LUDHAM INVESTMENTS (PVT) LTD

And

MENA INVESTMENTS(PVT)LTD

And

FAULKLAND INVESTMENTS (PVT) LTD

And

STRIPHOL ENTERPRISES (PVT) LTD

And 5

NETWORK INVESTMENTS (PVT) LTD

And

TRUSTEES (for the time being of) KUKUPA TRUST

And

HALFWAY INVESTMENTS (PVT) LTD

And

RADAK INVESTMENTS (PVT) LTD

And

PAUMART INVESTMENTS (PVT) LTD

Versus

BRIOLETTE SERVICES (PVT) LTD

And

HELENSVALE MARKETING (PVT) LTD

And

OMAHN INVESTMENTS (PVT) LTD

And

TRUSTEES (for the time being) of BELCOT FAMILY TRUST

And

RATLINE INVESTMENTS (PVT) LTD

And

WETA FARMING (PVT) LTD

And

NAGO ENTERPRISES (PVT) LTD

And

GOLDEN PILLAR MARKETING (PVT) LTD

And

WHITELY INVESTMENTS (PVT) LTD

And

ACE OT TRUMPS (PVT) LTD

And

SUKU'S INVESTMENTS (PVT) LTD

And

SACHIMORE (PVT) LTD

And

RISE INVESTMENTS (PVT) LTD

And

CHIMBIDZAYI SANYANGARE

And

HACOR INVESTMENTS (PVT) LTD

And

REGISTRAR OF COMPANIES

HIGH COURT OF ZIMBABWE

COMMERCIAL DIVISION

CHIRAWU-MUGOMBA J

Harare 13, 26, 27, 28 September, 2 , 6 and 9 October 2023

T. Mpofu, for the applicants

F. Mahere, for the 1st -12th respondents

OPPPOSED APPLICATION

CHIRAWU-MUGOMBA J.

This matter was placed before me as an application for a declaratur, in terms of s14 of the High Court Act [Chapter *7:06*]. The applicants seek an order that the registered nominal shares of the 1st respondent total 24 000 (Twenty-Four thousand) and additionally costs of suit on a legal practitioner to client scale against any respondent who opposes the application.

The deponent to the applicants' founding affidavit is one Never Mhlanga. He avers that he derives his authority in his capacity as a director of the 1st applicant. He proceeds by narrating the basis of the application as follows. The 1st applicant is a shareholder in the 1st respondent, "hereinafter 'the company"). On the 6th of May 1997, the company was incorporated in terms of the then Companies Act [Chapter 24:3] as a limited company. The initial capital of the company was 20 000 issued shares valued at one dollar each. Two persons had initially subscribed to 50 ordinary shares each, therefore totalling 100 allotted shares valued at a dollar each.

In 1998, all applicants and 2-13th respondents acquired 100% shareholding in first respondent from the initial subscribers. A total of 4 000 shares were added to the initial ones by special resolution to make the share capital 24 000 valued at a dollar each. In December 1998, 23 900 more shares were allotted, including the initial 100, thus taking the allotted total to 24 000. This is the nominal share capital as at the 4th of June 1999. The applicant holds 1000 shares in the company. There have been two previous attempts the first one in 2006 and the second one in 2009 to increase the share capital of the company by 23500 shares at each attempt. These attempts are tainted with irregularity due to lack of a special resolution by members authorising such increase and also this was not registered with the 16th respondent.

The annual returns for the period 1998 -2008 continued to reflect the correct allotted share capital of 24 000. After the second failed attempt to increase, there was an alteration of the 1st respondent's share capital from 24 000 to 47 500. Even then, the special resolution on the increase violates the 1st respondents' articles and statute. The directors had no authority and capacity to pass such a resolution. It is a legal nullity and must be corrected. The increase was also done in a manner that was unprocedural.

At an AGM held on the 27th of October 2016, members passed a resolution to cancel the 2009 increase of share capital. Despite this, the company is conducting business on the basis of 47 500 shares instead of 24 000. Dividends are being miscalculated on the basis of

this illegal increase and the shareholding of the applicants has been diluted. In light of these factors, the applicants seek a declaratur with no consequential relief. Attached to the founding affidavit are supporting affidavits from the 3rd to the 9th respondents.

The 1st to the 12th respondents strenuously oppose the application. The deponent to the affidavit is one Tamuka Madzore who states that he does so in his capacity as the company secretary of the 1st respondent. Four preliminary issues were raised as follows. (a) The application has prescribed. The cause of action arose on the 17th of August 2006 when the rights issue was specifically agreed to by all parties. The applicants ought to have approached the court to set aside the August 2006 resolution. Seventeen years down the line when a lot of money has been injected into the business, they seek to reap where they did not sow. (b) The cause of action is incompetent. The company's share register, annual returns and special resolution that set out the correct shareholding have never been set aside by a competent court. The court is being asked to grant a declaratory order that is tantamount to interfering with the documents filed with the 16th respondent. (c) The deponent to the founding affidavit has no authority. This point was abandoned at the hearing.(d) The application is replete with material non-disclosure. A total of seventeen out of twenty-three members of the company have made full payment for the increased shareholding pursuant to the August 2006 rights issue. The company was on the brink of collapse when it was realised that only recapitalization would save it. This is the reason why no member sought to set aside the annual returns.

On the merits, the resolution to increase the share capital was properly arrived at in August 2006. It was implemented by over 70% of the members. There was no attempt to set this aside. The official documents support the fact that the 2006 rights issue is valid. Seventeen years down the line, the applicants cannot be heard to try and undo the 2006 events. As of 2009, the majority of the company members had paid for the new shares in line with the 2006 rights issue. The share register was upgraded to reflect the new structure. On the 16th of August 2009, the company filed a formal members special resolution with the 16th respondent to confirm and ratify the 2006 resolution as a formality. This was never challenged or set aside. The relief sought by the applicants will result in unjust enrichment. The 2-12th respondents filed supporting affidavits.

The applicants deposed to an answering affidavit, which became a bone of contention and I will return to this point later.

At the hearing, the matter proceeded on the basis of the objections *in limine* after which I reserved judgment. I also put in on record that the first respondent filed a counter application which was opposed. Although at the onset of the hearing, I had stated that I will deal with the preliminary issues in the counter application, I did not do so because the resolution of the preliminary issues in the main application would have a bearing.

It is trite that points *in limine* should be able to dispose of the matter. In *casu*, this means dealing with the issue of prescription. I however have deliberately taken the route of dealing with the issue of the answering affidavit for reasons that will become clearer. Rule 33(1) of the High Court (Commercial Division) Rules, 2020, deals with the filing of an answering affidavit. It reads as follows

> *Answering affidavit*
>
> 33.(1) Subject to these rules, where the respondent has within the prescribed time, filed a notice of opposition and an opposing affidavit, the applicant may file an answering affidavit, with the register within five (5) days of the service of the opposing affidavit, which may be accompanied by supporting affidavits:
>
> Provided that no answering affidavit may be filed after the expiry of the fifth day without the leave of a judge and on good cause shown.

The position of the 1st to the 12th respondents which is common cause is that the applicants filed the answering affidavit outside the five -day period without seeking leave of a judge. Per *F Mahere*, the answering affidavit is invalid and should be expunged from the record. The time lines reveal that the notice of opposition was filed on the 20th of April 2023. The five days deadline expired on the 27th of April 2023. The affidavit in contention was filed on the 5th of May 2023 without leave being sought. A litigant should first seek leave before filing the answering affidavit and not after. The disregard of the rules cannot be condoned. in light of this blatant disregard of the rules, the affidavit should be expunged from the record. Reliance was placed on the decision in *Chimunda vs. Zimuto and anor*, SC-76-14. Per *T. Mpofu*, the infraction is technical in nature and ought to be condoned. In any event, it does not dispose of the matter. He further implored the court to take into account the ethos of the Commercial Division and allow the answering affidavit. In my view, counsel for the

applicants should have conceded this point. It is clear as daylight that in as much as an answering affidavit can be filed out of time, it can only be with leave of a judge. I did not hear *T. Mpofu,* submit that leave was sought. The aspect of 'good cause' has been the subject of judicial interpretation. It means leave is not granted by the mere asking. Ironically he cited the ethos of the division. Whilst I am cognisant of the fact that the court has inherent jurisdiction to control its own processes, such must not be abused. A careful reading of the rules of the Commercial Division will show, that time is of the essence if disputes are to be resolved speedily, and that is why they were framed in such a way to ensure that litigants who are sluggish will face the consequences. Allowing the filing of the affidavit without leave creates a dangerous and unwelcome precedent. Leave should have been sought. It was not. I therefore order that the answering affidavit be expunged from the record.

I now turn to deal with the crux of the points in *limine,* which is the issue of prescription. In *casu,* the time lines are common cause. The company was incorporated on the 6th of May 1997. Sometime in 1998, its entire shareholding was acquired by the applicants and the 2nd to the 13th respondents. In 2006, the share capital was increased from 24 000 to 47 500. This increase was registered with the 16th respondent merely according to the 1st to the 12th respondents, as a formality. In October 2016 a meeting of members was held, and one of the agenda items was the increase of the share capital. These minutes were approved on the 24th of November 2017. Taking a purely mathematical approach, indeed the application was filed well after three years when the conduct complained of, that is the increase in share capital was effected. But is the matter as simple as that? In my view, the answer lies in the cause of action and whether or not it has prescribed.

In their submissions, both counsels adopted different positions. *F. Mahere* submitted as follows. Section 15(d0 of the Prescription Act[Chapter *8:11*]. provides that the prescriptive period for a debt is three years. The cause of action at best arose in 2006. The applicants became aware of the allotment of shares in 2006 and participated in the rights issue. The cause of action having arisen in 2006, it expired in 2009. To date no attempt has been made to challenge the allotment and the annual returns filed of record. Applicants' as can be seen from their founding affidavit are challenging payments that have been made in respect of dividends based on the obtaining share structure. There is a resolution of the 20th of June 2009 which communicates the accurate share structure that remains unchallenged.

The contention by the applicants that the law of prescription does not apply to declaratory orders is misplaced as it has been settled by the Supreme Court in *Syfin Holdings (Pvt) Ltd vs. Pickering*, 1982 (1) ZLR @10. In that matter, the Supreme Court made reference to the definition of a debt under the Prescription Act and held that this definition is broad enough to include claims for specific performance or for declaration of rights. This means that given the state of affairs from 2006, the claim has prescribed. The High Court has also pronounced itself on the legal effect of failure to protest an allotment of shares in the case of *Fumia and anor. -v- Matshiya and anor.* This case falls on all fours with the one in *casu.* It is evident that the applicants failed to protest the legality of the allotment and the declaratory order sought is an attempt to nullify the rights issue and set aside the annual returns. The special resolution in relation to the shares is dated 2009 and the applicants still did not challenge it within the three -year prescriptive period. The applicants have instead been participating in getting dividends from the company as supported by page 108 of the record. The applicants acquiesced to the payment of dividends based on the share structure that they were now challenging.

In response, *T. Mpofu* made the following submissions. The application before the court is about a purported increase in the authorised share capital of a company. It is not about the allotment of shares. The question of the authorised share capital of a company is governed by statute and hence it is in realm of public law. Statutory rights do not prescribe. It is the allotment of shares in the realm of private law, governed by the law of contract that prescribes. A company has an authorised share capital established by its memorandum. Shares can be issued or unissued. Once issued, they are allotted to individual shareholders. The unissued ones remain in the hands of the directors to allot when the need arises. However, when a company wants to increase or alter its share capital, this is done in accordance with statutory provisions and it is in the hands of shareholders and not directors. The issue that the court should concern itself with is whether or not there was an alteration of the share capital of 24 000 shares and who resolved that alteration? He urged the court to have regard to the fact that the company has filed a counterclaim basing it on the cause of action in the main application. This constitutes a waiver of its right to object to the main claim. The onus is always on the party taking the point of prescription. In *casu*, the dates

the increase of the share capital was only confirmed on the 24th of November 2017. What the shareholders did has not been set aside. The wrong is still continuing. The 24th of November 2017 has not been placed before the court as the date the cause of action arose. Therefore no onus on prescription has been discharged. He further argued that as per the *Mushaishi vs. Lifeline Syndicate and anor,* 1990 (1) ZLR 284, a declaratur does not bestow anything on a party. It sets out what is the state of affairs and that is the difference between it and constitutive relief. On the authority of the *Ndlovu vs Ndlovu*, 2013 (1) ZLR 110, declaratory relief does not prescribe. The application before the court is a vindication of a statutory right. In that case, the court correctly cited the law based on the decision in *Oertel and ors. NO vs. Director Of Local Government,* 1981 (2) SA, 477. This is to the effect that a statutory right is not susceptible to prescription. The applicants are basing their claim on the old Companies Act, s87 on the alteration of the authorised share capital. They are simply averring that there was no alteration of the shares. In terms of s89, when shareholders altered the authorised share capital, they must take the resolution by which they have done so and register it with the Registrar of Companies. The applicants content that this was not done. They further content that in terms of s136, if no special resolution is passed and registered, whatever is done becomes null and void. The wrong is a continuing one as considered in *Hakos Makers (Pvt) Ltd vs. Pretorial City Council,* 1971(4) 465 @ page 467H- 468B. Once this fact is established, i.e of a continuing wrong, the claim does not prescribe.

In my view, the cause of action is what the applicants term an unlawful and unauthorised increase in the share capital of the company and lack of compliance with the law. They want the state of affairs to revert to the June 1999 position in which 24000 shares were allotted. *T. Mpofu* cites various infringements of the Companies Act [Chapter *24: 03*]. These are notably ss87- captioned, ‘ Power of Company to alter its share capital”, ss89 , ‘Notice of increase of share capital’ and ss136, Registration and Copies of Special Resolution”. I do not agree with *T. Mpofu*, that the 1-12th respondents have failed to outline the dates. In my view, the dates are common cause. Even if we were to consider the 24th of November 2017 as the date that the cause of action arose, there is no doubt that the applicants did not act within three years. What the parties differ on is merely the implications, for

instance the 1st to the 12th respondents content that the registration of share increase was a mere formality.

Having said that, I hasten to add that the case of the applicants is premised on the infringements of statutory rights.

> In *Fumia and anor. Vs Matshiya and anor,* HH-31-16, HUNGWE J (as he then was) stated as follows,
> "As indicated above, the applicants seek an order declaring as unlawful the allotment of eight shares in favour of the late Fumia on the basis that the allotment did not comply with article 4 of the Memorandum and Articles of Association of the company. The present papers make no reference to s 118 of the Act nor do they pretend to be couched in the language derived from reliance on that section. It seems to me that the case which the respondents were required to meet at court is that which was prepared and presented to them in the court application. That court application relied on the failure by the accountant to comply with article 4 of the memorandum and articles which required that in the disposal of shares in the company, there be consultation and consensus between and amongst the directors first. There is no suggestion that the registered members were not entitled to shareholding in the company but only that the correct procedure in the disposal of the eight shares was not followed. If regard is given to the effect of the claim, it inevitably would amount to declaring the applicants the sole shareholders. In my view, the claim is couched in a manner which does not preclude this court from determining the claim as one sounding in money and therefore a "debt" as envisaged in the *Prescription Act, [Chapter 8:11*]. The declaration that the shares were irregularly issued to the late Ettore Fumia would in effect result in the shares reverting to the other shareholders namely the applicants thereby enriching them. In that sense the claim amounts to one of return of an asset, which ordinarily would be a debt in terms of the Prescription Act. Where a time for payment is not fixed, a debt becomes due when the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises, or could have acquired that knowledge by exercising reasonable care."

I distinguish the *Fumia* matter with the one in *casu.* In the former matter, the court found that the application was not based on the infringement of statutory obligations. Hence, the court went on to hold that the claim constituted a debt and had prescribed. In view of the application being one premised on the infringement of statutory rights, it has not prescribed. Let me hasten also to add that this finding does not dispose of the matter on the merits. Having also made that finding, it is not necessary for me to deal with the issue of whether or not the claim constitutes a debt, as was done in the *Fumia* matter.

Having found that the claim has not prescribed, I will proceed to consider the other issues raised *in limine*. *F. Mahere* submitted that the cause of action is incompetent mainly

because the court is being asked to give an order that is at odds with the provisions of the Companies Act. Documents have been filed and accepted by the Registrar of Companies.

These have not been challenged. There is a presumption of regularity when documents are filed. In my view, this addresses the merits of the application and can be argued at the appropriate time. No argument was addressed orally on the application being replete with material non-disclosure. In the 1-12th respondents' heads of argument, I was referred to the case of *Fuyana vs. Moyo and ors,* 2005(1) 302 (H). The contention is that the applicants failed to disclose that the allotment entered into enabled the business to stay afloat and to run sustainably. This is not my reading of the dispute that is at hand. In any event, in a court application, the court or a Judge, acting in terms of R58(12), permit or require any person to give oral evidence in the interests of justice. This point in *limine* is therefore dismissed.

T. Mpofu submitted at the hearing that he had preliminary points to raise on the counter application. These do not appear in the pleadings filed of record. In my view, it will be prudent to allow the applicants to file supplementary heads of argument on these points and also allow the 1st to the 12th respondents to also file their heads. This will aid the court in speedily dealing with both the main matter and the counter applications speedily.

In view of the fact that the matter will proceed on the merits and also deal with the counter application, the most appropriate order for costs is that these shall be in the cause.

DISPOSITION

1. The applicants' answering affidavit is expunged from the record.
2. The rest of the 1st to the 12th respondents' preliminary objections be and are hereby dismissed.
3. The matter shall proceed to be heard on the merits in the main and the counter-application.

4. The applicants' shall file and serve supplementary heads of argument on the preliminary objections to the counter- application within a period of ten (10) days from the date of this order.

5. The 1st to the 12th respondents shall file and serve supplementary heads of argument on the applicants' preliminary objections to the counter application within ten (10) days of receipt of the applicants' heads of argument.

6. Costs shall be in the cause.

Munangati and Associates, applicants' legal practitioners.

Nyakutombwa Legal Counsel, 1st to 12th respondents' legal practitioners.