LAWRENCE BERNARD GWARADA

versus

DOUGLAS TANYANYIWA

and

DOUGLAS WARRIORS FOOTBALL CLUB

HIGH COURT OF ZIMBABWE

MUTEMA J

HARARE, 14, 15 AND 16 February, 2011 and 22 June 2011

**CIVIL ACTION**

*G V Mamvura*, for the plaintiff

*M Kamudefwere*, for the defendants

MUTEMA J: The plaintiff runs a tour operator company under the style of LED Travel and Tours (Pvt) Ltd. The first defendant owns Douglas Car Sales (Pvt) Ltd and he also owns the second defendant. The present feud between the parties has its genesis in matters of football and partnership.

When the first defendant, in 2008, found it difficult to run the second defendant due to financial constraints, he intimated to the plaintiff that he was thinking of either selling the second defendant’s franchise or seeking a partnership in order to lessen the financial burden bedevilling him. The two subsequently concluded a partnership agreement whereby the plaintiff was to purchase 49 000 shares valued at US$49 000-00 representing a 49% stake in the second defendant while the first defendant would retain the balance. The plaintiff was to pay for 40% stake in 2009 and 9% in 2010. During 2009 the plaintiff and the first defendant were to each contribute towards the running costs of the second defendant in the ratios of 40% and 60% respectively, based on their respective “shareholding”. Pursuant to the agreement, as at 10 October, 2009, the plaintiff had paid to the first defendant US36 807-00 for the purchase of shares and a further sum of US35 533-00 being his pro rata contribution towards the running costs of the second defendant.

In about November, 2009 the partnership deal collapsed. What engendered its collapse is the bone of contention between the parties. The plaintiff alleges that the first defendant occasioned the collapse when he, contrary to the agreement, started claiming that the partnership was for the 2009 football season only. The plaintiff’s contention is that the partnership had no time life limit, that shares cannot be bought only for one football season and that purchased shares must be transferred to the buyer. The plaintiff then issued summons claiming reimbursement of the two sums of money stated above.

The plaintiff’s evidence was to the following effect: he has known the first defendant since 2002 via his football club, the second defendant. Initially he was just a supporter of the second defendant before he became the second defendant’s treasurer for almost five years until 2008 when the first defendant approached him with the idea of buying shares in the second defendant. When he accepted the idea, the first defendant asked him to lodge a written application which he did on 27 December, 2008. He produced the written application as exh 1. It is written on the plaintiff’s company letterhead addressed to the first defendant in this vein:

“Re: APPLICATION TO BUY 49% STAKE IN DOUGLAS WARRIORS FOOTBALL CLUB\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

I submit my application to buy 49% stake in Douglas FC through my company LED Travel & Tours – coming in as the sponsor.

The value of the shares is USD49 000-00 and as agreed in our meeting of 27 December, 2008 – the payment plan is as follows:

Year 2009 – 40%

* + - USD 10 000-00 to be paid by 5 January 2009 subject to availability of foreign bank account
    - USD5 000-00 by mid to end of January 2009
    - Payment of balance to be spread over a period of 10 months and mode of payment will be finalised in due course.

Year 2010 – 9%

* + - As agreed, the remaining 9% will be reserved for me in 2010 at same value. By then the team will be in Premier League.

My stake will be registered under my wife Gracious Mawungwa and in future will be managed by my two sons Bernard Gwarada Jnr and Lawrence Gwarada”.

The first defendant’s response was via exh 2 – a letter dated 5 January, 2009 titled Re: APPLICATION FOR A 49% STAKE IN DOUGLAS WARRIORS FOOTBALL CLUB. It states:

“The above matter refers and I acknowledge receipt of your application requesting for a 49% stake in Douglas Warriors Football Club.

I am pleased to notify you that your request has been accepted of which the conditions would be spelt out in the agreement document which will be availed to you upon receipt of the first instalment of USD10 000-00.

I would want to express my appreciation for showing interest of running Douglas Warriors Football Club jointly with the current administration.

I look forward to a cordial working relationship”.

Following his $10 000-00 cash payment to the first defendant as first payment towards the purchase of the 40% stake, the first defendant wrote him a letter – exh 3 – acknowledging the above payment and stipulating how the balance should be paid. The January, 2009 balance of $5 000-00 was to be paid on or before 31 January 2009. The remainder of $25 000-00 was to be paid thus:

USD5 000-00 cash on or before 31 March, 2009

USD5 000-00 cash on or before 31 May, 2009

USD5 000-00 cash on before 31 July 2009

USD5 000-00 cash on or before 30 September 2009

USD5 000-00 cash on or before 30 November 2009

The final 9% stake to be paid for on or before 31 January 2010.

He said he did effect the cash payments to the first defendant as proposed until November, 2009 when the partnership collapsed.

The plaintiff produced exh 4 which he said is the partnership agreement document that the first defendant gave him, spelling out the terms and conditions of their partnership. It was drafted by the first defendant’s legal practitioner Mr Gijima. After going through the document Mr Gijima called him together with his legal practitioner Mr Mujeyi to come and sign the agreement at his offices. The two of them went to Mr Gijima’s offices where the plaintiff signed the agreement which falls on all fours with exh 4 and Mr Mujeyi also signed it as his witness. The signed document remained with Mr Gijima for him to give to the first defendant for his signature. However, that was the last time he saw that document as it was never returned either to him or to Mr Mujeyi. He emphasised that clauses 2.1 – 2.3 of exh 4 accurately captured the agreement the parties had reached regarding the shares which he was paying for. In those clauses reference to the first director denotes the first defendant while reference to the second director denotes himself.

He produced exh 5 – a letter by the first defendant dated 2 March, 2009 acknowledging receipt of payments he made to the first defendant up to that date in respect of instalments for purchase of shares and operational costs. Exh 6 reflects the parties’ pro rata contributions to the second defendant’s operational costs. He also produced exh 9 – the expenditure he had made as at 10 October, 2009 towards the second defendant’s welfare reflecting the following amounts:

* + - * USD36 807-00 for share purchase
      * USD35 533-00 for operational costs

This document was compiled by the second defendant’s administrator and endorsed by both the first defendant and himself as the directors.

He explained exh 18 as a letter to him from the first defendant advising him that the partnership agreement document was ready for signing. It is dated 29 October, 2009. This document, the plaintiff said, is the one he later signed with his lawyer Mr Mujeyi at Mr Gijima’s offices which was never returned to him. Exhibit 20 is a letter by the first defendant, to him dated 4 November, 2009 advising him *inter alia* that the partnership document was ready and if he could advise his lawyer to contact F G Gijima & Associates concerning it. The plaintiff ended his testimony by explaining that the shares that he paid for were never transferred to him and the purchase price he paid for them as well as the monetary contributions he made for operational costs of the second defendant whose combined total is US$72 340-00 was never refunded to him following the collapse of the partnership when the first defendant refused to sign the agreement and started changing goal posts alleging that the agreement was only for the 2009 soccer season, hence this suit.

The plaintiff then called Bruce Bevan Mujeyi as his witness. His evidence was this: he is a duly admitted legal practitioner practising under the style of Bruce Mujeyi Attorneys. His professional experience spans over some 13 years.

The plaintiff is a client of his. In 2009 the plaintiff approached him with a draft shareholder agreement pertaining to the second defendant. He instructed that he intended investing in the second defendant and that Mr Gijima had drafted the particular document. He identified exh 4 as the draft document in question. The plaintiff also showed him other documents – exh(s) 1 – 3. Although he felt that exh 4 could have been drafted more elegantly the plaintiff’s purpose was captured in para 2 thereof, headed “shares”. When the plaintiff showed him exh 4 payments had already commenced as shown in exh 3. The instructions he got from the plaintiff were that the plaintiff would purchase 40 000 shares in 2009 and in 2010 he had an option to purchase a further 9 000 shares of the stake. This is also what he gleaned from the document in question.

On a date he could not recall, the plaintiff and himself attended at Gijima’s offices for purposes of signing the agreement as is, viz exh 4. They were given an exact copy of exh 4 and when he explained that they were not going to change the contents of the draft they waited for copies to be printed. He signed a document which falls on all fours with exh 4 as the plaintiff’s witness. The first defendant was not present and Mr Gijima did not take issue with the draft document they signed. The document they signed had no provision that the agreement was only for the 2009 soccer season. The effective date which they put on the document was for January, 2009. This was done for tax purposes and Mr Gijima did not take issue with the date and he promised to explain this to his client the first defendant. The signed copies were handed to Mr Gijima’s secretary the arrangement being that once the first defendant appended his signature the plaintiff’s copy would be sent to his (witness’s) offices. However, no such copy was ever sent to his offices and he never got to know the reason why. He also has no knowledge of that copy being sent to the plaintiff. The document was supposed to be sent from legal practitioner to legal practitioner.

Later when it became clear that there was a serious dispute between the parties regarding the agreement, he advised the plaintiff to get independent legal advice.

After his evidence the plaintiff closed his case.

For the defendants two witnesses, viz the first defendant and Fredrick Garikai Gijima gave evidence.

The first defendant’s evidence was this: he is self-employed. He owns Douglas Car Sales and the second defendant. He has known the plaintiff since 2004 when the latter joined the second defendant as club treasurer. Their working relationship was cordial.

He formed the second defendant in 2000. In 2008, due to hyperinflation, he found it difficult to run the club. He contemplated selling the franchise, folding up the club or entering into a partnership. Among the people he approached for a partnership was the plaintiff who had earlier shown an interest in the club. They discussed the matter and when the plaintiff expressed interest he asked him to put in an application which he did and he accepted it. Exhibit 1 is the application in question. The partnership agreement was that he would be the first director of the club with 60% stake while the plaintiff would be the second director holding 40% stake with an option to buy a further 9% provided the club qualified into the premiership. The plaintiff’s 40% stake was specifically for the 2009 season only as reflected in the application letter exh 1. He explained that having run the club alone for nine years and letting the plaintiff acquire 40% for only $40 000-00 would not make any business sense. He gave an instance that if today they sold a player, say to South Africa with the plaintiff getting 40% it would mean that the plaintiff would be entitled to $100 000-00 and this would not make good business sense on his part. This is why he still insists that the plaintiff’s 40% stake was only for the 2009 season.

Exhibit 2 is his acceptance of the plaintiff’s application. It does not spell out that the partnership was only for the 2009 season because he was basically answering to the plaintiff’s application. He drafted the agreement with the plaintiff and in their discussions in meetings held the tenure of the partnership was that the 40% was for 2009 and the 9% was for 2010 because the plaintiff believed that he would not want to put money in a division one club in 2010.

He produced exh 27 – a draft partnership document done by his office under his supervision. The document was in layman’s language to be sent to the club lawyer for a final draft. He said the plaintiff did contribute to this draft document verbally. Under the clause on shares it is clear that the agreement was only for the 2009 season. He did show the plaintiff this document but it is unfortunate that the latter now alleges that he never saw it. He said soon after discussing this draft with the plaintiff the document was sent to Mr Gijima. Exhibit 28 was also drafted by his office under his supervision and the same obtains in respect of exh 29. In both these draft agreements the clause relating to shares limits the tenure of the partnership to 2009 season.

The agreement document he got from Mr Gijima was the final draft which the plaintiff and his witness had signed. Exhibit 30 is not the final draft document but its contents are similar to the final one signed by the plaintiff and his witness and it limited the issue pertaining to the plaintiff’s 40% shareholding to the 2009 season. After the plaintiff had backdated the date of signing the final draft to 1 January, 2009 Mr Gijima sent the documents to him and he in turn sent them to the plaintiff to correct that date under cover of exh 32 – a letter that he wrote. However, the plaintiff never returned those papers to him. Asked to comment on clause 2 of exh 4 relating to shares, he said he did not recall ever seeing exh 4 and he did not know why clause 2 of exh 4 is different from clause 2 of all other drafts and he did not know who drafted exh 4.

In terms of the agreement the plaintiff was supposed to pay $40 000-00 for his 2009 season shares but he only paid $36 807-00 so he is claiming for the balance. He contended that it was the plaintiff who occasioned collapse of the partnership by ignoring correspondence sent to him as well as by not honouring his part of the agreement. Apart from the balance regarding purchase of the shares the plaintiff also failed to pay his pro rata share of the operating costs. He is entitled to those costs as well as per his counter claim.

He denied that he was unjustly enriched by the plaintiff’s payments arguing that in fact the plaintiff made him poorer as he had not budgeted to run the club alone. This almost caused divorce from his wife because of lack of food at home. It was the plaintiff who was unjustly enriched through marketing his company products by having his company logo in front of the team jerseys and on his buses.

Fredrick Garikai Gijima gave the following evidence:

He is the senior partner in the law firm F G Gijima & Associates. He has known the first defendant since the early 1980s and to him the first defendant is almost a brother. The plaintiff is like a brother to him and he has worked with the plaintiff in various projects. He has acted as a legal practitioner for the two defendants for many years but has never acted as counsel for the plaintiff in any legal matter.

Regarding the parties’ intended partnership he became involved in January/February 2008 when he received instructions from the first defendant that he intended to enter into a deal with the plaintiff for the management of the second defendant. He advised the first defendant to provide him with a draft of the points which they wanted to agree on to enable him to draft a document and have the parties discuss it. The first defendant thereafter gave him exh 27 – the draft document, save for the handwritten alterations on it.

On p 32 of that draft document, instructions were that the parties were agreeing that the arrangement would be for the 2009 season only because the first defendant was finding it financially strenuous to single handedly sponsor the team. The plaintiff had approached him so that the two would co-sponsor the team during that season on two conditions, viz that the first defendant would retain 60% value stake in the second defendant and the plaintiff would purchase 40% stake in the team and that in the event that the team qualified into the premier league, the plaintiff would have an option to buy a further 9% stake.

By the term “shares” he understood and was instructed that parties meant the percentages which each party would contribute in terms of expenses and which each would also suffer in terms of losses; also, it was also to enable them to arrive at a figure which the plaintiff would then pay to the first defendant as his 40% contribution to the value of assets of the team as at the beginning of 2009. According to him the term “shares” was used loosely. On p 35 (his handwritten notes) of the defendants’ bundle of documents he indicated that the total shareholding shall be for 2009 only.

Exhibit 28 is the first printed document by his private assistant on the computer at his offices following the typing of his handwritten notes on pp 34 – 40 of the defendants’ bundle of documents. Again last sentence of the first paragraph on p 42 of exh 28 under shares states that the agreement was for 2009 only. When the first draft was printed he went through it checking and then called the first defendant to his office and together they went through it with the first defendant adding the handwritten corrections. Regarding the parties’ intentions he assumed they were discussing the issues at their level as it seemed they were very clear on how they wanted to relate and he never had any problems with them.

Exhibit 30 was the last document he did regarding the relationship between the parties. Clause 2 thereof under “shares” again states that the shareholding was for the year 2009 only. This is an exact copy of the draft that he presented to the plaintiff and his witness Mr Mujeyi to sign on 12 November, 2009. The plaintiff and his witness did not read the document at all. In fact he had to run the document on computer while they waited as they had come to his office without notice. He had the documents bound in three copies and he gave the three to the plaintiff and Mr Mujeyi. They seemed to be familiar with the contents because they quickly signed on the last page. Thereafter he sent the three copies with legal covers to the first defendant with a covering letter – exh 31 – bringing his attention to the date that had been put by the plaintiff as date of signing and imploring the first defendant to sign his portion and return the documents to him if he was agreeable to that date so that he would distribute them to the parties and retain a copy in his file. He also enclosed a statement of his account exh 22. That was the last time he saw the three documents. They were never returned.

He denied ever giving the plaintiff or Mr Mujeyi any of the documents whether draft or final. He said the person he was communicating with throughout was the first defendant. Commenting on exh 4, he said at a glance it looks like one of his draft documents due to the font and arrangement, but he never gave the plaintiff any of his drafts. Regarding clause 2 of exh 4 he said there was a clear material difference as to the tenure of the agreement. He was boggled as to how the plaintiff obtained exh 4. That exh 4 is materially different from the document the plaintiff signed is also borne out by the fact that para C of exh 4 is on p 1 whereas on exh 30 it is on p 2 and the words “Ephraim Gwiliza transferred to Dynamos Football Club” in that paragraph on exh 4 read “Ephraim Gwiliza, loaned to Dynamos Football Club, in 2008”.

He also said from the onset he advised the first defendant that he was using the word “shares” loosely for these were not really shares *stricto sensu*. Limitation of the tenure to 2009 season was premised on the fact that the first defendant said the second defendant had been in division one for ten years failing to qualify into the premier league and after the parties had agreed to co-sponsor the team the plaintiff saw an advantage in the deal in that 2010 would be World Cup in South Africa and he wanted to market his travel and tours business. His instructions were that if the team failed to qualify into the premier league in 2009 the partnership would end as the plaintiff wanted to be associated with a premier league team while the first defendant did not wish to continue in division one. He said that was the advice that he also gave to the first defendant. After his evidence the defendants closed their case.

Before analysing the evidence adduced and the probabilities, there is a small matter of mathematics I must advert to. This relates to the value of each share as given in all the drafts of the partnership agreements viz, exh 4, 27, 28, 29 and 30 in clause 2.1. Therein, it is stated that the club’s shares shall be divided into 100 000 shares of US$1 000-00 each. This would mean that for 40 000 shares the plaintiff was to buy he would pay a total of $40 million. The correct share price was $1 each and the first defendant acknowledged this mathematical error.

The plaintiff and his witness gave their evidence in a clear and straightforward manner and were not shaken under cross examination. I have no reason not to believe them. They were credible witnesses. They corroborated each other on the issue of exh 4 falling on all fours with the document they had perused before signing at Gijima’s office and that in it, clause 2 did not have a provision limiting the agreement to the 2009 soccer season.

A holistic look at the plaintiff’s evidence and the probabilities yields clearly that the agreement could not have been for the 2009 soccer season only. 40% stake was to be bought in 2009 and 9% on or before 31 January, 2010 to add up to a total stake of 49% in the second defendant. This reflects continuity beyond 2009 and not seasonal severability. Even the last paragraph of exh 1, that in future, the plaintiff’s stake will be managed by his two sons buttresses this conclusion. Also, exh 2 and 7 wherein the first defendant was acknowledging receipt of the plaintiff’s application for the 49% stake and of payment for January and March 2009 of $20 000-00 respectively do not limit the deal to 2009 season. This conclusion is further buttressed by the use of the words that the plaintiff “shall with effect from 1 January, 2010 have an option to purchase a further 9 000 shares” in clause 2.3 of exh 4. Even para 4 of exh 1 gives the same impression of continuity. Over and above that, it does not make any sound business sense, especially for the plaintiff, who had been the second defendant’s treasurer for five years, to invest that much in a soccer club, which he knew was loss-making, only for one season.

While the first defendant averred that he sent copies of the document the plaintiff and Mr Mujeyi had signed to the plaintiff to have the date of signing changed, the plaintiff was adamant that he never got those copies. It behoves me to look at the probabilities in determining where the truth lies.

I find it improbable that the first defendant would send the documents in question directly to the plaintiff for the correction he alluded to. The proper and obvious course was for the first defendant to return the documents whence they have come, viz Gijima’s office with instructions to his legal practitioner to have the correction effected as desired. I have already made a finding that I believe the plaintiff and his witness that the document they had signed falls on all fours with exh 4 with a provision under the heading “shares” not limiting the agreement to the 2009 soccer season. Why then would the plaintiff, if he received three documents as alleged by the first defendant, conceal them? The plaintiff stood to benefit from his investment in terms of exh 4 with or without the amendment to the date of signing. On the contrary, the first defendant, without seeking to speculate on his motives which though seem apparent, most likely thought he stood to gain by hiding the copies plaintiff and his witness had signed and by subsequently producing a doctored document limiting the agreement to the 2009 soccer season.

On his part, the first defendant was a very poor witness. He seemed apprehensive and would dodge questions under cross-examination. Questions had to be repeated and his answers to material questions were evasive. I gained the impression that he is a sly character. Under cross-examination he did not “allot” the “shares” the plaintiff had paid for because this was supposed to be done upon signing the agreement. He is the one who refused to sign it when the plaintiff had and subsequently made it vanish. He therefore breached the agreement. For instance, to the question: “As we speak you have taken his (plaintiff’s) money and you have kept the shares” his answer was “I have accepted payment”. When the question was repeated his answer was “I would not comment further”.

His witness Fredrick Gijima also fared badly. He contradicted himself, for example, in his evidence-in-chief he said regarding the parties’ intentions he assumed they were discussing the issues at their level as it seemed to him that they were very clear on how they wanted to relate and he never had any problems with them. This implies that he did find out from the plaintiff what the plaintiff was agreeing to with the first defendant. Under cross-examination, however, he shifted ground saying “unfortunately instructions were coming from the first defendant and my understanding and instructions from the first defendant were that at each stage he would always discuss the draft document with the plaintiff or would call on the plaintiff to make inputs if any”. In fact under cross-examination he conceded that he never conversed with the plaintiff concerning these draft documents.

Under normal circumstances, one would assume that if Mr Gijima, who was close to both parties, wanted to be impartial, the proper approach would have been to sit down with both parties at all the stages and thrash out the terms and conditions the parties wanted incorporated into the final draft instead of either assuming that the parties were engaging each other at every stage or getting instructions only from the first defendant.

The first defendant and his witness contradicted each other on the aspect of who drafted exh 28, 29 and 30. The first defendant said these documents were prepared at his office on his instructions and were then sent to Mr Gijima. On his part Mr Gijima told the court that the documents in question were prepared at his offices by him. Also, while the first defendant said Mr Gijima gave him four copies of the document signed by the plaintiff and his witness, Mr Gijima said he gave him only three copies. It is baffling that a client and his legal practitioner who are also respectively a defendant and his witness would entangle themselves in such contradictions. I find both difficult to believe.

Under cross-examination Mr Gijima made some telling concessions, viz that exhibits 28, 29 and 30 share the same font size with exh 4 and also the same ink print. He knew that there were no shares which the first defendant could sell to the plaintiff yet in clause 2.1 of exh 30 – which he said was the final draft – he wrote that the second director (plaintiff), shall with effect from January, 2009 purchase 40 000 shares; in clause 2.3 the plaintiff would have an option to purchase a further 9 000 shares in January, 2010; in clause 4 on disposal of shares and in clause 4.1 on right of first refusal when disposing of the shares; in clause 4.2 on shares being offered to third party and in clause 4.3 on offering the shares to members of the immediate family he knew that there were no such shares to be bought or alienated since there were never any! His explanation was that he so wrote on the first defendant’s instructions and that the word “share” was being loosely used and not in the strict legal sense. Yet it did not occur to him at any stage to sit down with both parties to explain the legal nitty gritties and implications of using that term? For a legal practitioner worth his salt this is highly improbable. Mr Gijima in vain tried to justify that the word “share” was being loosely used saying he even had a telephone discourse with Mr Mujeyi about it and Mr Mujeyi assured him that there was no problem yet this was never put to Mr Mujeyi in cross-examination at all.

On the totality of the evidence adduced before me in conjunction with the probabilities, I am satisfied on a balance of probabilities of the following:

1. That exh 4 falls on all fours with the partnership agreement document which the plaintiff and Mr Mujeyi signed at F G Gijima & Associates. It necessarily follows that that agreement, in clauses 2.1 and 2.2 under “shares” did not limit the partnership to the 2009 soccer season. It was a partnership without limit of time;
2. That it was the first defendant who frustrated/repudiated the partnership by not only refusing to sign his portion but by concealing the copies signed by the plaintiff and his witness and attempting to shift goal posts regarding the duration of the partnership and the transfer of the shares the plaintiff had paid for;
3. That when the partnership collapsed in October, 2009 through no fault of his, the plaintiff had paid US$36 807-00 to the first defendant towards the purchase of shares and US$35 533 to the second defendant towards operational costs. The essentials of the special contract of partnership as stated in the case of *Joubert* v *Tarry and Company* 1915 TPD 277 at 280-1 were present in the instant case, viz:
   * + - That each of the partners brings something into the partnership, or binds himself to bring something into it, whether it be money, or his labour or skill;
       - That the business should be carried on for the joint benefit of both parties;
       - That the object should be to make profit;
       - That the contract should be a legitimate one.

Where there is a fundamental misrepresentation or fraud which induces an innocent party to hand over property in circumstances that amount to theft from him such as is shown by the facts of the instant case such a party can elect to resile from the contract expressly or impliedly. Having resiled from the contract, the innocent party is entitled to reclaim any money or property he has handed over in pursuance of the contract in exchange for full restitution of whatever he has received: RH Christie *Business Law in Zimbabwe*, Juta, 2nd ed p 80. In *casu* the plaintiff did not receive anything out of the contract so there is no restitution he can make. He simply elected to reclaim what he has handed over to the defendants, to which he is clearly entitled.

1. That from the first defendant’s unjustified and fraudulent conduct, the counter-claim has no legal leg to stand on.

In the result, the court’s order is as follows:

1. The defendants’ counter claim be and is hereby dismissed.
2. Judgment be and is hereby entered for the plaintiff against both defendants jointly and severally, the one paying the other to be absolved:
3. In the sum of US$72 340-00;
4. Interest thereon at the prescribed rate from the date of summons to the date of payment in full;
5. Costs of suit.

*Scanlen & Holderness*,plaintiff’s legal practitioners

*Muringi*, *Kamdefwere Legal Practitioners*, respondents’ legal practitioners