PAINA MACHIDZA
versus
MSASA PARK (PVT) LIMITED

HIGH COURT OF ZIMBABWE
MUCHAWA J
HARARE, 20 February, 29, May & 10 July 2024

Opposed Matter: Court Application for a declaratory order and consequential relief

Mr *T Madzvamuse*, for the applicants
Mr *S Banda with Mr F Zuva & Mr M Bwanya* for the respondent

MUCHAWA J: At the initial hearing of this matter Mr *Madzvamuse* applied for a postponement of this matter to enable the finalization of an application for joinder filed under HCH 1110/24. The court granted that application and this resulted in the joinder of 554 other applicants to a matter wherein there were initially 300 applicants.

The terms of the draft order filed by the applicants are to the following effect:

"**IT IS ORDERED THAT**:

1. The application for a declaratory order be and is hereby granted.
2. It is declared that applicants' right of occupation and ownership of pieces of land allocated to each of them on stand 560 Chadcombe Township, measuring 279 8393 Hectares, held under Certificate of Consolidated Title No 19391/1990, dated 30th March 1990, arise from the donation of the said stand 560 by the respondent to ZANU PF Mukuvisi Tashinga District in 2012.
3. It is declared that other than each applicant meeting its share of the subdivision costs incurred by the respondent on stand 560, together with transfer costs, any arrear utility bills thereat and conveyancing fees, applicants have no obligation to pay market purchase prices to the respondent for respondent to effect transfer into their individual names.

4. Subject to each applicant complying with their obligations as set out in para 3 above the respondent be and is hereby directed to take all necessary steps to immediately effect transfer of individual stands allocated to each of the applicants.
5. In the event that the respondent fails to comply with para 4 above the Sheriff of the High Court be and is hereby directed and authorized to sign all papers to effect transfer of the said stands into applicant's names.
6. The respondent shall bear costs of suit.

According to the applicants, the respondent which is the owner of the land in issue donated the land to ZANU PF Mukuvisi Tashinga District through one Charles Mike who was, at the material time, one of its directors. Such donation is alleged to have been meant to empower the homeless members of ZANU PF Mukuvisi Tashinga District. Such donation is said to have been duly accepted on 27 November 2012 and the logistics to engage the Surveyor General were initiated. It was then left to have this finalized by coming up with the necessary plans *in liason* with the City of Harare and the developer after securing a permit.

Thereafter, the applicants allege that they were allocated pieces of land and to date most have completed construction of houses on such stands.

The applicants allege that they were disturbed to discover that contrary to the donation and developments that had ensued the respondent had gone ahead and proposed an agreement of sale with each of the applicants in which a market-based sale is intended.

Each applicant is now expected to pay a market purchase value for the stands which is fixed in United States Dollars. This is seen as resiling from the donation and likely to cause undue hardship on the applicants who have already erected houses thereat yet they are of little or no means. The applicants fear that they will be evicted from the stands.

The applicants resultantly seek the relief set out above which shows that they are only prepared to meet the subdivision and transfer costs.

The respondent's version of events is totally different. It is pointed out the offer of land was never made to Mukuvisi Tashinga District but to ZANU PF Harare Province. It has an affidavit from the Chairman of ZANU (PF) Harare Province, Mr Goodwills Masimirembwa who distances the ZANU (PF) party from ever having allocated stands to the applicants or anyone. It is denied that Charles Mike was ever a director of the respondent and alleged that he was a mere employee who because of an acrimonious employment dispute has set out to fix the respondent by peddling lies.

It is admitted that the respondent did offer an undeveloped stand to ZANU (PF) as a party but the size of such stand was not to the extent alleged by the applicants as it was merely meant for the construction of a district office for the ZANU (PF) Mukuvisi Tashinga District. It is vehemently denied that the respondent ever intended to have the party's disadvantaged members settled on such land.

Furthermore, the offer letter relied on by the applicants is said to only offer a single stand and not multiple stands, was to be subject to terms and conditions to be agreed upon, and would be subject to a survey.

The allocation of the land to the applicants in the absence of a subdivision permit as prescribed by s 39(1) of the Regional, Town and Country Planning Act [*Chapter 29:12*] is stated to be an illegality.

According to the respondent, the applicants invaded this privately owned land after buying or other arrangements with land barons some of whom were operating under the guise of housing cooperative societies such as Mukuvisi Tashinga Housing Cooperative Society, Tushasha Housing Cooperative Society and Quad Unity Housing Trust in Africa (Pvt) Ltd. It is averred that some of these people even paid prices of up to US $ 10 000.00 to such land barons.

In 2013 the respondent sued the housing cooperative societies under cases HC 10560/13 and HC 10561/13 seeking he ejectment of the cooperative societies and anyone claiming through them. Orders for ejectment were granted in favour of the respondent. The applicants are said to belong to the Mukuvisi Tashinga Housing Cooperative Society against who an order is extant.

The respondent says that it noted that most of the applicants had constructed permanent houses on its land and out of humanitarian grounds, did not execute the order of eviction but embarked on a regularization process by seeking a subdivision permit in retrospect. The permit was granted in October 2019.

The fact that the applicants refer to the regularization process as "disturbing developments" is seen to show they are ingrates who do not appreciate how the respondent has saved them from eviction. It is pointed out that in a previous case in August 2022 under case HC 5736/22, the applicants filed an urgent chamber application under the appellation "ZANU(PF) MUKUVISI TASHINGA DISTRICT" That matter was withdrawn after the chairman of ZANU (PF) Party Harare Province distanced the party from the proceedings.

Points *In limine*

At the hearing of this matter, I entertained the following points raised by the applicants:

(i) An application to adduce an affidavit of Joseph Zvirevo, one of the applicants joined to the proceedings.

(ii) That the deponent to the respondent's affidavit is not properly before the court as no company resolution authorizing him to represent the company had been filed.

On its part, the respondent also raised points *in limine*, as follows:

(i) That there are only three applicants before the court.

(ii) That the applicants have no *locus standi*.

(iii) That the applicant's claim has prescribed.

(iv) That there are material disputes of fact incapable of resolving the matter on the papers.

After hearing the parties, I reserved my ruling. This is it I deal with each point in turn below.

The application to admit Joseph Zvirevo's affidavit

Mr *Madzvamuse* applied to adduce into the record the affidavit of the joined parties as they were joined so that their position is known as the affidavit of Joseph Zvirevo is not part of the consolidated record. The affidavit of Joseph Zvirevo is allegedly deposed to on his own behalf and also on behalf of the other 553 joined parties.

In the affidavit Joseph Zvirevo generally joins issues with the initial 300 applicants. He however makes a starting averment to the effect that despite an approach to the office of the Registrar of Companies and a company search, they have failed to ascertain the existence of the respondent as the Chief Registrar of Companies has not responded to their letter. In the circumstances, they caution the court against relying on the respondent's evidence. They insist on the adducing of this affidavit into the record and that the evidence points to the nonexistence of the respondent.

Mr *Banda* was opposed to the adducing of the supplementary affidavit as it has not been made on notice as prescribed by the Rules. It was averred that Mr *Banda* was only hearing for the first time about this application. It was pointed out that Mr *Madzvamuse* had not related to the requirements for leave to file a supplementary affidavit and this application should fail.

The fact that Mr *Madzvamuse* went further to relate to the contents of the affidavit was alleged to be improper. As to the allegation that the respondent is a non -existent

company, Mr *Banda* said this is a startling and unfortunate revelation as it would mean there is no respondent to be sued or hold title to land.

Further, Mr *Banda* indicated that if the affidavit had been merely one of collegiality, they would not have problems with its admission as the application for joinder was made on that basis. The joined applicants are said not to have indicated that they want to introduce their own case otherwise the joinder would not have been granted and they would have filed a separate suit.

At the initial hearing when this matter was heard and a postponement was sought on account of the need to have the application for joinder resolved, the applicants indicated that they wanted to impugn the lawfulness of Thomas Ritchie and how he had ascended to directorship. They wanted that issue to be fully ventilated before the court.

Mr *Banda* retorted that a point *in limine* had already been raised questioning the authority of Thomas Richie.

In general, a party to proceedings has a right to be heard by placing their matter before the court and is entitled to join issue with those already before the court so as to be before the court. Rule 59(1) provides that a court application shall be supported by one or more affidavits setting out the facts upon which an applicant relies. For a party to be properly before the court, they need to place an affidavit before the court.

In the circumstances there can be no problems with the admission of the affidavit except that the respondent was not given notice to mount its response to this as prescribed by r 59 (7) as read (8).

Be that as it may in a very disingenuous way, the applicants are digging that own grave by alleging that the respondent does not exist. The respondent should have been accorded time to respond to this allegation. They were not given notice.

I could very easily admit this affidavit and note the alleged non existence of the respondent and strike the matter off the roll.

Mr *Madzvamuse* conceded that the order for joinder did not grant leave to file the supplementary affidavit.

In the circumstances, the application to admit the affidavit of Joseph Zvirevo is dismissed as it would cause unnecessary prejudice to both the applicants and the respondent.

Whether the deponent to the respondent's affidavit has authority to represent the company.

Mr *Madzvamuse* submitted that Thomas Ritchie who deposed to the opposing affidavit did not file a company resolution to show that he was authorized. Due to the questioning of the existence of the respondent company, it was concluded that this was the reason why there was no company resolution. It was contended that in the circumstances there is no opposition to the application and the claim should be granted.

Mr *Banda* pointed out that at the hearing on 20 February he had given Mr *Madzvamuse* a copy of the resolution. In the respondent's heads of argument, notice is given that the resolution would be produced at the hearing. This was duly tendered.

In the case of *Dube* v *Premier Service Medical Aid* Society & Anor SC 73/19, the issue of the conflicting decisions emanating from the High Court on this subject was resolved.

It was held that "A person who represents a legal entity when challenged, must show that he is duly authorized to represent the entity. His mere claim that by virtue of the position he holds in such an entity he is duly authorized to represent the entity is not sufficient. He must produce a resolution of the board of that entity which confirms that the board is indeed aware of the proceedings and that it has given such a person authority to act in the stead of the entity. I stress that the need to produce such proof is necessary only in those cases where the authority of the deponent is put in issue."

In casu, Mr Thomas Ritchie's authority as deponent was put in issue and he proceeded to produce a valid company resolution. There is therefore no merit in this point *in limine* and I dismiss it.

Whether the applicants have locus standi to institute proceedings

Mr *Banda* submitted that the applicants have no *locus standi*. *Locus standi in judicio* was defined as referring to one's right ability or capacity to bring legal proceedings in a court of law. It was argued on the strength of the cases of *Makarudze & Anor* v *Bungu & ORS* 2015 (1) ZLR 15 (H) & *Zimbabwe Teachers Association & ORS* v *Minister of Education & Culture* 1990 (2) ZLR 48 (H) that one must justify their right by showing they have a direct and substantial interest in the subject matter and outcome of the litigation.

In casu, it was pointed out that the applicants in paragraph 3 of their founding affidavit state that the land in issue was donated to ZANU (PF) Mukuvisi Tashinga District, so they were not the beneficiaries of the donation. Another shortcoming pointed to, is that they do not identify the actual stands in which each one has a direct and substantial interest.

Mr *Banda* pointed out that because ZANU(PF) the alleged done, is a juristic person capable of suing and being sued, it is the one that should be before the court as the applicants are not privy to the donation, nor direct beneficiaries of the donation.

Mr *Madzvamuse* argued that the respondents had misinterpreted what locus standi entails. He started that the applicants have a direct and substantial interest and will be affected by the outcome of this application as they are beneficiaries of the donation.

The Honourable MAFUSIRE J wrote a seminal judgment on the question of *locus standi* in the case *of Makarudze & Anor* v *Bungu & ORS* 2015 (1) ZLR 15(H).

He covers the basic dictionary definitions as he cites with approval from *Sovereigh Empowerment Centre Tutonial Trust* v *Old Mutual Investment Group Property Investment Zimbabwe (Pvt) Ltd & Anor* HH 351/13.

> "Wikipedia, the free encyclopaedia refers to the phrase *locus standi* to mean:
> "…… the right to bring an action to be heard in court or to address the court on a matter before it ……. *locus standi* is the ability of a party to demonstrate to the court sufficient connection to, or harm from, the law or action.
> Wisegeek . com discusses the phrase and stresses that:
> …….. locus standi refers to the fact of whether or not someone has the right to be heard in court……. As general rule, a person has locus standi in a given situation if it is possible to demonstrate that the issue at hand is causing harm and that an action taken by the court could redress that harm……"

It was held to be a trite position stated in a long line of cases such as Zimbabwe Teachers *Association & ORS* v *Minister of Education & Culture 1990* (2) ZLR 48(1) PE Bosman *Transport Works Committee & ORS* v *Piet Bosman Transport (Pty) Ltd 1980* (4) SA 801 (t) & *United Watch & Diamond Co (Pty) Ltd & ORS* v Disa *Hotels & Anor* 1972 (H) SA 409 (c) *inter alia.*

> "It is well settled that in order to justify its participation in a suit such as the present, a party …… has to show that it has a direct and substantial interest in the subject matter and outcome of the application."

Do the applicants who are not the direct beneficiaries of the donation, who have left out the party, ZANU (PF), the alleged donee, really have a direct interest in this matter? They have not detailed which piece of land each of them got from the respondent. Their individual claims are buried within the alleged donation to ZANU (PF) which is not before the court. In any event the Provincial Chairman of ZANU(PF), the alleged donee, on p 90 to 91 of record dissociated the party from legal proceedings that had been instituted in its name based on the alleged donation of 2012. He confirms that the party is a juristic person capable of suing and being sued. Tellingly he says,

> "ZANU PF Harare Province is involved in positive discussions with Msasa Park (Pvt) Ltd to ensure regularization of the illegal settlement established by heartless illegal land barons. No evictions have taken place since 2023 despite the land owner having the right to do so."

It is my considered view that the applicants have no direct and substantial interest to launch this application which they are basing on a donation to a party which is not before the court. In the face of the eviction orders granted in favour of the respondent in 2013, the applicants are in illegal occupation of the respondent's land. They clearly do not have a direct and substantial interest in this matter. As started in *United Watch & Diamond Co (Pty) & ORS* v *Disa Hotels & Anor Supra*, the applicants have not met the requirement of a legal interest in the subject matter of the action which could be prejudicially affected by the judgment of court.

I uphold this point *in limine* and as prayed for will dismiss this application on this point alone. However, for completeness, I will deal with the other points.

Whether the matter has prescribed

Mr *Banda* submitted that, assuming the applicants have *locus standi*, they would still fail because of prescription.

The applicants' claim is alleged to be based on a donation made and accepted in November 2012 as per the founding affidavit in para 6:3.

It is argued that ownership and transfer of rights flowing from a donation constitute a debt within the contemplation of the Prescription Act [*Chapter 8:11*] and s15 provides for three years for the prescription of a debt. Such period is alleged to have expired in 2015.

The applicants are said to have disguised their claim as a declarator in the hope of escaping the prescription point. Case Law was referred to such as *Ndlovu v Ndlovu & Anor* 2013 (1) ZLR 110 (H) and *NASSA v City of Mutare* HH 385/18. Contrary to be the position in those judgments which might have provided a safe haven for the applicants, I was referred to the cases of *Dube* v *Zimra 2/14 and Sithole* v *Zimra* 248/22 to argue that the claim, whatever its form is subject to s 15 (d) of the Prescription Act.

On the other hand, Mr *Madzvamuse* argued that prescription should be construed from the date when the cause of action arose which is 31 August 2023 when the respondent introduced an agreement of sale where the land would be sold at the market rate, I was referred to the case of *Ngulube & Anor* v *Dewa & Ors* HH 387/23.

Mr *Banda* retorted that the cause of action shown in the founding affidavit and para 2 of the draft order is the alleged donation in 2012. The applicants also rely on a letter of 2015.

In the case of *Peebles* v *Dairibord Zimbabwe (Pvt) Ltd* 1999(1) ZLR 41 h at 45 E-F a cause of action is defined as follows:

> "A cause of action was defined by Lord Esther Mr in *Read v Brown* (1888) 22 Q B 131 as every fact which it would be necessary for the plaintiff to prove if traversed in order to support his right to the judgment of the court. In the same case, Lord Fry at 132- 133 said the phrase meant everything which if not provided gives the defendant an immediate right to judgment."

In para 6 of the founding affidavit, it is clear that the applicants are indeed basing their claim on the alleged donation made in November 2012 and the allocations in para 14 the emphasize the basis of their claim as the same donation. They then question the demand to pay market values for the stands in 2023.

Paragraph 2 of the draft order is revealing. It reads as follows:

> "It is declared that applicants' right of occupation and ownership of the pieces of land allocared to each of them on stand 560 Chadcombe Township, measuring 279 83 93 Hectares, held under certificate of consolidated Title No 19391/1990, dated 30th March 1990, arise from the donation of the said stand 560 by respondent to ZANU PF Mukuvisi Tashinga District in 2012."

It is clear that this is the basis of the claim. The alleged issue of "disturbing events" of 2023 is clearly not one of the facts necessary to be proved to support their right. It is just what spurred the applicants to act.

There can be no doubt that by 2012 the cause of action was complete and the applicants did not enforce their rights. Prescription commenced to run then, or at the latest in 2015 when one Provincial Secretary for Legal Affairs in ZANU (PF) Province was in communication with the respondent. Either way, the matter has prescribed.

Can the applicants escape prescription on account of having filed an application for a declarator. I think not I take a leaf from the judgment of MANZUNZU J in *Sithole v Zimbabwe Revenue Authority* HH 248/22 who had to determine whether a claim that is declaratory in nature is not susceptible to prescription. I can do no better than quote verbatim what he said which I fully associate with.

"Section 14 of the High Court Act [*Chapter 9:06*] under which this application was brought reads as follows:

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

Mr Marange for the respondent argued that application had no existing or future right to protect because her claim has prescribed by virtue of s 196 (2) of the Act. He further relied on the case of *Dube* v *Zimra* HB 2/14 in which the court said:

"The right that the applicant sought to invite this court to determine were prescribed and extinguished. *Cadit questio*. There are no existing, future or contingent right to determine. The court will not decide abstract, academic or hypothetical questions unrelated to any existing, future or contingent right. See *Munn Publishing (Private) Limited v Zimbabwe Broadcasting Corporation* 1995 (4) SA 675 at p 680 A …… The fact that she s seeking a declarator does not entitle her to disregard the above peremptory provisions of the customs and Excise Act under which she sought to found her right in the first place She must comply with the law."

In the case of *Nguluwe & Another v Dewa & Ors* HH 387/23, the court affirmatively held that a claim for a declarator prescribes. The court in *Chiparaushe & ORS v Triangle Ltd & Anor* HH 196/15 held that prescription applies as much to a declarator as to an interdict, which are common law remedies.

It is my finding that this claim is prescribed and, on this point alone l would dismiss it.

Whether there are material disputes of fact in this matter

Mr. *Banda* submitted that as a general rule, in motion proceedings, the courts are enjoined to take a robust and common-sense approach to disputes of fact to resolve the conflict. The matter should be capable of resolution without causing injustice to either party. I was pointed to the case of *Masukusa* v *National Foods Ltd & Anor* 1983 (1) ZLR 232 (S) at 235A.

The case of *Supa Plant Investments (Pvt) Ltd* v *Chidavaenzi* 2009 (2) ZLR 132 (H) at 136F – G was referred to. Therein MAKARAU JP (as she then was) said:

> "A material dispute of facts arises when material facts alleged by the applicant are disputed and traversed by the respondent in such a manner as to leave the court with no ready answer to the dispute between the parties in the absence of further evidence."

Some of the material disputes of fact crying out for resolution are said to be;

(i) The allegation that the respondent is non existent which is not supported by an affidavit from the Registrar of Companies

(ii) There is a dispute about Charles Mike's position as a director in the respondent and whether he had authority to transact for and on behalf of the company. On record there are no relevant company documents produced to resolve this issue yet the basis of the claim is that Charles Mike was authorized to execute the donation as director of the respondent. See p 59 – 60 of the record.

(iii) Another dispute is whether or not there was a donation if only one director signed. See p 24 of the record.

(iv) Another dispute is about which piece of land was allocated to each of the 854 applicants since only one stand was allegedly donated. The court will be clueless about which stand to allocate to each applicant and the extent of such stands.

Mr. *Madzvamuse* countered that there are no disputes of fact which can be classified as material. His position was that most of the listed disputes can be disposed of on the papers.

The direction to be taken by a court faced with such a dilemma was aptly set out in *Douglas Muzanenhamo* v *Officer in Charge CID Law & Order & Others* CCZ 3/13. It was held as follows:

> "The first inquiry is to ascertain whether or not there is a real dispute of fact. As observed by MAKARAU JP (as she then was) in *Supa Plant Investments (Pvt) Ltd* v *Chidavaenzi* 2009 (2) ZLR 132 (H) "136F – G:
>
> A material dispute of fact arises when material facts alleged by the applicant are disputed and traversed by the respondent in such a manner as to leave the court with no ready answer to the dispute between the parties in the absence of further evidence."

It is not enough to just have a mere allegation of a possible dispute of fact. A bare denial of the applicant's material averment does not suffice. The opposing papers must show a bona fide dispute of fact incapable of resolution without viva voce evidence having been heard.

In this case I will not detain myself on the material allegation in Joseph Zvirevo's affidavit, that the respondent is non existent as l declined to admit that affidavit into evidence. Had I accepted that affidavit, viva voce evidence would have been necessary to resolve this issue as the land in issue is held by the respondent and there is no evidence from the Registrar of Companies.

Since the applicants rely on the averment that Charles Mike acted as director of the respondent at the relevant time when he transacted on behalf of the respondent and the respondent denies this and avers, he was a mere employee who even registered a labour dispute with the Labour Court, there is a material dispute of fact. This is because this would go to the root of the validity of the transactions executed by Charles Mike which is the basis for applicants' claim. This issue cannot be resolved on the paper as the relevant company documents have not been availed.

If it would have been found that indeed Charles Mike was a director, another material question would be the validity of the donation as only one director signed.

The purported deed of donation speaks to one piece of land. There are 854 applicants who each seek a share of such stand. It would be material to determine who owns which piece of land and the extent of same if this order sought is to be complete and executable. That information has not been availed.

There is also need to resolve whether the applicants are related to the housing cooperatives which the respondent got eviction orders against. Whereas the applicants allege that they got allocated the land through ZANU PF, a letter on record from the Provincial Chairman Mr. Masimirembwa states that the ZANU PF party never allocated stands to anyone. So how can this dissonance be resolved without viva voce evidence?

There are no supporting affidavits from all the applicants save for only three. On the other hand some of the alleged applicants have filed affidavits distancing themselves from the application and alleging their signatures were forged. They confirm to have bought their pieces of land from illegal land barons and that they are willing to regularize their occupation and pay the real owner of the stand. They make the material averment that the stands were never a donation.

In the face of this, it is my considered opinion that the court is unsure of who the real applicants before it are, whether there was any donation, what was donated, to whom and the extent of such donation. There are indeed material disputes of fact as I have no ready answer to the dispute between the parties on the absence of further evidence.

The options open to court which finds that there are material disputes of fact are trite. In Herbsein & Van Winsen, *The Civil Practice of the High Courts of South Africa*, 5th ed, Juta, at p 459 it is stated that the court may:

(i) direct that oral evidence be heard on specified issues with a view to resolving ant dispute of fact, in terms of the Rules, or

(ii) dismiss the application with costs, or

(iii) order the parties to go to trial.

The dismissal of the application which is prayed for by the respondent is done when the applicant should have realized when launching the application that a serious dispute of fact is

bound to arise. This approach was followed in *Masukusa* v National Foods Ltd & Anor 198 3 (1) ZLR 232.

In *casu* the applicants should have known that all the alleged applicants had not resolved and authorized the institution of proceedings. Given the history of litigation regarding this land, the applicants must have known of the orders of eviction in cases HC 10560/13 and HC 10561/13 which were in favour of the respondent and against the housing cooperatives which had a hand in the allocations. Further the position of the ZANU PF party which they wish to shield themselves behind was made clear in case HC 5736/22 in which the chairman denied the party's involvement in the allocation of land. They even ended up withdrawing that matter. They must be aware too of the ZANU PF party's engagements on the stands with a view to rationalization.

Given the allegations of Charles Mike's directorship, only one director's signatures to the said transactions, and the lack of relevant company documents, they certainly should have known of the ensuing dispute on material facts. Charles Mike knows too that he once lodged a claim with the Labour Court as an employee of the respondent.

Further as the donation is for one undivided piece of land and there are 854 applicants, there was bound to be a dispute as to which applicant owns which land and the extent of such. This cannot be resolved on the papers. The terms and conditions which were to be agreed as per the offer are also unclear.

In the circumstances of this case, I am inclined to take the approach commended by MC NALLY J (as he then was) in *Masukusa* v *National Foods Ltd & Anor Supra* wherein he referred to the dictum of MILLER JA in *Tamarillo (Pvt) Ltd v B Aitken Pty Ltd* 1982(1) SA 398 @ 430 G-H.

> "a litigant is entitled to seek relief by way of Notice of Motion. If he has reason to believe that facts essential to the success of his claim will probably be disputed, he chooses that procedural form at his peril, for the court in the exercise of its discretion, might decide neither to refer the matter for trial nor to direct that oral evidence on the disputed facts be placed before it, but to dismiss the application."

In this matter I elect to dismiss the matter with costs

Disposition

I declined to admit the supplementary affidavit of Joseph Zvirevo, one of the applicants joined to the proceedings.

On whether the deponent to the respondent's affidavit was properly before the court, I found that indeed he was, as a company resolution was produced which authorized him to represent the company in these proceedings.

I upheld the points *in limine* that the applicants have no *locus standi* to bring these proceedings, that the claim has prescribed and that there are material disputes of fact incapable of resolution on the papers. There is no point in dealing with the last point raised by the respondents, that there are only three applicants before the court.

Whichever way one looks at the matter, it suffers one fate which is dismissal. Costs follow the cause. Accordingly, I order that:

The matter be and is hereby dismissed with costs.

Chinawa Law Chambers, applicants legal practitioners
Bruce Tokwe Commercial Law Chambers, respondent's legal practitioners