PETER CHINGWENA
versus
CROCO INVESTMENTS (PRIVATE) LIMITED
and
CROCO HOLDINGS (PRIVATE) LIMITED
and
CROCO MOTORS (PRIVATE) LIMITED
and
MOSES TONDERAI CHINGWENA
and
FARAI MATSIKA
and
ANNE MARIE NOMSA GRACE CHINGWENA
and
WESLEY TAZVISHAYA CHINGWENA
and
TONDERAI WAYNE CHINGWENA
and
REGISTRAR OF COMPANIES

HIGH COURT OF ZIMBABWE
MANDAZA J
HARARE, 9 October 2024 and 8 November 2024

Civil Trial

Adv *G Sithole*, for the plaintiff
Adv *T Mpofu*, for the 1st to 4th and 6th defendants
Adv L Madhuku with Mr T Ndudzo, for the 5th defendant
Adv *T Magwaliba with Adv D. Ochieng*, for the 7th and 8th defendants

MANDAZA J:

Background facts

In this matter, the plaintiff is Peter Tapiwa Chingwena, who sues Croco Investments (Pvt) Ltd and 8 other defendants, who include Moses Tonderai Chingwena ("Moses Chingwena"), Anne

Marie Nomsa Grace Chingwena ("Anne Marie Chingwena"). The plaintiff and Moses Chingwena are brothers. The case for the respective parties is set out below.

The plaintiff's case

In his declaration, the plaintiff alleges that sometime in 1989, he and Moses Chingwena and Anne Marie Chingwena started a car sales and servicing business and that they went on to operate Croco Investments (Pvt) Ltd, which trades as Chiredzi Motor Sales. He also avers that Croco Investments (Pvt) Ltd later traded as Croco Motors and were all equal shareholders. The plaintiff further alleges that Moses Chingwena, without his consent and knowledge registered Croco Motors (Pvt) Ltd in 2004. He states that the trade name of Croco Investments (Pvt) Ltd was used to register a separate company. In addition, he states that Moses Chingwena also registered Croco Holdings (Pvt) Ltd ("Croco Holdings") in 2001 without his knowledge. He proceeds to say that his shares were allotted to Croco Holdings without his consent or knowledge, as he did not sell or donate the shares to anyone. In fact, the plaintiff accuses Moses Chingwena of fraudulently and unlawfully allotting those shares. He states that he is still a shareholder.

Further, the plaintiff alleges that, in July 2014, Moses Chingwena caused a fraudulent CR14 to be filed without his knowledge, which showed that the plaintiff resigned as a director of Croco Investments (Pvt) Ltd on 1 April 1998. He says that he did not resign, and that he became aware of the alleged fraudulent document on 7 March 2018, and that the removal of his name is a nullity. He also alleges that Farai Matsika (5th Defendant) was appointed a director of Croco Investments (Pvt) Ltd through the CR14 referred to above. The plaintiff also states that Farai Matsika was fraudulently allotted shares around the time the CR14 was filed. He avers that the allotment was done unlawfully without his consent and knowledge. The plaintiff continues that Moses Chingwena fraudulently manipulated company records at the office of the Registrar of Companies, and registered himself, Wesley Chingwena (7th Defendant) and Tonderai Wayne Chingwena (8th Defendant) as directors of Croco Investments (Pvt) Ltd. He says that these appointments were illegal.

Finally, the plaintiff alleges that Moses Chingwena fraudulently registered Croco Holdings as a company of Croco Investments (Pvt) Ltd without his knowledge. He adds that Moses Chingwena caused all of the plaintiff's shares to be allotted to Croco Holdings in 2007. Besides, he

states that the shareholders of Croco Holdings are Moses Chingwena and Farai Matsika. He concludes that the allotment of shares, including those held by him, was illegal, null and void.

As a result, the plaintiff seeks various declaratory orders, including a declaration that the allotment of shares in Croco Investments (Pvt) Ltd to Croco Holdings is null and void; and that he be declared a shareholder of Croco Investments (Pvt) Ltd together with Moses Chingwena and Anne Marie Chingwena. Additionally, he seeks an order declaring the allotment of shares in Croco Investments (Pvt) Ltd to Farai Matsika to be a nullity and that the allotment be set aside. Furthermore, he wants the court to grant an order declaring his removal as a director of Croco Investments (Pvt) Ltd to be a nullity and setting aside the appointment of the seventh and eighth defendants as directors of Croco Investments (Pvt) Ltd. The final order that he asks for is that the registration of Croco Holdings and Croco Motors (Pvt) Ltd as companies linked to Croco Investments (Pvt) Ltd be cancelled and set aside.

The fifth defendant (Farai Matsika) denies that his appointment as a director of Croco Investments (Pvt) Ltd (first defendant) was on the basis of fraud. He contends that his appointment as a director of the first defendant is lawful as it was done in terms of the shareholders' agreement and articles of association of the first defendant. The fifth defendant says that his shareholding in the second and third respondents is on the basis of lawful subscription to shares, and argues that the plaintiff's prayer for an order nullifying his shareholding in the said companies should be dismissed. Finally, he states that his purported removal and disqualification by the plaintiff is illegal, as he argues that the plaintiff and the fourth defendant have no rights at law to disqualify him as a director of the first, second and third defendants as he has 30% of their issued shares.

As relevant background information, it is worth mentioning that a dispute involving Farai Matsika and Moses Chingwena, Croco Investments (Pvt) Ltd, Croco Holdings (Pvt) Ltd, Croco Motors (Pvt) Ltd came before this court under HC 875/20. The judgment of the late Justice Tagu is worth bearing in mind. That case concerned a claim by Farai Matsika of 30% of the shares in Croco Holdings (Pvt) Ltd, but his claim was not successful in this court as was his appeal to the Supreme Court. The Supreme Court judgment is SC 144-21. I will make reference to the High Court and Supreme Court judgments whenever it is necessary to deal with specific factual averments arising in this case. As I have already observed, the matter before this court is a trial

cause. However, at the commencement of the trial, the first to fourth and sixth defendants raised some preliminary points, and it is important to deal with them.

The first, second, third and fourth defendants' case

In the pleading filed in this court, the first to fourth, sixth, seventh and eighth defendants raised a special plea of prescription in terms of the Prescription Act [*Chapter 8:11*], and also pleaded to the merits of the case. Regarding the special plea, the said defendants averred that the plaintiff's cause of action arose more than three years before the service of process on them and, as such, the claims are prescribed.

On the merits, the defendants in their plea denied that the plaintiff was ever a member of the 1st defendant, and the first, fourth and sixth defendant, while admitting that the plaintiff was a director of Croco Investments (Pvt) Ltd until 1998, denied that he was a shareholder in the company. They further state that the registration of Croco Motors (Pvt) Ltd did not require the consent or notification of the plaintiff. In respect of Croco Holdings (Pvt) Ltd, the defendants averred that its incorporation was known to the plaintiff, but did not require his consent or notification. They averred that the plaintiff had no shares in Croco Investments (Pvt) Ltd and, that being the case, no shares of his were ever allotted to Croco Holdings (Pvt) Ltd. The defendants deny any fraudulent or unlawful conduct on their part in the allotment of shares, and ask the court to dismiss the plaintiff's claim with costs on the scale of attorney and client.

Subsequent to the special plea and plea on the merits, the first to fourth and sixth defendants filed a Notice of Points *in Limine*. The submissions made by the respective parties in relation to those preliminary points are the subject of this judgment. For the avoidance of doubt, the special plea of prescription was not argued before this court. Therefore, this judgment does not deal with it at all. The first to fourth and sixth defendants argued that there is an attempt by the plaintiff to speak for the fifth defendant. Adv *Mpofu* who appeared for the first to fourth and sixth defendants observed that this matter was filed in 2019 under HCH 2603/19, but nothing was done to progress it to finalization. Counsel continued to give reasons why the matter was not pursued then. He stated as follows: The fifth defendant then brought an application in 2020 in the lawsuit *Farai Matsika & Anor v Moses Tonderai Chingwena & Ors* HH 573-20. For the sake of convenience, I will call this "the Farai Matsika case". In that case, the fifth defendant argued that he was a 30% shareholder and

the fourth defendant was a 70% shareholder in the companies cited in this lawsuit as the first, second and third defendants. For this reason, the plaintiff relented on HCH 2603/19, and allowed the Matsika case to run. It is common cause that the matter was resolved against the fifth defendant by judgment rendered by the late Justice Tagu under HH 573-20.

The first to fourth and sixth defendants contends that this lawsuit is an abuse of process by both the plaintiff and the fifth defendant. They aver that the fifth defendant has effectively pitched camp with the plaintiff, and put forward to the court a case which favours of the plaintiff. Counsel for the first to fourth and sixth defendants advised the court that the parties agreed that the preliminary points they raised could be taken at this stage. He said that the parties' only dispute is what happens if the court upholds those points in *limine*. The first to fourth and sixth defendants referred to the case *JD Agro Consult & Marketing* v *Editor of the Herald* HH 61-07, and argued that the proper relief is a dismissal. To support that position, the first to fourth and sixth defendants submit that the court relates to a claim based on the pleadings. They assert that in the plaintiff's pleadings, his case is set out both in his summons and declaration. In addition, the further particulars that have been filed become part and parcel of the pleadings in respect of which questions were asked requiring clarification. Counsel for the first to fourth and sixth defendants argues that the court is bound by the pleadings. For this proposition of law, reference was made to the judgement of *Medlog Zimbabwe (Private) Limited v Cost Benefit Holdings (Pvt) Ltd* SC 24-18, where it was held that a litigant is bound by the pleadings. The first to fourth and sixth defendants then refer to the declaration, in particular, the word "allotment" in para 15 on p 10 of the record. These defendants drew the court's attention to para 19, which states that the allotment was fraudulently registered, and the said allotment of shares was illegal.

It is contended by the first to fourth and sixth defendants that the cause of action that the plaintiff presented to court is the fraudulent and illegal allotment of shares. He simplified the plaintiff's case to be a claim that he has a share and that share has been allotted to some of the defendants. Thus, it was argued that it is a legal impossibility for shares held by a shareholder to be allotted. The submission continued that an allotment is a contract between a company and the shareholders, which enables the taking of shares that are in a company and placing them in the hands of a shareholder. The 1st to 4th and 6th defendants contended that the movement of shares from one shareholder to another is not allotment, as that amounts to a transfer of shares between

shareholders. The said defendants argued that a cause of action is essential in that no party has the right to come to court with a complaint unless that complaint has a legal basis. They relied on the case of *Jirira v Zimcor Trustees (Pvt) Ltd* 2010 (1) ZLR 375.

Additionally, the above defendants submitted that a substantive cause of action must be pleaded as a necessary requirement for one to get relief. They contended that it is not enough for the plaintiff to say that he holds shares, but those shares have been allotted to another party. They add a further argument by directing the court's attention to the declaration and further particulars of the plaintiff. In those pleadings, the plaintiff asserts that he started off with one share and then mentions 100 shares. It is the first to fourth and sixth defendants' submission that the plaintiff's pleadings do not explain how the initial single share grew to become 100 shares. Because of this, the aforesaid defendants argue that the plaintiff's averments present something that is legally untenable. In brief, the first to fourth and sixth defendants' submission is that there is no cause before this court that can take this matter to trial and, consequently, this point must be upheld.

The next point that the first to fourth and sixth defendants raised relates to the relief being sought against the second and third defendants. Their submission is that the second and third defendants are separate legal *persona* who have been made defendants in this lawsuit. The five defendants argue that the plaintiff was not involved in their incorporation, and his only grievance with the second and third defendants is that they tout themselves as holding companies of the first defendant. As a result of this grievance, the plaintiff claims entitlement to the first defendant's holding companies and asks the court to cancel the registration of the second and third defendants. The first to fourth and sixth defendants aver that the plaintiff has not set out a legally recognized basis to seek cancellation of the existence, registration, or incorporation of the second and third defendants as legal *persona*. Their argument continues that, even if the second and third defendants do not hold any shareholding in the first defendant, that has nothing to do with their incorporation. For that reason, these defendants contend that the relief that the plaintiff wants the court to grant is not legally competent.

The legal position of the fifth defendant

The position of the fifth defendant appears from the plaintiff's pleadings, where he is presented as a shareholder. The plaintiff then says he wants relief against the fifth defendant. The

argument by the fifth to fourth and fifth defendants also gives clarity to the position of the fifth defendant at law. As appears from the summary of the plaintiff's case above, the first to fourth and sixth defendants argue that the fifth defendant is not a shareholder. Their contention it is a matter that has been finalized by the courts and cannot be revisited. In that regard, these defendants state that they were respondents in that matter which resulted in the judgment HH 573-20. They provide a synopsis of what happened in that matter: The fifth defendant approached this court arguing that he was a 30% shareholder in the defendants before the court, namely, the first, second and third defendants. He said the other 70% shareholding was for the fourth defendant. In response to this, the first to fourth and sixth defendants assert that any relief that seeks to re-open a matter that has been finalized by the superior courts is incompetent at law. In addition, the said defendants argue that the plaintiff should not be allowed to seek such relief because he has no right to support what is unavailable at law. In fact, their position is that, as a result of all these findings, the fifth defendant's claim to be a 30% shareholder in the first, second and third defendants was dismissed by the High Court in HH 537-20. According to the first to fourth and sixth defendants, the dismissal was a judgment in their favour, so this court rendered a judgment in favour of fourth defendant which says that the fifth defendant is not a 30% shareholder in these companies.

The aforesaid defendants further argue that the fifth defendant approached the Supreme Court in *Farai Matsika & Anor* v *Moses Tonderai Chingwena & Ors* SC 30-22, seeking to reverse the High Court judgment under HH 537-20, but because did not comply with the appeal procedure, he brought an application to condone the non-compliance. The Supreme Court said that he was not a shareholder, and that his claim was based on forgery and falsehoods, and those findings were final. But still, the fifth defendant was unhappy he sought to review the Supreme Court before the Supreme Court. Supreme Court refused to review itself. Unhappy with the decision of the Supreme Court, the fifth defendant went to the Constitutional Court, which said that the findings of the Supreme Court were final. The question regarding the entitlement of the fifth defendant as a shareholder is a question that has been resolved, its *res judicata*. The first to fourth and sixth defendants contend that the point in *limine* ought to be upheld.

The plaintiff's case in response to the points *in limine*

The plaintiff denied that he was acting in collusion with the fifth defendant. He argued that whether or not shares which have been allotted to one person can be allotted to another is an issue

that can be dealt with during trial. The plaintiff argues that the fact is that he resigned as a director and the allegation that he was a shareholder should be ventilated at trial. He persists that he has not failed to establish the allotment. Furthermore, the plaintiff referred to the two judgements relied on by the 1st to 4th and 6th defendants, namely, *Jirira v Zimcor supra* and *JDM Agro Consult v Editor of the Herald Newspaper supra.* In respect of *Jirira v Zimcor supra,* the plaintiff submitted that the issue was that there was a material dispute of facts. On the issue of alleged deceit, the plaintiff contended that MAKARAU J (as she then was) found that imprecision in pleadings was an issue that rendered the summons bad or the cause of action bad. He added that the court was of the view that, because of the imprecise manner of the pleadings, the court could not relate to them. The Plaintiff contended that he has something precise that he has pleaded, and whether it can be granted or not can be ventilated at the trial stage. With respect to the *JDM Agro Consult* judgment, the plaintiff submitted that what rendered the matter or summons invalid was that the plaintiff had sued a non-existent person which the court could not relate to. The plaintiff asserts that the two cases relied on by the first to fourth and sixth defendants cannot be a basis for upholding the points *in limine*. In respect of the argument that the judgments of the High Court, Supreme Court and Constitutional Court settled the issue of shareholding, and that issue cannot be raised any more, the plaintiff's answer was that the High Court judgment was about the fifth defendant's claims in a dispute which had nothing to do with the plaintiff. It did not speak to a present cause of action. The plaintiff suggested that the claim or the relief must not be dismissed, but struck off the matter from the roll.

Analysis of the arguments of the parties

The first point made by the first to fourth and sixth defendants is that the plaintiff did set out a legally cognizable cause of action in his pleadings. They noted that he pleaded a case of illegal and fraudulent allotment of shares, and argued that shares already allotted to one person cannot be allotted to another. Their argument is that this is a legal impossibility and, as such, the plaintiff failed to establish a cause of action. The subsidiary objection by the first to fourth and sixth defendants is that the plaintiff's case is that he had one share in the first defendant, and does not plead how the 100 shares now held by the first defendant could not have arisen from his single share. Thus, the first to fourth and sixth defendants contend that this makes the claim that the first defendant now holds the plaintiff's shares legally incompetent. In other words, the submission these

defendants make is that no facts have been pleaded to show how the single share multiplied into 100 shares in order for the plaintiff to lay a claim to those shares. In other words, the defendants argue that the plaintiff has not established a cause of action for the relief that he seeks.

The first to fourth and sixth defendants relied on the Supreme Court case of *Medlog Zimbabwe (Private) Limited* v *Cost Benefit Holdings (Pvt) Ltd* SC 24-18, which held that a party is bound by his/her or its pleadings. This position has been stated in a number of judgments in this jurisdiction, especially in cases brought to court by way of applications, where courts have said that an application stands or falls on its founding affidavit. An example that comes to mind is *Muchini v Adams & Ors* SC 47-13, where ZIYAMBI JA stated that:

> "It is trite that an application stands or falls on the averments made in the founding affidavit. See *Herbstein & van Winsen the Civil Practice of the Superior Courts in South Africa* 3rd ed p 80, where the authors state:
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> > "The general rule, however, which has been laid down repeatedly is that an applicant must stand or fall by his founding affidavit and the facts alleged therein, and that although sometimes it is permissible to supplement the allegations contained in that affidavit, still the main foundation of the application is the allegation of facts stated therein, because these are the facts which the respondent is called upon either to affirm or deny. If the applicant merely sets out a skeleton case in his supporting affidavits any fortifying paragraphs in his replying affidavits will be struck out"

The contention that a case stands or falls on its founding affidavit is very much the same argument that in a case brought to court by summons, the pleadings must establish the cause of action. The issue of an objection being raised because of the absence of a cause of action is not one coming to this court for the first time. Exactly, the same point in *limine* came before the High Court and was dealt with by CHINAMORA J in *Daniel Mukarakati* v *The Trustees of the Don Moyo Trust & Others* HH 677-22, where the learned judge began by stating the law as follows:

> "The pleadings must state in clear terms the applicant or, in the case of an action, the plaintiff's cause of action. In my view, the purpose of pleadings is to clarify the issues between the parties that require determination by a court of law. This has been stressed by the courts in a number of cases. For example, in *Durbach v Fairway Hotel Ltd* 1949 (3) SA 1081 (SR), the court made the self-commending remarks that:
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> > "The whole purpose of pleadings is to bring clearly to the notice of the court and the parties to an action the issues upon which reliance is to be placed".

The learned judge then cited with approval the Supreme Court decision in *Patel* v *Controller of Customs and Excise* 1982 (2) ZLR (HC) 82 at 86C-E, where GUBBAY J (as he then was) stated:

"In *Controller of Customs v Guiffre* 1971 (2) SA 81 (R) at 84A, BECK J, in *Abrahamse & Sons v SA Railways and Harbours* 1933 CPD 626 at 637 WATERMEYER J stated:

> "The proper legal meaning of the expression 'cause of action' is the entire set of facts which gives rise to an enforceable claim and includes every act which is material to be proved to entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration in order to disclose a cause of action. Such cause of action does not 'arise' or 'accrue' until the occurrence of the last of such facts and consequently the last of such facts is sometimes loosely spoken of as the cause of action. (See Halsbury, vol 1, sec 3, and the cases there cited.) **[Emphasis supplied]**

I also observe that in *Daniel Mukarakati* v *The Trustees of the Don Moyo Trust supra*, the court went on to uphold the preliminary point on the absence of a cause of action, concluding as follows:

> "As I have already observed, the applicant did not allege and give particulars which show that there was fraud, bad faith or knowledge of any defect on the part of the purchaser. The authorities are clear that these are the allegations which necessarily establish a cause of action for an applicant who makes an application to impeach a sale in execution and title after transfer has been effected, having failed to challenge the sale in execution in terms of r 359 of the High Court Rules".
> **[Emphasis supplied]**

I respectfully acknowledge that the pronouncements of the law made in the authorities referred to above are compelling. There is nothing I have come across which shows that the High Court decision in the *Daniel Mukarakati case supra* was overturned in an appeal. That being the case, the position that a point in *limine* based on lack of a cause of action can be taken in action proceedings is the law in this jurisdiction.

The second preliminary point raised by the first to fourth and sixth defendants is that both the High Court in *Farai Matsika & Anor* v *Moses Tonderai Chingwena & Ors supra* and the Supreme Court in *Farai Matsika & Anor* v *Moses Tonderai Chingwena & Ors supra* held that the fifth defendant is not a shareholder in the first, second and third defendants. Thus, they argue that the issue of the shareholding in the first, second and third defendants was resolved by those judgments and is no longer justiciable. While the plaintiff contends that the Supreme Court judgment had nothing to do with the plaintiff but concerned the fifth defendant's shareholding claim, there are important points I wish to make. That judgment certainly addressed two critical factual findings made by the High Court. In this respect, BHUNU JA (under the heading **"Factual Findings of the Court A Quo"**) began his examination by stating as follows:

> "The court *a quo* found that the application was founded on material falsehoods based on fraudulent documents. Both the shareholders' agreement and the share transfer documents were adjudged to be fraudulent documents. It also found that in relation to the point *in limine*, the applicant was unable to explain two conflicting CR2 documents".

Thus, the court *a quo* upheld both points *in limine*.

The learned judge then gave the following analysis:

> "The cardinal factual issue for determination in the court *a quo* was whether the 1st applicant **[Farai Matsika]** was a shareholder of the company. It is settled law in our jurisdiction that an appeal court will not easily interfere with factual findings made by a lower court. To that extent, case law has set the test for discrediting and upsetting factual findings by a lower court so high that they cannot easily be overturned on appeal. In *Reserve Bank of Zimbabwe v Granger and Anor*[1] This Court held that:
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> > "An appeal to this court is based on the record. If it is to be related to the facts there must be an allegation that there has been misdirection on the facts which is so unreasonable that no sensible person who applied his mind to the facts would have arrived at such a decision. And a misdirection of facts is either a failure to appreciate a fact at all or a finding of fact that is contrary to the evidence actually presented."
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> > **[Emphasis supplied]**

It is worth noting that the learned judge was not able to interfere with the factual finding that the documents which the fifth defendant relied on to support his claimed 30% shareholding were based on material falsehoods and forgery. The judge examined the fifth defendant's assertion that Mr Gwatidzo admitted preparing the shareholders' agreement, and concluded that:

> "It is axiomatic that the authenticity of the questioned document was premised on them having been prepared and signed by the auditor Gwatidzo. Gwatidzo's denial that he is the author of the questioned documents was fatal to the applicant's case. It destroyed the whole foundation and basis of his case".
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> **[Emphasis supplied]**

The second crucial observation by BHUNU JA in relation to the court a quo's factual findings is as follows:

> "Ultimately the learned judge *a quo* upheld the two preliminary points and, in the process, found that the application was bad at law in that it did not meet the requirements of s 95 as read with s 196 of the Act. In the result he dismissed the application with costs."

The learned judge proceeded to analyze this finding as follows:

> "To make matters worse the 1st applicant filed two conflicting CR2 forms. The first one showed that the company owned all the shares in the 2nd respondent Moses Tonderai Chingwena Family Trust. Upon realising that the first CR2 form was fatal to his case, the 1st respondent filed another CR2 form with his answering affidavit contradicting the first CR2 which asserted that 3rd respondent owned all the shares in 2nd respondent.
> …
> These examples of the 1st applicant's shenanigans portray him as a dishonest devious person who is prepared to twist the truth in order to advance his nefarious cause. In light of his deceitful character the learned judge *a quo* cannot be faulted for holding that the 1st respondent's cause was founded on lies and fraudulent documents. That finding is amply supported by the evidence on record".
> **[Emphasis supplied]**

In light of the above, the argument that the Supreme Court did not relate to the merits of the case before the High Court is not supported by the judgment of BHUNU JA. Accordingly, the point *in limine* that the issue of the fifth defendant's shareholding was resolved by the High Court, Supreme Court and Constitutional Court judgments has merit. In other words, the objection is that the plaintiff has no valid legal basis for claiming that the fifth respondent has shares in the first, second and third respondents, in respect of which he seeks an order declaring the allotment of shares from the fifth defendant to Croco Holdings (Pvt) Ltd a nullity. Given the finding of the High Court that the fifth defendant had not proven any shareholding in the first defendant and the fourth defendant is the sole shareholder in that company, the relief sought is obviously incompetent.

In conclusion, based on the above, I am inclined to uphold the points *in limine* taken by the first to fourth and sixth defendants. Counsel for the parties were not in agreement on what the court should do if it upholds the preliminary points i.e. whether it should dismiss the plaintiff's claim outright or strike the matter off the roll. In the Farai Matsika case heard by the late Justice Tagu, the court exercised its discretion and dismissed the application. In that case, the existence of material disputes of fact clearly influenced that decision. The High Court relied on the case of *Masukusa* v *National Foods Ltd & Anor* 1983 (1) ZLR 232 (H) where MCNALLY J (as he then was) stated:

> "Where the facts are in dispute the court has discretion as to whether to dismiss the application or allow the matter to go to evidence. The first course is appropriate where an applicant should, when launching his application, have realized that a serious dispute of fact was inevitable."

In this case, the issue is that cause of action has not been set out to establish the plaintiff's claim. This argument derives from two bases. The first is that the case pleaded by the plaintiff is that the allotment of shares was done fraudulently and illegally, but the particulars of fraud were not pleaded. The second is that the plaintiff pleads that he had one share in the first defendant, yet in his pleadings he seems to lay a claim to 100 shares in the first defendant without pleading how his initial single share grew to 100 shares. Counsel for the first to fourth and sixth defendant seems to have left it open to the court's discretion to decide whether to dismiss or strike the matter off the roll. I have decided to uphold the preliminary points and strike the matter off the roll. Costs normally follow the cause. The first to fourth and sixth defendants have succeeded in so far as their points in *limine* have been upheld and are entitled to costs.

Disposition

In the result, I make the following order:

1. The preliminary points raised by the first to fourth and sixth defendants are upheld.
2. This matter be and is hereby struck off the roll.
3. The plaintiff shall pay the first to fourth and sixth defendants' costs.

Mabulala & Dembure, plaintiff's legal practitioners
Atherstone & Cook, defendants' legal practitioners
Mutamangira & Associates, fifth defendant's legal practitioners