

**IN THE HIGH COURT OF UNITED REPUBLIC OF THE
TANZANIA
(COMMERCIAL DIVISION)
AT DAR-ES-SALAAM**

MISC.COMMERCIAL APPLICATION NO. 47 OF 2020

LYCOPODIUM TANZANIA LTD....APPLICANT/2nd DEFENDANT

VERSUS

POWER ROAD (T) LIMITED1stRESPONDENT/1st DEFENDANT

PANGEA MINERALS LTD.....2nd RESPONDENT/3rd DEFENDANT

PETROFUEL (T) LIMITED.....3rd RESPONDENT/PLAINTIFF

RULING

Date of the Last order: 28/5/2020
Delivery of the Ruling : 23/7/2020

NANGELA, J.,

This is a ruling in respect of a notice of preliminary points of law filed in this Court on the 22nd April 2020. The notice is in objection to the hearing and determination of this application. The Application was filed by way of a Chamber Summons supported by an affidavit of Ms. Linda Bosco, dated in Dar-es-Salaam on the 21st April 2020. The Chamber Summons was filed under *Order XLIII rule 2 of the Civil Procedure Code, Cap.33 [R.E.2019] (as amended)* and section 14 (1), and 21 (2) of the *Law of Limitation Act, Cap.89 [R.E 2019]*.

In this Application, the Applicant prays for the following:

1. That, the Court be pleased to extend the time within which to file an application for setting aside the *ex-parte* Decree dated 24th October 2014; and
2. The Honourable Court be pleased to exclude the time between October 2019 to 15th April 2019 as such time was used by the Applicant to defend an appeal and prosecute a cross-appeal which was filed in the Court of Appeal of Tanzania.
3. That, the costs of the application be in the cause.

The 1st and 2nd Respondents did not file their counter affidavits as they did not intend to oppose the application. However, the 3rd Respondent filed its counter affidavit on 26th May 2020.

On 27th May 2020 this application was called on for necessary orders. On that day, Ms. Caroline Kivuyo, learned Advocate, appeared for the 2nd Respondent. She also held the briefs of Ms. Janeth Njombe, who represents the Applicant. Mr. Bernard Shayo appeared for the 1st Respondent, while Messers Killey Mwitasy and Bavoo Junis, learned advocates, represented the 3rd Respondent.

Speaking on behalf of Ms. Njombe, Ms. Kivuyo suggested to the Court that, since the 1st and the 2nd Respondents are not opposing the application, the 3rd Respondent's preliminary legal points should be disposed first. She thereby proposed to proceed by way of filing written submissions and dispose such preliminary points of law. The learned counsel for the 3rd Respondent was in agreement with that proposal.

In view of the above, this Court made the following scheduling orders:

1. That, the 3rd Respondent should file its written submission on or before 10th June 2020.
2. The Applicant shall file its written submission on or before 26th June 2020.
3. Rejoinder submission be filed on or before 2nd July 2020.

4. Ruling to be delivered on 23rd July 2020 at 9.00 am.

On 10th June 2020, the 3rd Respondent filed its Written submission dutifully. The Applicant filed its submission on 25th June 2020 and a rejoinder submission by the 3rd Respondent was filed on 3rd of July 2020 instead of 2nd July 2020. Since the rejoinder submission was filed outside the time prescribed by this Court, and this was done without any leave of the Court, I will not consider it. I will, therefore, consider the two rival submissions in chief only.

Essentially, the preliminary legal issues raised in objection to this Application are as follows:

- (a) That, the Application is bad in law and incurably defective for being supported by a defective affidavit which bears a defective verification clause.
- (b) The Affidavit of the Applicant is incurably defective for containing extraneous matters by way of hearsays, arguments, conclusions and prayers.
- (c) The Affidavit in support of the Application is incurably defective for being sworn by an incompetent person.

In support of the *first ground*, the learned counsel for the 3rd Respondent submitted that, the verification clause in the supporting affidavit of Ms. Linda Bosco was defective. It was argued that, being an important part of an affidavit, a verification clause confirms the correctness, truthfulness and authenticity of the matters deponed in the affidavit. To reinforce that argument, this Court was referred to S.C SAKAR, **Civil Procedure**, 11th edition, 2006, Vol.I, pp. 1508-1509, where the learned author had the following to say regarding a verification clause:

"The reasons for verification of affidavits are to enable the court to find which facts can be said to be proved on the affidavit evidence of the rival parties. The allegations may be true knowledge or allegations may be true information received from persons or allegations may be based on records. The importance of verification is to test the genuineness and authenticity of allegations and also to make the deponent responsible for the allegations. In essence, verification is required to enable the court to

find out as to whether it will be safe to act on such affidavit evidence. In the absence of proper verification, affidavits cannot be admitted in evidence ...Affidavits not properly verified will be rejected."

The learned counsel for the 3rd Respondent submitted further, that, it is in the verification clause wherein the deponent has to clearly state which facts are based on personal knowledge, and which are based on information received or records. Reiterating the principles governing affidavits, the learned counsel submitted that, sources of information must be disclosed for all affidavits whose facts are based on information received by the deponent, and there must be an averment that the deponent believes that information to be true. To buttress that position, this Court was referred to the Court of Appeal decision in the case of ***Lalago Cotton Ginnery and Oil Mills Co. Ltd v Loans and Advances Realization Trust (LART), Civil Application No.80 of 2002 (unreported)***.

In reference to the instant application, the 3rd Respondent attacked the verification clause in the affidavit of Ms. Linda Bosco. It was stated that, her verification clause was defective. The defect, in particular, was in regard to paragraph 8 of the affidavit. It was contended that, although the deponent alleges that the contents in that paragraph were based on advice received from the Applicant and the records of the proceedings, nowhere does she state whether she believed the advice to be true. Consequently, it was argued that, in light of the Court of Appeal decision in ***Lalago Cotton Ginnery and Oil Mills Co. Ltd (supra)***, such a clause was defective.

Concerning the *second ground of objection*, it was argued, as a matter of principle, that, affidavits must be confined to such facts as the deponent is able of his own knowledge to prove, and, that, the statements of the deponent's belief may be admitted provided that the ground thereof are stated. To support that position, the learned counsel for the 3rd Respondent referred this Court to *Order IX rule 3 (1) of the Civil Procedure Code, Cap.33 [R.E 2019]*. He also relied

on the cases of ***Uganda v Commissioner for Prisons Exparte Matovu [1966] E.A 514*** and ***Karata Ernest & Others v The Attorney General, HC Civil Case No.95 of 2003 DSM (unreported)***. It was argued, however, that, despite of the above settled principles, the affidavit of Ms. Linda Bosco contains extraneous matters by way of hearsays, arguments, conclusions and prayers.

Besides, it was submitted that, there are apparent inconsistencies and contradictions between what the deponent has verified in the verification part, and what she has narrated in the substantive paragraphs. The 3rd Respondent's legal counsel contended, with the exception of paragraph 8, that, the Deponent has alleged in the verification clause that, all what is stated in the rest of paragraphs are true to the best of her knowledge. The learned counsel for the 3rd Respondent contended that, since the contents of paragraphs 2, 3, 4, 5, 6, 7, 8, and 9 of the Applicant's supporting Affidavit detail what transpired before the 29th October 2019, it is in no way possible that such detailed information could have originate from the own knowledge of the deponent.

Instead, it was contended that, such information must have been acquired from the reading of various documents, a fact which ought to have been disclosed in the verification clause. Failure to do so, it was argued, the deponent's allegation that information in such paragraphs was derived from her own personal knowledge was false and misleading.

To cement the above submission, the counsel for the 3rd Respondent referred to this Court the case of ***Kadodi Sugar Estate &5 Others v Tanga Petroleum Co. Ltd, Civil Application No.110 of 2009 (unreported)***. In that case, the Court held, at page 4 of the typed ruling, that: "...surely, no court properly directing its mind to the dictates of justice can act on an affidavit which is based on a falsehood." He urged this court to refrain from acting on the affidavit of Miss Bosco on the ground that it contains information which is false, unreliable and hearsay.

As regards paragraph 10 of the affidavit, it was contended that, the same was misleading and false. It was argued that, while the deponent deposed that the Applicant became aware of the *Commercial Case No.29 of 2012* on 29th October, 2019 (when she was being served with the written submission and record of Appeal of *Civil Appeal No.96 of 2015* through her Advocate), such averment is flawed because it suggests that prior to October 20th, 2019, neither the Applicant nor the Deponent had a clue of what was going on.

The 3rd Respondent's grip was even more tightened in relation to paragraph 13, 15, 16, 17, 18 and 19 of the affidavit. It was contended that, these paragraphs contain legal arguments, conclusions, and prayers, contrary to the laws and rules of procedure governing the drafting of affidavits.

As for the *third ground of objection*, the 3rd Respondent's counsel submitted that, the Applicant's supporting affidavit is defective for being sworn by an incompetent person. The counsel for the 3rd Respondent asserted that, while an advocate may swear and file an affidavit in proceedings in which he appears, there are certain prerequisites that need to be considered. To support his contention, he referred to this case the Court of Appeal decision in **Lalago's case**, (*supra*), where the Court of Appeal had the following to say:

"An advocate can swear and file an affidavit in proceedings in which he appears for his client, but on matters which are in the advocate's personal knowledge only. For example, he can swear an affidavit to state that he appeared earlier in the proceedings for his client and, that, he personally knew what transpired during those proceedings."

The Court was as well referred to its own decision in the case of **Hon. Zitto Zuberi Kabwe v The Board of Trustees, Chama cha Demokrasia na Maendeleo and Another Civil Case No.270 of 2013, High Court of Tanzania, DSM (unreported)** where (Utamwa, J.) had the following to say:

" My settled view in interpreting the decision in the Lalago Case is that, though it is undisputed that our justice system recognises an advocate as an authorised agent of the party he represents in court, the precedent

(Lalago's case) did not give a blank cheque authority to an advocate when swearing affidavits for his clients in respect all facts that he had personal knowledge. The authority is only limited to facts that came into the advocate's personal knowledge by virtue of him acting in such capacity for his client. That mandate does not extend to substantive evidence for establishing a right or denying liability for his client in any court proceedings. Otherwise, an advocate will be both a witness and a counsel in the same case because, affidavits in law take place of oral evidence"

On the basis of the above two cases, the 3rd Respondent argued that the affidavit of Ms. Linda Bosco is defective as it does not meet the tests established in those cases. In particular, it was argued that, paragraphs 2, 3, 4, 5, 6, 7, 8 and 9 of the supporting affidavit, were not based on the deponent's own knowledge. It was further, contended that, paragraphs 8, 13, 15, 16, 17 and 18 are highly contentious and tend to extend to substantive evidence for establishing a right to her client as well as denying liability of her client. In view of that, the 3rd Respondent prayed that the entire application be struck out with costs.

As stated earlier, the Applicant' learned counsel filed a reply submission on 25th June 2020. Responding to *the first ground of objection*, the Applicant conceded that, the contents of paragraph 8 of the supporting affidavit are based on information obtained from the proceedings of this Court. The Applicant further conceded that the phrase that "... **believed to be true...**" is also missing in the verification of part of paragraph 8 of the affidavit.

However, the Applicant contended that, the defects pointed out above do not render the paragraph to be hearsay as suggested by the 3rd Respondent's counsel, but, at most, it should be regarded as just an incomplete verification. For such reasons, it was argued that the defect was insignificant as it cannot render the whole affidavit incurably defective. Further, that, the Court has discretion to order an amendment of a defective verification clause to correct

an error or expunge an offending paragraph from an affidavit, especially where doing so does not affect the rest of the paragraphs.

To buttress that legal position, reliance was placed on the following cases: ***Sanyou Service Station Ltd v BP Tanzania Ltd (now Puma Energy (T), Civil Appl. No. 185/17 of 2018 (unreported); Invest International Ltd v Tanzania Harbour Authority & 2 Others, Civil Appl. No.8 of 2001 (Unreported); University of Dar-es-salaam v Mwenge Gas and Lub Oil Ltd, Civil Appl. No.76 of 1999 (unreported).***

The applicant's learned counsel submitted, therefore, that, the cases cited by the learned counsel for the 3rd Respondent, to the extent that they suggest that the affidavit is incurably defective, are distinguishable.

As regards the 2nd ground of objection, the learned counsel for the Applicant was of the view that, paragraphs 2, 3, 4, 5, 6, 7 and 9 of the affidavit were properly verified by the deponent as being within her personal knowledge, while paragraph 8 was based on an advice from the Applicant and the record of proceedings.

The learned counsel further refuted the allegation that these paragraphs contain extraneous and contradictory matters. She submitted that, to hold so, the Court would need to consider evidence to establish such inconsistencies and, for that reason, such a ground cannot be a pure preliminary objection. To support her point of view, reliance was placed on the case of ***Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696*** and ***Mechmar Corp. (Malaysia) Berhad (Liquidation) v VIP Engineering and Marketing Ltd & 3 Others, Civil Appl. No. 190 of 2013, CAT, DSM (unreported).***

Concerning paragraphs 13, 15, 16, 17, 18 and 19 of the affidavit, the learned counsel for the Applicant denounced the 3rd Respondent's contention that such paragraphs contain legal arguments, conclusions and prayers. In her

view, these paragraphs are mere *statements of facts about the deponent's knowledge of the law*. The learned counsel invited this Court to be guided by the Court of Appeal decision in the case ***Convergence Wireless Networks v WIA Group Ltd & Others, Civil Appl. No. 263 "B" of 2015, CAT, DSM (unreported)***, as in that case, the Court of Appeal made a similar finding.

The learned counsel for the Applicant submitted further, that, paragraph 17 of the affidavit of the Applicant is a statement of fact on the issues of illegality intended to be raised in the application to set aside the default judgement. She argued therefore, that, the paragraph is not a legal argument and, that, at most, if concerns are with regard to the word "**serious**", which appears to connote a conclusion, the Court may apply the principle in ***Sanyou and DDL cases (supra)*** and expunge or ignore it, thus, leaving the paragraph intact.

Concerning the last ground of objection, the Applicant's learned counsel contended that, the case of ***Lalago Cotton Ginnery (supra)*** and ***Zitto Kabwe's case (supra)*** have been taken out of context. She submitted that, the ***Zitto Kabwe's case*** restricted the authority in ***Lalago's case***, and, therefore, there is nothing to stop an advocate from swearing an affidavit for the client in court proceeding except on affidavits bringing substantive evidence for establishing a right or denying a liability for his client.

The learned counsel for the applicant argue that, what is before this Court is just an application for extension of time to apply to set aside a default judgement and, that, this is a procedural aspect of the case. In view of that, she distinguished the ***Zitto Kabwe's case*** from the case at hand and finally prayed that the preliminary objections by the 3rd Respondent be dismissed with costs.

I have carefully considered the above rival submissions. As I stated earlier, I will not consider the rejoinder submission filed by the learned counsel for the 3rd Respondent for the simple reason that the filing was done outside

the prescribed date, and, above all, the same was filed without first seeking the leave of the court. Having said that, the key issue which I am called upon to determine in this ruling, is, in my view: *whether the affidavit supporting this application is incurably defective as alleged by the 3rd Respondent's learned counsel.* To be able to respond to the above, however, one has to examine the affidavit itself in light of what has been submitted and the existing law governing affidavits.

To begin with, I will look at the affidavit in light of the first ground of objection which is to the effect that: *the Application is bad in law and incurably defective for being supported by a defective affidavit which bears a defective verification clause.* The impugned verification clause reads as follows:

"I Linda Bosco DO HEREBY verify that all what is stated in paragraphs 1, 2, 3, 4, 5, 6, 7, 9,10, 11, 12, 13, 14, 15, 16, 17, 18 and 19 herein above is true to the best of my knowledge in my capacity as Counsel for the Applicant and paragraph 8 is based on advice from the Applicant and Record of the Proceedings."

The learned counsel for the 3rd Respondent has assailed the above verification clause as being defective. However, such particular attack was not directed to the entire contents of the clause but is only restricted. It is in relation to verification of paragraph 8 of the affidavit whose contents were, *inter alia*, based on an advice received from the Applicant. The advice is not verified as to whether the deponent believed it to be true or not, as it was emphasized in the **Lalago's** case (*supra*).

That being the case, there is no doubt that there is a defect in regard to the verification of paragraph 8 of the Affidavit. Even the Applicant's counsel readily conceded to that fact. However, he has submitted that, the defect is minor and, at most, it should be taken as *"just an incomplete verification"*.

Be that as it may, it is clear that an incomplete verification is no verification. That will mean, therefore, that, a finding is hereby made to the

effect that paragraph 8 of the supporting affidavit of the Applicant is defective for being wrongly verified. I will, however, consider the effects of holding so later in this ruling.

The *Second ground of objection* is to the effect that: *the Affidavit of the Applicant is incurably defective for containing extraneous matters by way of hearsays, arguments, conclusions and prayers.* The basis for this 2nd ground of objection seems to be partly pegged on *paragraphs 2, 3, 4, 5, 6, 7, 9 and 10*, as well as *paragraphs 13, 15, 16, 17, 18 and 19* of the supporting Affidavit.

Specifically, the argument advanced in regard to these paragraphs is that, the first batch (*i.e, paragraphs 2, 3, 4, 5, 6, 7, 9, save for paragraph 10*) provides a detailed account of what transpired before the 29th October 2019 which, by no any means can be said to come from the own knowledge of the deponent, but rather, such must have been acquired from elsewhere. It was argued, therefore, that, one would have expected the deponent to provide a reliable source of such information in her verification clause, failure of which makes the allegation that the information from such paragraphs were derived from her personal knowledge to be false and misleading.

As regards paragraph 10, the learned counsel brands it as being "*false and misleading*" since the deponent has stated that, the Applicant became aware of the *Commercial Case No.29 of 2012* on 29th October, 2019 (when she was being served with the written submission and record of Appeal of *Civil Appeal No.96 of 2015* through her Advocate). It is contended that, such a view connotes that prior to October 20th, 2019, neither the Applicant not the Deponent had a clue of what was going on, a fact which is purely false and misleading.

As regards paragraphs 13, 15, 16, 17, 18 and 19 of the affidavit, the argument is that, these paragraphs contain legal arguments, conclusions, and

prayers, contrary to the laws and rules of procedure governing the drafting of affidavits.

Responding to the allegations upon which the 2nd ground of objection is premised, the learned counsel for the Applicant refuted the allegations as being baseless. She contended that, the deponent properly verified paragraphs 2, 3, 4, 5, 6, 7 and 9 of the affidavit as being within the personal knowledge of the deponent. The learned counsel for the Applicant argued further that, to find out whether what is stated in those paragraphs is of extraneous in nature, inconsistent or otherwise, the Court will have to consider evidence to establish such inconsistencies and, for that reason, such a ground cannot be a pure preliminary objection. In my considered view, however, I do not think so. I think one can still look at the affidavit itself, without further ado, and rule out whether its contents are extraneous in nature, are argumentative, or amounts to prayers or conclusions.

I have read the impugned paragraphs of the affidavit. In short, paragraph 2 is concerned with the reasons why the learned counsel filed the affidavit, while paragraphs 3, 4, 5, 6, 7 and 9 provide detailed information verified as being matters within the knowledge of the deponent. The counsel for the 3rd Respondent has challenged this kind of verification. He contends that it is inappropriate, given that, such details could have only been obtained from another source which was not disclosed. With due respect to the learned counsel for the 3rd Respondent, I do not think that the noted paragraphs are defective.

As submitted by the learned counsel for the Applicant, paragraphs 2, 3, 4, 5, 6, 7, 9, were true to the best knowledge of the deponent, the knowledge acquired in her capacity as the counsel for the Applicant. As a counsel for the applicant, it may safely be assumed that she must have perused the record and the relevant documents from which the *ex-parte* Decree which is the subject of

the instant application, arose; and, from such a reading, she acquainted herself with the knowledge of the facts she deposed in her affidavit.

Indeed, I am persuaded by an Indian case of ***Dwarkanath, Hindu Undivided v Income-Tax Officer, Special, [1966] AIR 81***, of which, while determining a similar kind of objection to an affidavit partly based on deponent's own knowledge, the Court stated, as follows, that:

"Deponent's own knowledge"... is wide enough to comprehend the knowledge of the appellant derived from a perusal of the relevant documents; and the affidavit in express terms disclosed and specified the documents, the source of the appellant's knowledge."

In our instant case, the Applicant has attached, in all those cited paragraphs of her affidavit, the respective documents from which the contents of the affidavit are based. To me, that is sufficient to indicate that she was acquainted with knowledge of such facts contained in the record so perused. I think, that is a plain fact sufficiently demonstrated in the verification clause.

As regards paragraph 10 of the supporting affidavit, the same is said to be defective as it is false and misleading. The basis for such a view is that, based on what is stated in that paragraph, it is impossible that prior to October 20th, 2019 neither the Applicant nor the Deponent had a clue of what was going on in respect of *Commercial Case No.29 of 2012* on 29th October, 2019.

I have looked at the paragraph. I think I can buy that argument, given that the Applicant was represented in Court. That means the paragraph is hereby found to be defective and misleading. Just like what I stated in respect of paragraph 8, the effect which such a holding has to the case will be assessed afterwards herein below. It suffices for now to hold that paragraph 10 of the affidavit in support of the application is false and misleading.

As regards paragraphs 11, 13, 14, 15, 16, 17, 18 and 19 of the affidavit, the question is whether these paragraphs contain legal arguments, conclusions, and prayers, contrary to the laws and rules of procedure governing the drafting

of affidavits. The Applicant has argued that their content constitutes statements of fact based on the deponent's knowledge of the law.

To cement the above submission, and with intent to demonstrate that such statements cannot be challenged, this Court was referred to the case of ***Convergence Wireless Networks v WIA Group Limited & 2 Others, Civil Application No.263 "B" of 2015, CAT, at DSM (unreported)***. In that case, the Court of Appeal of Tanzania stated, on page 8 of the typed judgement, that:

"I agree with Mr. Nyika that paragraph 33 of the affidavit is a statement of fact and what is contained in are 22, 23, and 33 is based on the knowledge of the deponent in his capacity as counsel to the applicant as reflected in the verification clause which says it all regarding the contents in the said paragraphs".

I have taken the liberty of examining paragraphs 11, 13, 14, 15, 16, 17, 18 and 19 of the affidavit of Linda Bosco. I am of a settled view that, paragraph 11 of the affidavit is nothing but a statement of fact to the effect that there was an appeal filed in the Court of Appeal, and, that, the deponent was the counsel instructed to prosecute the appeal. I see not fault with that paragraph at all.

Likewise, paragraphs 13, 15, 16, 18 and 19 are purely based on the deponent's knowledge of the law in her capacity as counsel for the applicant. These have, as well, been verified, and, I find no offense in them. In that regard, the ***Convergence Wireless Networks's case (supra)*** is quite relevant to this case in respect of the appropriateness of those paragraphs.

However, *paragraph 14*, in my view, seems to be problematic as it does not carry with it contents which are of a mere non-contentious nature. In principle, whether an applicant was acting in good faith or was negligent when he opted to pursue an appeal against an *ex parte* Decree of this Court, instead of applying to the respective court to have such decision be set aside, that amounts to a substantive matter seeking to establish a right or denying a

liability. It is clear, therefore, that, the paragraph does not stand the test indicated in the **Zitto Kabwe's case (supra)**.

Besides, paragraph 17 is also tainted with defects. It reads as follows:

"That, the intended application to set aside the *ex-parte* decree raises serious issues of illegality in that the Applicant was condemned unheard because the *ex-parte* judgment was passed without the Applicant being given the opportunity to be heard."

Looking at the above paragraph, I tend to agree with the submission made by the learned counsel for the 3rd Respondent that the paragraph is defective because, in my view, it is conclusive in nature. As it was stated in the case of ***Uganda v Commissioner for Prisons Exparte Matovu [1966] E. A 514, at page 520:***

" [As] a general rule of practice, an affidavit for use in court, being a substitute for oral evidence, should only contain statements of facts and circumstances to which the witness depones either of his own personal knowledge or from information which he believes to be true. Such affidavit should not contain extraneous matters by way of objection, prayer, legal argument or conclusion."

As regards the **third ground of objection**, (*i.e., the Affidavit in support of the Application is incurably defective for being sworn by an incompetent person*), I am of the view that the test which I have been called upon to apply, can only apply in respect of paragraph 14 and 17 which, as I have already stated herein above, are defective. The learned advocate for the applicant, therefore, had no mandate to depone on those facts.

In view of the above findings, I am of a settled view that the only paragraphs of the Applicant's supporting affidavit found to be problematic or rather defective are paragraphs 8, 10, 14 and 17. With that in mind, the next question that follows is: ***if paragraphs 8, 10, 14 and 17 are defective, does that suffice to render the whole affidavit incurably defective and thus***

liable to be struck out? Put differently, what consequences do these paragraphs have to the entire affidavit after being found to be defective?

In my view, the answer to the above questions can be found in the case of ***Omary Ally v Idd Mohamed & Others*** (*supra*), which, in a way, has eased my task, as it sets out the general rule which should be applied. According to that decision, the general rule is that:

"[A] defective affidavit should not be acted upon by a court of law, but in appropriate cases, where the defects are minor, the court can order an amendment by way of filing a fresh affidavit or striking out the affidavit. But if the defects are of substantial or substantive nature, no amendment should be allowed as they are a nullity, and there can be no amendment to a nothing."

It is clear from the above rule, therefore, that, the Court has a discretion to order an amendment of an affidavit provided that the defects in that affidavit are of a trivial nature or the Court can even make an order to expunge the offending paragraph from the affidavit. If amendments are ordered, such may include amendment of a defective verification clause.

The cited cases of ***Sanyou Service Station Ltd v BP Tanzania Ltd*** (now ***Puma Energy (T)***, ***Civil Appl. No. 185/17 of 2018*** (unreported); ***Invest International Ltd v Tanzania Harbour Authority & 2 Others***, ***Civil Appl. No.8 of 2001*** (Unreported); ***University of Dar-es-salaam v Mwenge Gas and Lub Oil Ltd***, ***Civil Appl. No.76 of 1999*** (unreported), are all supportive of such a legal position.

On the other hand, if the defects are substantial or are of a substantive nature, the court cannot make an amendment order but will proceed to strike out the affidavit. From the above general rule, the question that follows, therefore, is whether the defects pointed out are of a trivial nature or material (substantial) or substantive in nature.

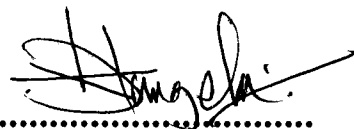
In my view, I find that, the defects pointed out in the affidavit of Ms. Linda Bosco are not substantial in nature. They only touch on paragraphs 8, 10, 14 and 17 of the affidavit. Even if these paragraphs are expunged from the affidavit, the affidavit can still stand and support the application as the rest of the remaining paragraphs stand intact.

Even so, to avoid more confusion, this Court will, in the interest of justice, order that the affidavit be amended by removing or making good the defects pointed out.

In the upshot, the Court settles for the following orders:

1. *That, the preliminary objection raised by the 3rd Respondent is partially upheld with cost, in respect of paragraphs 8, 10, 14 and 17 of the Affidavit in support of the application. That is to say, such paragraphs are found to be defective.*
2. *That, in view of the decision of this Court and those of the Court of Appeal of Tanzania cited herein above, since the defects pointed out in the affidavit are not substantial to warrant a total rejection of the affidavit, they can be amended by filing a fresh affidavit to make good the defects.*
3. *That, the Applicant is granted seven days from the date of this ruling to file a fresh affidavit that takes into account what has been stated in No.2 herein above..*

It is so ordered.



.....
DEO JOHN NANGELA
JUDGE,
High Court of Tanzania (Commercial Division)
23 / 07 /2020

Ruling delivered on this 23rd day of July 2020, in the presence of Miss Janeth Njombe, the Advocate for the Applicant and Mr. Joseph Nyirembe, Advocate for the 2nd Respondent and Bavoo Junus for the 3rd Respondent. The 1st Respondent was absent in Court.



A handwritten signature in black ink, appearing to read "Deo John Nangela". The signature is written in a cursive style and is positioned above a horizontal dotted line.

**DEO JOHN NANGELA
JUDGE**

**High Court of Tanzania (Commercial Division)
23 /07/2020**