by the fourth respondent. Furthermore, after the answering affidavit has been filed no further affidavits may be filed without leave of the court, and as such, the so-called affidavit of withdrawal is irregular. Accordingly, I uphold the third point *in limine*. The fourth respondent's notice of withdrawal and affidavit of withdrawal are therefore struck out from the record. I now turn to consider the respondents' preliminary points.

The respondent's points in *limine*

The first point raised was that the present application is an abuse of court process, because it concerns, in part, efforts to set aside a default judgment that was granted against the applicant in the year 2000. It is argued that the applicant sat on her laurels for almost two decades, and that therefore, she cannot now be allowed to approach the court when she has sat on her laurels all this while. I agree that a period of 20 years is indeed an inexcusably inordinate time for one to wait before seeking rescission, but the facts of this case are a little more complex than just that. Firstly, the applicant has demonstrated that she indeed instructed her erstwhile legal practitioners to seek rescission of the default judgment as soon as she discovered it. This was done under HC11729/00. The applicant avers that she was under the assumption that the rescission had been granted, given that the 1st respondent has, over the past 20 years, not enforced the default judgment. I also note that the application is not premised entirely on an effort to seek rescission of the default judgment obtained under HC6048/00. The founding affidavit alleges that the applicant only became aware of various acts of fraud and unlawful attempts to disenfranchise her of the immovable property, towards the end of the year 2020. It was the discovery of these facts between October 2020 and December 2020 that prompted this application. It is therefore not a correct characterization of the present application to state that the cause of action arose 20 years ago. In my view, there are critical issues that stand to be decided in this application, particularly because the immovable property is indeed registered in the applicant's name. The court cannot turn a blind eye to her allegations of ownership of the immovable property. At the very least, they must be interrogated. Her claim does not appear to me to be frivolous or to constitute an abuse of court process. I therefore dismiss this point *in limine*.

The second point *in limine* taken against the application is that there are material disputes of fact which cannot be resolved on the papers and that therefore the application should have been instituted as a summons action instead. It must be stated that it is not every dispute of fact that constitutes a material dispute of fact. A material dispute of fact occurs where, on account of the conflicting positions taken by the parties, the court is left unable to resolve the dispute *see Supa Plant Investments (Pvt) Ltd* v *Edgar Chidavaenzi* HH 92-09. As stated by the Supreme Court in the case of *Zimbabwe Bonded Fibreglass (Pvt) Ltd* v *Peech* 1987 (2) ZLR 338 (S) at *339C-D*, the court should, in motion matters, always endeavour to take a robust and common sense approach.

Usually, such a preliminary point is taken after the court has heard the merits, because only then can the court make an informed decision whether or not there are material disputes of fact. The disadvantage of having such a point taken before the merits are head is that the court is not afforded an opportunity to take a robust and common sense approach to the dispute. From a cursory glance of the allegations made by the parties, and the documentary evidence placed before the court, this appears to be a matter capable of resolution on the papers without recourse to *viva voce* evidence. For starters, it is common cause that the immovable property is registered in the applicant's name, and has been so registered since 1983. The first respondent alleges that applicant took transfer as an agent of Dr. Ushewokunze. No agency agreement is placed before the court, neither does the title deed allude to such agency. Other than the first respondent's hearsay testimony, there is nothing to controvert the applicant's ownership. Should the court find that there is a material dispute of fact under such circumstances? I believe not. The first respondent has also alleged that transfer of the immovable property from the applicant to Dr. Ushewokunze was first demanded in 1983. The applicant says that since no proceedings were instituted to seek such transfer since then until Dr. Ushewokunze's death more than a decade later, that therefore the claim for transfer prescribed. Can it be said that the issue of prescription cannot be resolved on the papers? I think not. The second and third respondents, on the other hand, allege that the Mr. William Duncan Kona ("Mr. Kona") purchased the immovable property from Dr. Ushewokunze and not from the applicant. In light of that allegation, and the admission that the immovable property was registered in the name of the applicant, can there be any material dispute of fact insofar as the applicant alleges that she did not sell the immovable property to Mr. Kona and that she did not authorize transfer of the immovable property into his name? Again, I believe not. As I have said, I do not find that there are such significant disputes of fact as to render it impossible for the court to decide this matter on the papers placed before it. In light of the foregoing, I do not find merit in this point *in limine*. I accordingly dismiss it.

The next point *in limine* is that the applicant is guilty of material non-disclosure. In this regard, reference is made to various documents, which it is alleged that the applicant deliberately omitted to bring to the attention of the court in her founding affidavit. I have carefully studied the documents upon which the allegation is premised. I note that it is those very documents which have armed the applicant with the argument of prescription in her answering affidavit. I do not doubt that if the applicant had been aware of these documents, she would not have failed to

address them in her founding affidavit, because they actually tend to support her case. For instance, I have perused the letter dated 26 October 1983 authored by the firm of Messrs Lazarus & Sarif, which demanded that the applicant transfer the immovable property to Dr. Ushewokunze. Given how heavily the applicant relies on that letter to substantiate the argument of prescription in her answering affidavit, I am convinced that she would have relied on it in her founding affidavit from the onset if she had been aware of it. In any event, there is nothing suggesting that the applicant was aware of any of the documents furnished in the respondents' opposing affidavits, or that she had such documents in her possession. It has not been demonstrated how exactly it is that she failed to disclose documents that were allegedly in her possession. The onus lay on the respondents to demonstrate that the applicant did not disclose documents that she was aware of. That onus has not been discharged. I do not find merit in this preliminary point. It is consequently dismissed.

Another preliminary point raised by the respondents is that of *lis alibi pendens*. It is contended by the respondents that there is an ongoing matter, pending under Bulawayo High Court case number HC2076/20. I have perused the summons for that matter, which forms part of the record. It appears that the cause of action in that matter concerns enforcement of an alleged verbal agreement between the late Dr. Usehwokunze and the applicant, whereas the present application is premised on section 14 of the High Court Act as well as rule 449 (1) (a) of the old rules. Apart from the fact that the Bulawayo High Court summons under HC2076/20 and the present application relate to the same immovable property, there is nothing similar about the cause of action or the relief sought in the two matters. Two the key requirements for *lis pendens* to succeed are that the two matters must be premised on the same cause of action, and must involve the same parties. Both tests are not met in this case. Accordingly, this point *in limine* is dismissed.

The next preliminary point taken is that the relief sought by the applicant in para(s) 1, 2 and 3 (b) – 3 (e) is irrelevant and unnecessary. Paragraph 1 seeks *declaraturs* to the effect that the immovable property is owned by the applicant, that she did not enter into any agreement to surrender the immovable property to Dr. Ushewokunze, that she never sold the immovable property to Mr. Kona and that therefore any agreement of sale between Mr Kona and members of the fifth and sixth respondents relating to the immovable property is invalid. This does not at all appear to be irrelevant and unnecessary. In fact, it appears to go to the root of the dispute

between the parties, which has necessitated the application. Paragraph 2 seeks an order declaring that the subdivision permit and all other official documents relating to the subdivision of the immovable property, which were issued in the name of Mr Kona in respect of the immovable property to be deemed to have been issued to the applicant. It also seeks an order directing that all purchasers of subdivisions of the immovable property, who purchased the same from Mr Kona, be directed to enter into agreements of sale with the applicant, failing which they will be evicted from the immovable property. Again, this relief does not seem irrelevant to me. The applicant is attempting to vindicate her rights in the immovable property, over which she holds title deeds. She acknowledges that the immovable property had been subdivided on account of what she terms as the unlawful and illegal actions of Mr Kona. Instead of immediately seeking the eviction of all those persons who purchased subdivisions from Mr Kona, she is offering them an opportunity to regularize their standing with her, and only if they fail or refuse to do so will they then be evicted. Again, this relief flows naturally from the cause of action pleaded in the founding affidavit. It seems very necessary and relevant. The relief sought in para(s) 3 (b) – 3 (e) concerns efforts to set aside judgments which, according to the applicant, the High Court would not have granted have it been made aware of the true state of affairs. The judgments which are sought to be set aside all concern the immovable property which is registered in the name of the applicant. If indeed those judgments were granted erroneously as alleged by the applicant, then clearly, they must be set aside. Again, I find that relief to be relevant and necessary in light of the allegations made in the founding affidavit. Accordingly, the preliminary point lacks merit and must be dismissed.

The next point *in limine* taken by the respondents attacks the propriety of the application on the basis that the applicant combined an application for a *declaratur* in terms of s 14 of the high Court Act, and an application for rescission in terms of r 449 (1) (a) of the old rules. The respondents contend that such a hybrid application is not permissible. I find no reasonable justification why a litigant would be precluded from instituting a hybrid application in the manner done by the applicant. Given the background of this matter, which spans over two decades, it would cumbersome and tedious for the applicant to institute separate applications which are all related. Not only that, but multiple applications would unnecessarily clog the court system. As long as a litigant addresses the individual requirements of each aspect of the hybrid application,

there can be nothing preventing the applicant from pursuing a hybrid application. This point *in limine* must fail.

The next point taken by the respondents is that there has been material non-joinder. It is alleged that there may be other purchasers apart from members of the fifth and sixth respondents, as well as the seventh respondent, who purchased subdivisions of the immovable property from Mr Kona, and who are not cited in this application. It is further alleged that such persons would be negatively affected by the outcome of this application, and yet they have not been given an opportunity to be heard. Firstly, I notice that this point is premised entirely on conjecture. The respondents are unable to identify a single person whom they say should have been joined. They merely say that there might exist such a person. The court cannot delay the resolution of a matter purely on speculation. However, and in any event, r 87 of the old rules provides that:

> "No cause or matter shall be defeated by reason of the misjoinder or non-joinder of any party and the court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter."

The same provision is replicated in r 32 (11) of the High Court Rules, 2021 ("*the new rules"*) Therefore, even assuming that there had been non-joinder of some interested parties, that alone would not prevent the court from determining the dispute as it pertains to those parties that are before the court. Accordingly, this point *in limine* is dismissed.

The next point taken by the respondents is that the relief sought is competent and self-defeating. I have already analysed the relief sought when I was dealing with the fifth preliminary point, and I found the relief to be logical and coherent. It is necessary to go a little further, as I address this point *in limine*. As I understood the submissions of counsel in respect of this point, it was argued that the applicant cannot, on the one hand, seek an order validating her ownership of the immovable property, and on the other hand, seek an order directing that the subdivision permits be deemed to have been issued in her name, and directing the members of the fifth and sixth respondents to engage her for purposes of regularizing their sale agreements with her. Such relief is not self-defeating in my view. Clearly, the applicant alleges in the papers that she has a right to recover her immovable property from whoever is in possession of it. She also acknowledges that there were many innocent purchasers who genuinely but wrongly believed that Mr Kona was a *bona fide* owner of the immovable property. Out of the desire to be fair to these innocent purchasers, the applicant therefore seeks an opportunity to allow them to regularize their

agreements with her. Only if they are unable to purchase the subdivisions from her will she then seek their eviction. I find this to be entirely coherent and logical.

While on the same point of incompetent relief, it was argued for the respondents that the relief sought by the applicant under para(s) 3 (b) and 3 (c) of the draft order, with regards to the rescission and setting aside of the judgments obtained under Bulawayo High Court case numbers HC1716/02 and HC432/04, is incompetent because those judgments had already been set aside in a default judgment that was granted in favour of the first respondent under Bulawayo High Court case no. HC2167/19 on 3 October 2019. From my reading of the founding affidavit, I note that the applicant acknowledges that those two judgments were set aside. However, the applicant also states that the judgment under HC2167/19, which had set aside those two judgments, was the subject of a subsequent application for rescission of default judgment, which had been instituted by the sixth and seventh respondents under Bulawayo High Court case number HC1426/20. The applicant's founding affidavit specifically states in part as follows:

> "However, in the unlikely event that by the time that the application *in casu* is heard, an order would have been granted setting aside the order under HC2167/19, then I would ask this Honourable Court to again set aside the two judgments granted in favour of Mr. Kona under HC 1716/02 and HC 432/04 for the reasons I have explained above. The two judgments were erroneously granted. They both affect my legal rights in the Immovable Properties, they were both granted in my absence and are both riddled with significant errors which this Court cannot possibly ignore."

It appears that the applicant contemplated the possibility that by the time that this application was heard, the sixth and seventh respondents' rescission application under HC 1426/20 could have been granted, the effect of which would be to resuscitate the two judgments obtained under Bulawayo High Court case numbers HC 1716/02 and HC432/04. During the hearing of these preliminary points, counsel for the fifth and sixth respondents furnished the court with a copy of the written judgment of the Bulawayo High Court which granted the rescission application of the sixth and seventh respondents under HC1426/20. That rescission effectively means that the default judgments obtained by Mr. Kona have been revived, in which case, it would seem that the applicant is entitled to challenge those orders. Therefore, the eighth point *in limine* raised by the respondents is hereby dismissed accordingly.

The ninth point *in limine* raised by the respondents was that the application *in casu* deprives the respondents of the right to be heard. As I understood the submissions of counsel, the

argument made under this point was that if the *declaraturs* and consequential relief are granted, then the respondents would be denied an opportunity to institute summons in future against the applicant. I did not find this argument to make much sense. Each of the respondents that opposed the application have been afforded an opportunity to be heard. They have filed lengthy notices of opposition in which they have raised numerous preliminary points as well as specifically answered to the applicant's allegations on the merits. Each of the respondents who is desirous of opposing the application has been given ample opportunity to be heard. I therefore do not agree that the application deprives any respondents the right to be heard. Accordingly, this point *in limine* must fail.

The last and final point *in limine* raised by the respondents challenged the validity of the applicant's answering affidavit. The challenge was twofold. In the first instance, it was alleged that the answering affidavit is replete with legal comments. In the second instance, it was alleged that the answering affidavit attempts to raise new allegations that were not raised in the founding affidavit. With regards to the first leg of this argument, I do not find it merited. As rightly submitted by counsel for the applicant, the respondents raised a cumulative total of nine preliminary points in their respective notices of opposition. Points *in limine* are, by their nature, points of law. It is difficult to imagine how exactly the applicant should have answered to nine points of law in the answering affidavit without making legal comments. I find the respondents argument in this regard to be ingenuous and insincere. The second leg of this argument was that the applicant raised the issue of prescription for the very first time in her answering affidavit. I find two immediate responses to this argument. The first is that the issue of prescription was raised in answer to allegations made by the first respondent in his opposing affidavit. As I earlier mentioned, it is the 1st respondent who argued in his opposing affidavit that Dr. Ushewokunze first demanded transfer of the immovable property from the applicant by way of a letter dated 26 October 1983 that was authored by the firm of Messrs Lazarus & Sarif. The applicant then retorted in her answering affidavit that if the first respondent first demanded transfer in 1983, then his right to take such transfer elapsed after three years from that date of initial demand. This is not the same thing as raising issues for the first time in one's answering affidavit. The issue of prescription was raised specifically as an answer to allegations made in the first respondent's opposing affidavit. In any event, prescription itself is an issue of law, and as such, can be raised

at any time. In the Supreme Court case of *El Elion Investments (Pvt) Ltd* v *Auction City (Pvt) Ltd* SC 29-16 it was stated that:

> "It is accepted that a point of law can be raised at any stage of the process even on appeal. The law on the raising of points of law for the first time on appeal is clear and has been articulated in a plethora of cases."
>
> *See also Muchakata* v *Netherburn Mine* 1996 (1) ZLR 153 (S) at 157A *and Muskwe v Nyajina & Ors* SC 17-12

If a point of law can be raised for the first time on appeal, it certainly can be raised for the first time in an answering affidavit. I therefore do not find anything amiss by the applicant's raising of the argument of prescription in the answering affidavit. In the result, the respondents' last point *in limine* is also dismissed for lack of merit.

Disposition

In the result, it is ordered that:

1. The letters of administration appointing Ndaizivei T. N. Ushewokunze as co-executor testamentary of the estate late Dr. Herbert Sylvester Masiyiwa Ushewokunze are hereby admitted as part of the record. Consequently, the applicant's first point *in limine* is dismissed.

2. The second and third respondents' application for condonation and removal of bar for non-compliance with r 227 (2) (c) of the High Court Rules, 1971 is hereby granted. Consequently, the applicant's second point *in limine* is dismissed.

3. The applicant's third point *in limine* is hereby upheld, and consequently, the fourth respondent's notice of withdrawal and affidavit of withdrawal are hereby struck out from the record as the fourth respondent is barred.

4. All of the respondents' points *in limine* are dismissed.

5. The Registrar is hereby directed to set the matter down for determination on the merits.

C Z Attorneys, applicant's legal practitioners
Mutuso Taruvinga & Mhiribidi, first respondent's legal practitioners
Lazarus & Sarif, second and third respondents' legal practitioners
Nyoni & Nyoni, fifth and sixth respondents' legal practitioners