CHARELE (PRIVATE) LIMITED
versus
EVANGELICAL ANGLICAN CHURCH
and
MINISTRY OF LANDS, AGRICULTURE, FISHERIES WATER AND
RURAL DEVELOPMENT N.O
and
MUTASA RURAL DISTRICT COUNCIL
and
MUTASA DISTRICT AND RURAL DISTRICT DEVELOPMENT COORDINATOR N.O

HIGH COURT OF ZIMBABWE
MUZENDA J
MUTARE, 29 May 2025

OPPOSED APPLICATION

Mr *M.M Ndebele*, for the applicant
Mr … *Maunga (Jr)*, for 1st respondent
Mr *B Zviuya*, for the 3rd respondent
Mr *P Garwe*, for 2nd - 4th respondents

MUZENDA J: On 16 February 2017 applicant and first respondent signed a Memorandum of Agreement relating to 6 stands located in applicant's piece of land effectively compensating first respondent's loss of land consumed by roads developed in lieu of applicant's housing project in Mutasa District. The ceded land added up to 4220 hectares. After the Memorandum of Agreement first respondent proceeded to have that ceded piece of land registered in its name. the Memorandum of Agreement was then filed with the District Administrator's office, the second respondent, the Ministry of Lands and then Rural Resettlement and Mutasa Rural District Council.

After the applicant had notified all these government offices, it wrote a letter of complaint to the Chief Lands Officer for Manicaland Province to the following effect:

> *"We seek to have the agreement revoked as it was signed under duress from your office without considering that the mistake to allocate two organisations the same piece of land was your mistake. You personally insisted that we sign the agreement on the conditions that were proffered by Evangelical Anglican Church in spite of all protest and desire for you to see reason being rejected."*

This complaint apparently relates to the subject memorandum of Agreement of 16 February 2017. A vast of other letters speaking of the same complaint was written to various government departments and another one to the Land Commission and to the first respondent. When applicant failed to get assistance or intervention it then approached this court seeking the following relief in its draft order:

"*IT IS HEREBY ORDERED AND DECLARED THAT:*

a) *The application for a declaratory order be and is hereby granted.*
b) *The allocation of a portion of land to the 1st Respondent by the 2nd, 3rd and 4th Respondents within Lot 1 of Fairview Estate Mutasa Rural District measuring 40 hectares in extent be and is hereby declared null and void.*
c) *The agreement entered into between the Applicant and first Respondent on the 16th February 2017 which purportedly cedes residential stands number 2004, 2005, 2006, 2008, 2009 and 2010, as compensation for the road allegedly passing through the 1st Respondent's stand and subsequently endorsed by the second, third and fourth respondents be and is hereby declared void and illegal and of no force or effect.*
d) *The 1st Respondent and all those enjoying occupation through it be and is hereby ordered to vacate the premises located with a portion of land of Lot 1 of Fairview Estate, Mutasa Rural District, measuring 40 hectares in extent, allocated underlease number GL 1569 and transferred to the Applicant for housing project, within 14 days of the granting of this order.*
e) *The first Respondent to pay costs of suit on attorney-client scale*"

All four respondents are opposing the application. First respondent raises three points *in limine*. The first preliminary point relates to material disputes of fact. The view of fist respondent is that applicant's cause of action is based on a claim that applicant's title precedes that of first respondent. Applicant also contents that its title did not encroach upon applicant's church stand. Both of these [positions are controverted by first respondent and based on papers filed of record none of these issues can easily be resolved on paper without leading oral evidence. The court is left confused as to the real situation buttressed by credible evidence.

The second point *in limine* relates to unpaid legal costs incurred under HC11/21 where applicant withdrew any application and tendered costs to the first respondent.

The final point *in limine* raised by first respondent is founded on prescription. It is first respondent's contention that the memorandum of agreement was concluded on n16 February 2017 and the application for a declarator has prescribed. The third respondent, also raised points *in limine* chief among them being serious material disputes of fact. According to third respondent whether first respondent's stand is within or without applicant's 40 hectares would require an

expert qualified surveyor. In addition applicant has to prove whether its agents signed the memorandum of agreement under duress. Third respondent also raises defence of prescription. It added that the action prescribed on 15 February 2020 after 3 years from the date of its signing. The third respondent also attacks the relief sought as being legally incompetent in failing to take cognisance that the agreement between applicant and first respondent is still extant. Third respondent impugns further the relief sought by applicant as per its draft order. The relief sought seeks the eviction of a party which was properly allocated land.

In response to the points *in limine* applicant contends that there are no material dispute of facts which would require *viva voce* evidence. If there are any disputes of fact then they are capable of resolution on paper. On the question of unpaid cost applicant argues that there is a procedure open to the first respondent to recover these costs. On prescription, applicant contends that the cause of action arose in August 2024 and bot 16 February 2017 when applicant gave notice of cancellation of the agreement. Applicant added that a defence of prescription does not apply to a relief of a declarator it being a remedy to secure the public interest of certainty or correct legal position. To the applicant a declaratory order is a remedy to secure the public interest and such a remedy cannot prescribe. On issues of incompetent relief sought applicant insisted that all the reliefs sought are sound and legally competent. Applicant prayed that all pints *in limine* be dismissed and the court entertains the parties on merits.

Disposition of points *in limine*

It is incumbent upon this court to deal with points *in limine* first. If I uphold the preliminary points, obviously there will be no need to transcend to the merits. If the points *in limine* are disposed then I will deal with the application on merits.

Whether there are material disputes of fact?

The centre of dispute between applicant and first respondent is a piece of land where the roads were created as part of servicing the area for residential commercial and social facilities to the beneficiaries. The extent of such accessible roads is not known. Further the memorandum of agreement of 16 February 2017 speaks of compensation of first respondent by the applicant with a total of 6 residential stands with total area of 4 200m^2. It is not clear from the pleadings filed of

record whether indeed the lay-out of applicant's project eats up the exact surface area of first respondent's allocated area to the extent of 4 200m^2. Both applicant and first respondent were lawfully allocated the respective pieces of land they are occupying. Is it factually clear that it is first respondent who encroached into applicant's property, or it is applicant who did so as is apparent from the preamble to the memorandum of agreement. The diagram produced and attached by the applicant does not crisply explain this encroachment. I am persuaded by first and third respondents' submission that there is dire need for a surveyor to come and clarify this aspect of encroachment or alleged double allocation. Applicant inherited a piece of land originally granted to DTZ/P2GEO and the latter's evidence is necessary to clarify the boundaries particularly between applicant and first respondent's pieces of land. These grey areas cannot be obviously be resolved on paper without hearing oral evidence. In addition applicant vehemently and adamantly allege duress or pressure from an outsider, the then chief lands officer of Manicaland. There is nothing patent on the agreement which confirms that duress and such an allegation is best proved by way of leading oral evidence. At the time applicant filed its application it ought to have perceived these glaring material disputes of fact and could have sensibly avoided an application route. Indeed, in as far as the boundary dispute or encroachment or double allocation is concerned, this court is left with no ready answer to this dispute in the absence of further evidence. This point *in limine* was properly and relevantly raised, I uphold it.

Whether the application is prescribed

The focal point discerned from the applicant's papers is 16 February 2017 memorandum of agreement it entered into with first respondent and subsequently circulated to various government departments. It is the very document applicant alleges that it was coerced to enter and sign. It is the same document applicant seeks to be declared a nullity by this court. It is further the very document which applicant relies upon to move this court to deuce that there was a double allocation. The document is the pith of applicant's coming to court and as such it fundamentally forms the foundation of applicant's cause of action. I reject applicant's contention that the cause of action is its notice to first respondent advising first respondent about the cancellation of the memorandum of agreement. Consequently, the computation of 3 years as provided by the Prescription Act starts from 116 February 2017 and not in 2024 as argued by the applicant. As it

was succinctly put by TSANGA J in the matter of *Dhliwayo & Ors* v *Bere & Ors* HH 164/24, an authority cited by first respondent's counsel in its heads of arguments:

> "*The quest for a declarator cannot, simply put, be divorced from the causa as to do so would indeed creative situation where those who have done nothing about their claim, resort to using the declarator as a back door seeking coercive relief which they could have sought within the prescribed time limits. Different factual aspects of the case may have prescribed a different times."*

I am entirely in agreement with the sentiments of the learned Judge. Applicant had up to mid 2020 to take action. It did not do so and I am satisfied that respondent's preliminary points on prescription are valid and I uphold the point *in limine*.

My upholding of these two critical points *in limine* is capable of disposing of the application. The remainder of the points *in limine* would amount to be academic. There is no purpose in making a ruling on them. Prescription once upheld will dispose of the matter.

Accordingly, the applicant's application is prescribed and on that basis the application is dismissed wit costs on party and party basis.

Muchengeti & Company, applicant's Legal *Practitioners*
Maunga Maanda & Associates, 1st respondent's legal practitioners
*Bere Brother*3rd respondent's legal practitioners
Civil Division of the Attorney General's Office, 4th respondent's legal practitioners