

VALENTINE ZISWA
and
MARGARET ZISWA
versus
GREAEEME SHAUN CHADWICK
and
LANDOS FARM (PVT) LTD

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 18 February, 19 February, 20 February and 11 March 2015

Civil Trial

L Uriri, for the plaintiffs
A Rutanhira with *E T Moyo* and *Ms R Magundani*, for the defendants

MATHONSI J: The first plaintiff is a farmer who owns Ziswa Farm (“the farm”) otherwise known as Farm 23 of Lawrencedale estate in the District of Makoni, Rusape which farm he prefers to rent out while staying on it, as he currently rents it out to his neighbour, he having rented it out to the first defendant prior to that and yet to another person before the first defendant came in.

The second plaintiff is his wife who, apart from the fact that she was cited as a party along with the first defendant in a joint venture agreement concluded between the couple and the first defendant on 9 January 2009, has been cited in these proceedings in extremely unclear circumstances. The first defendant is a commercial farmer, a tobacco grower of note, conducting such business generally at Landos Farm, Halfway House in Headlands and is a director of the second defendant a duly incorporated company.

The plaintiffs instituted proceedings against the defendant and in their summons and declaration they set out an array of claims, 13 in all, arising out of a lease agreement signed between first plaintiff and the first defendant on 9 January 2009 on which date a second agreement titled “Memorandum of Joint Venture Agreement” was also signed between the first and second plaintiffs on the one hand and the first defendant on the other hand.

The plaintiffs averred that sometime in 2008 they had entered into a long term development lease agreement with the defendants for the use of the farm and that although the first defendant had signed as the tenant, the actual farming was done through the second defendant. In terms of the lease agreement the defendants were expected to put up and maintain infrastructure at the farm like the construction of 44 houses for workers, dam and barn construction. The relationship between the parties deteriorated over time resulting in the defendants cancelling the lease agreement on 2 July 2012 before vacating the farm without notice.

The plaintiffs averred further that when the defendants vacated the farm they unlawfully removed certain items of property belonging to the plaintiffs valued at US\$186 701-00 which amount they claimed. The defendants badly damaged the plaintiffs' property valued at \$15 905-00. They removed fences and gates as they vacated whose value is \$7 600-00. During the tenancy the defendants damaged 4 barns which were falling at the time they left while 2 barns were badly cracked and supported by poles. This was in breach of the agreement of the parties requiring the defendants to keep the barns in good and perfect condition and to repair them to usable state when vacating. The plaintiffs claimed \$5 008-00 being the costs of repairing the barns.

In further breach of the agreement the defendants left the farm without removing and destroying tobacco stalks from the land and seed beds which exercise the plaintiffs had to undertake at a cost of \$780-00 including a fine paid to the Environmental Management Agency. The plaintiffs claimed a sum of \$26 313-00 being the value of their property and machinery including overhead water storage tank and pipes, workers houses, underground cables, water reservoir, cast iron pipes, pump unit, electricals at boreholes and at transformers.

The plaintiff averred further that in terms of the lease agreement the defendants were obliged to deliver to them certain quantities of maize but failed to deliver 50 metric tonnes of maize worth \$15 000-00 which amount the plaintiffs claimed. They claimed a sum of \$45 000-00 damages for loss of income for the 2012 -2013 farming season they would have realised if the defendants had not prematurely terminated the lease agreement and without notice.

A sum of \$64 160-00 was claimed for arrear rentals for the 2011-2012 tobacco crop being 8% of the gross turnover in respect of crops produced at the farm in terms of the agreement given that 220 000kgs of tobacco were produced during that cropping season. A

sum of \$1 980-00 refund, of what the plaintiffs paid for rates and levies to Makoni Rural District Council was claimed which should have been paid by the defendants in terms of the lease agreement.

The plaintiffs claimed \$5 500-00 being their share of the hailstorm insurance claim made by the defendants to their insurers for the 2009-2010 and 2010-2012 seasons. A sum of \$67 506-00 was claimed as the value of a centre pivot and generator which although purchased by the defendants, they should have left at the farm for the plaintiffs benefit as part of the long term development of the plaintiffs' farm. They claimed \$4 240-00 being 8% of the tobacco seedlings grown on their farm by the defendants.

The defendants have contested the claims and in their plea they took issue with the citation of the second defendant as a party to the proceedings given that there was no agreement, of whatever nature, between the plaintiffs and the second defendant.

In respect of the first defendant, they averred that he complied with all the terms of his agreement with the plaintiffs and denied owing the plaintiffs any money. The relationship between the parties suffered as a result of the plaintiff's endless interference with farming operations and peaceful enjoyment of the property resulting in a court order being sought and granted interdicting such interference. The first defendant had to cancel the lease agreement after the plaintiffs had preferred false and malicious criminal charges against him.

The defendants averred that at the termination of the lease a verification exercise was conducted by the parties which established that all the plaintiffs' property had been accounted for and as such none was removed or damaged. In addition, the fact that the plaintiffs had forcibly taken possession of the farm and equipment, meant that the defendants could not be expected to account for the damage to any property during that period. They denied vacating the farm secretly or removing fences and gates in the process especially as the parties were aware of the termination and the defendants' vacation of the farm. They denied vandalising any property and that the plaintiffs were entitled to any damages for loss of income.

The parties agreed on the issues for trial at the pretrial conference which are captured in their joint pretrial conference minute as;

- a) Whether there was an agreement between the parties as pleaded by the plaintiffs;
- b) Whether the defendants fully complied with the terms and conditions of the agreement;
- c) Whether some of the plaintiffs' claims have prescribed, if so, which ones specifically, and

d) Whether the plaintiffs' are entitled to the claims set out in the summons.

Only the first plaintiff gave evidence while the second plaintiff chose not to. They also called witnesses namely, Assistant Inspector Nixon N'andu, Canaan Nyamombe and Fanuel Phange.

It was the evidence of the first plaintiff (Ziswa) that prior to the first defendant (Chadwick) approaching him in 2008 he had been leasing his farm to someone else and that after Chadwick left unceremoniously in July 2012, he again let out the farm to a neighbour of his Mr Coleman of Mersy Farm, who, upon taking over paired the 8 barns which Chadwick had left in a falling condition. Himself and Chadwick negotiated the lease agreement which was reduced to writing the latter having printed a standard form agreement obtained from the National Tobacco Association out of his computer.

He stated that they negotiated every clause and as they did so they added annotations in long hand, which unfortunately were not initialled or counter signed by the parties although every page was initialled at the bottom. After signing the lease agreement they also prepared and signed a Joint Venture Agreement (JVA) at the instance of Chadwick who wanted it to be signed to protect the parties given that politically leasing farms was unacceptable while joint venture agreements were tolerated. As far as he was concerned the real agreement between the parties was a lease and not a joint venture which is why the JVA also spoke of a lease and rentals. He referred to both agreements which are part of Exh 1.

Although both agreements were signed with Chadwick the witness insisted that they were concluded with both Chadwick and the second defendant, Landos farm (Pvt) Ltd (Landos), a claim which is difficult to sustain given that Landos as an incorporation was not cited at all in both agreements. He sought to hold Landos liable because Chadwick introduced himself as its directors and used its letterhead in correspondence. Some payments were made by Landos. His claim is based on both agreements. He explained that while the written agreements were signed on 9 January 2009 he had already allowed the defendants to commence farming in August 2008 and that the written agreements only recorded what the parties had agreed.

It is significant that the lease agreement does not necessarily contain some of the necessary details with the first clause omitting the name of the farm and its hectareage. It also omits the lease period and the date of commencement. It only has the date of termination entered in pen. On the various additions to the document appended in barely legible ink, Ziswa said some were entered by himself while some were made by Chadwick as the two

negotiated the terms of the agreement. The lease provides in clause 2 that the land was leased for purposes of growing tobacco on 30 hectares, maize on 40 hectares, 20 hectares of wheat or another crops agreed between the parties. Ziswa said practically, Chadwick only grew maize during the first year and did not do so for the remainder of the time he was on the farm electing to concentrate on tobacco farming. He never grew wheat or any other crop for that matter.

The payment of rent is provided for in clause 3 which reads:

“The rent payable by the Lessee to the Lessor shall be 6% on the US\$ ----- of the gross turnover in respect of the crops produced on the said land and payment of such rent/lease, shall be secured by means of direct payment into a FCA given by the lessee in favour of the Company against proceeds of tobacco sold through the Lessee’s contract and in the case of other such as maize/wheat in equivalue (sic) it shall be executed and registered as soon as may be after the signing of this lease. An advance payment shall be discussed if necessary.”

Despite this provision, Ziswa testified that his claim was for 8% of the gross turnover which he justified by reference to a letter written by Chadwick, on a Landos letterhead, on 22 February 2011 which reads:

“Dear Mr Ziswa

RE: JOINT VENTURE OFFER FOR 2010-2011 SEASON FOLLOWING

I am writing to present my offer on the subject stated above. I am hoping my proposal will be acceptable to you and will be effective for the next three seasons.

I am proposing that I pay you 8% of the gross realisation from the tobacco sales as my joint venture offer. This will be for the sole use of your whole farm.

Please consider that this is the best that I can do. May I refer you to the cost of production document that I sent you earlier on. If I go beyond this offer the whole enterprise ceases to be viable. I believe this offer presents a win win situation for both parties.

This really is the best that I can do. May you please inform me of your decision by or before 15 March so as to enable me to make preparations for the coming season.

Yours faithfully

Greame Chadwick” (the underlining is mine)

Although Ziswa said he accepted the offer, he did not say when and how this was done. He did not produce any document of acceptance neither did he expand on where the acceptance was communicated to Chadwick. This gives credence to Chadwick’s argument

that his offer was never accepted and that the 6% contained in the lease agreement remained in force. It is noteworthy that Chadwick appeared to have been writing in his personal capacity even though he used Landos's letter head.

Ziswa said that the lease was to subsist for an initial period of 5 years but they then "moved to 8 years" and that it was, "a developmental lease agreement" enjoining Chadwick to embark on improvements of a permanent nature on the farm like the construction of dams, staff housing, improving barns and other infrastructural development. He never did except for the construction of 11 staff houses out of an agreed total of 44 houses. Even the 11 constructed were not completed. He only repaired one barn which had been burnt down prior to the commencement of the lease. Even in respect of that one, the parties did it together with Ziswa providing the bricks. Chadwick however left the barns falling and supported by poles.

He said the failure to insert the lease period on the agreement was an oversight. So was the failure to insert the name of the leased farm and the date of commencement of the lease, but it was 1 September 2008 while termination was at the end of August 2018 at the completion of 10 years. It turns out it was not 5 years, neither was it 8 years but Ziswa did not explain when the lease period changed to 10 years.

He stated that at the commencement of the lease, they were to hand over to Chadwick their assets located at that farm which the latter was to use for his farming activities. In that regard and in the process of identifying and handing over those assets, they produced an inventory at entry point listing these assets. He made reference to p 20 to 26 of Exh 1 the inventory in question saying all the listed assets were handed over in good working order. The inventory has a column with the title "Quantity" which he says is where they endorsed not only the quantity of the items involved but also the condition of the items so that if the item was not in good order that would be stated in that column. The fact that there would be no comment on an item meant that it was in good order. A look at that inventory shows only a couple of comments. The first relates to Diesel tanks with the comment "on stand". The second relates to an MF Tractor with the comments "1 No Wheels." Other than the description of the disc harrow as "1 red in colour" nothing supports Ziswa's claims on the condition of the items whose state was not given throughout. Both parties kept their copy of the inventory.

Ziswa went on to say that although most of his claims are not based on the written agreements they had a lot of discussions which resulted in agreements not reduced to writing.

As far as he is concerned a verbal agreement is also binding. He referred in that regard to the agreement on the construction of dams.

After going through the list of items which he said were handed over to Chadwick including what he said were new “Flue Pipes not fitted to the barns but kept at the sheds” as well as his own stock of fertilisers not for use by Chadwick, Ziswa went on to say that the tenant had taken over the items and grew tobacco for 4 years with him being paid due rentals for 2009, 2010, and 2011. He was however not paid anything for the last year the tenant was at the farm which is 2012. The claim for arrear rent therefore relates to the 2011 to 2012 tobacco growing season. In arriving at the 8% of the tobacco produced for that season (as opposed to 6% stated in the agreement), he had to estimate using the sale sheets of Landos which he obtained. He went through those sale sheets stating that he had to resort to estimation because the tenant did not give him the information. Based on the sale sheets and the other information on the tobacco that was produced they computed that 220 000 kgs of tobacco was sold during that year and his 8% of it is the sum of \$64 160-00 being claimed as arrear rental for the 2011-2012 growing season.

When the plaintiffs wrote a letter of demand to Chadwick on 23 July 2012 they stated that 205 800 kgs of tobacco had been realised at the farm during that period which had been sold at \$4,10 per kg giving a gross of \$843 780-00. They were entitled to 10% of it which is \$84 378-00. It is not clear where 10% cropped up from but they claimed it all the same. In their summons the claim was reduced to 8% of the gross turnover estimated at 22 0000 kgs giving the \$64 160-00 being claimed.

Ziswa stated that in terms of the parties’ agreement the tenant was obliged to pay rates and levies due to Makoni Rural District Council which for the year 2011-2012 was \$1980-00. As the tenant did not pay in January 2012, he was forced to pay on their behalf. He would like to be reimbursed that amount. He stated that although he received a receipt upon payment, he was unable to produce it.

In support of his claim that the tenant was obliged to pay rates, Ziswa made reference to a letter written by Chadwick, again on the Landos letterhead, on 9 November 2010 which reads in relevant part as follows:

“Dear Mr Ziswa

RE: RESPONSE TO YOUR LETTER DATED 5/11/10

1. Landos Farm agrees to make a payment of
\$1440 (that had been paid for rates
\$750 (for 50 cords of wood @ \$15

\$350 (barn fire)
Total 2540

The money will be paid in on Wednesday the 10th of November 2010. The proof of payment will be on the farm on Thursday the 14th of November 2010 as well as for you to collect.”

Unfortunately Ziswa did not see the need to produce the letter of 5 November 2010 which was being responded to. He however maintained that the payment of rates was the responsibility of the tenant even though the lease agreement had no such provision.

In respect of the claim for \$5 500.00, Ziswa stated that the tenant was obliged to insure the tobacco crop against hailstorm destruction. In the event that the tobacco crop is destroyed by hailstorm the insurer would pay for it. Hailstorm destroyed the tobacco crop and the tenant claimed from his insurance and was paid but he did not transmit to him 8% share due in terms of the lease agreement. He is entitled to a percentage of the gross turnover and would also be entitled to the same percentage of insurance payment made for destroyed crops. He is not aware of the exact amount involved because Chadwick refused to give him the figures.

He has had to estimate the figure based on the investigations which he carried out involving his discussions with the employees of the insurer who came to the farm for an inspection. He did not disclose what those investigations revealed only stating that he estimated the figure based on his experience and the damage he observed on the crop, an explanation not helpful at all.

Asked as to why the claim for hailstorm insurance involving a 2009-2010 crop would be made by summons served on 26 November 2012 outside the prescriptive period of 3 years, Ziswa dithered. He then said that “in the heat of things” there was a typing error in the summons because his hailstorm claim is for the 2011-2012 cropping season and not 2009-2010 claimed in the summons. Significantly, no attempt was made to amend the pleadings. Pressed by counsel on how he could possibly justify a claim in which he had no figure, Ziswa offered to withdraw the hailstorm claim accepting that it could not be proved.

In respect of the claim for the replacement value of the centre pivot and generator Ziswa had a difficult time indeed. He said that the tenant had purchased these movable assets and brought them to the farm for use during the tenure of the lease. He had however taken them away at the end. As far as he is concerned these items fall under the long term development provision of the parties’ agreement meaning that they should accrue to the farm. As such they should be returned or their value paid. As to how such items should qualify for permanent improvements he could not explain. His problems were compounded by the fact

that he had, through a letter written on his behalf by his legal practitioners on 12 April 2012 written to Chadwick, stated in part that:

“Of essence, the agreement was that of long term development partnership in terms of which you are obliged to undertake permanent structural development on the farm such as construction and other infrastructure development. We have noted with concern that you have failed to meet your side of the bargain. You undertook to built (*sic*) 44 houses for the workers, however, only 11 have been constructed to date. You have bought a centre pivot for irrigation. However it does not qualify as long term development because it depreciates in value. Also there is a huge list of farm equipment that has broken down which you have not bothered to repair.”

There you have it. The plaintiffs themselves did not regard the centre pivot as a long term developmental addition and by any stretch of the imagination, the generator cannot be said to be either. The plaintiffs themselves understood long term to apply to construction of workers houses, dam and barn construction and other infrastructural development. Nothing more needs to be said about that.

On the value of the property either allegedly removed from the farm and not returned or those damaged by the tenant and not repaired, Ziswa reiterated that all the property given to the tenant at commencement was not only usable but also in good working order. He pointed out that at no time did they make life difficult for the tenant because he had free access to the farm at all times and had guards looking after the farm. It was only after he discovered that they were removing his property from the farm and refusing to return it and failing to pay to him what was due in terms of the agreement that he moved in with 3 of his own guards and closed the barns to prevent the tenant from removing any tobacco produce.

The tenant removed an electricity line running from the first to the second dam, wires and poles were all removed. The implements listed in the pleadings were also removed including underground pipes. He produced Exh 2, an album of photographs showing the state of some of the items which had been given to the tenant at the commencement of the lease agreement. The photographs were taken by his wife, the second plaintiff, and their legal practitioner, in the presence of police inspector N’andu at the time that the defendants vacated the farm. Unfortunately none of the photographs depicts the appearance of any of the items at the commencement of the lease agreement and would, naturally be unhelpful standing on their own, for comparison.

Ziswa stated that Chadwick had used most of his equipment during the lease but broke down most of them with some of the damage being inflicted deliberately. For more than 2 years, Chadwick had not repaired the damaged equipment. He made reference to a list

of items, p 15 of Exh 1, which he said was property stolen, and removed from the farm and another list, p 18, which he said was property removed and returned in a damaged state.

Although in the summons he was claiming sums of \$187 707-00 as the value of the property removed and not returned, \$15 905-00 as the value of property removed and returned in a damaged state, \$7 600-00 as the value of fences and gates removed or badly damaged by the tenant and \$15 008-00 being the cost of repairing the damaged tobacco barns, Ziswa said he has since seen the light. He now realises that he cannot sustain those claims given that the items involved were not new at the time the tenant took them. He is therefore not claiming the values contained in the summons but would now defer to the testimony of an expert witness, Fanuel Phange an accountant who penned exhibits 3 and 3a representing the depreciated values of all the items involved.

He said that he is the one who gave Phange the list of all the items involved and their description. He used the original inventory to do so. He gave Phange the quantities and the quotations for the cost of each unit, which he had sourced himself. With all that information, he instructed Phange to depreciate the values of the items using international accounting standards. He did and came up with a grand total of \$385 943-00 which he now craves.

On the claim for \$708-00 for labour hired to clear tobacco stalks from the fields and seed beds as well as the penalty paid to the Environmental Management Agency, Ziswa said he hired 10 or 15 casual workers at \$4,00 a day for one week. He hired a tractor for \$200-00, bought diesel for \$150-00 and paid a fine of \$150-00 to EMA. He could not properly break it down. If he hired 10 workers for 7 days (assuming that is the number of days as opposed to 5 working days, he would have paid each one of them \$28-00 per week and all of them \$280-00. If he hired 15 the figure would be much higher by \$140-00 meaning he paid \$420-00. Working on the lesser figure, he would have paid \$780-00 under this head. The higher the figure would yield a total of \$920-00.

Ziswa said in terms of the parties' agreement, which again is not captured in the written lease and JVA, the tenant owes him 50 metric tonnes of maize. They had agreed that Chadwick would deliver to him 18 tonnes of maize in the first year, 12 tonnes the 2nd year and then moving to 18 tonnes annually from the maize he was required to grow at the farm. He therefore owes 50 metric tonnes valued at \$15 000-00. In arriving at the value he inquired from GMB what the value of the maize was and was told that it was \$300-00 per tonne adding to \$15 000-00 he is claiming. Again he does not have a quotation to support the claim.

Ziswa testified that during the final year that the tenant occupied his farm, he had grown tobacco seedlings at the farm. He used these seedlings to grow the main crop of tobacco from which he is claiming a share. Chadwick also took some of the seedlings to his other farms and sold some to unnamed individuals in unknown quantities. According to him seedlings constitute a crop and as the agreement stated that he was entitled to a percentage of the crop grown at his farm, he was therefore entitled to 8% of all the seedlings not used to grow the main crop at the farm. He stated that he had established that seedlings were sold for \$200-00 during the 2011-2012 cropping season. He counted the number of seed beds at the farm over and above what was required at the farm to come up, with a claim that would have turned William Shakespeare's Shylock "The Merchant of Venice", very green with envy.

Regrettably he did not tell us what amount of seedlings were required at the farm, how many seedbeds were there, how the figure claimed is arrived at and more importantly how "the young one" of a tobacco crop could qualify for a crop and found a basis for a monetary claim. He however conceded that prior to the 2011-2012 season he had not been paid for seedlings and had not submitted a claim stating that in previous seasons he had not asked for payment for seedlings because relations had not soured. It is therefore a claim not based on the agreement, but clearly actuated by malice and a strong desire to claim virtually everything especially considering that the initial claim under this head was \$10 200-00 made in the letter of demand which was pruned down to the \$4 240-00 now being claimed.

The final claim of \$45 000-00 for loss of income and damages allegedly sustained as a result of the premature termination of the lease, was withdrawn by Ziswa in his evidence in chief. He said after consultation with his lawyers, he has decided to abandon that claim because he "wants this claim to be clean on things damaged and money not paid". It is a concession properly made in light of the abundance of evidence, including a court order granted by this court by consent, pointing to interference with farming activities by the plaintiffs which led to the termination of the lease.

Undercross examination, Ziswa conceded that the lease agreement that he relies upon contains a non variation clause. Clause 9 reads:

"This agreement constitutes the entire agreement between the parties and no representation or undertakings given by one of them to the other of them prior to the execution hereof, and no variation of the conditions hereof, shall have any force or effect unless recorded in writing and executed by the parties hereof."

The provision itself admits of no other interpretation but what it states and Ziswa conceded as much. He also admitted that he tried hard to get Chadwick to sign an improved

lease agreement during the tenure of the lease without success and that the one signed on 9 January 2009 remained effectual throughout governing the relationship between the parties. He also conceded that he was paid a sum of about \$21 000-00 in 2012 being rent due to him although he was of the view that such payment was for arrears that had accrued during the 2010/11 cropping season forgetting of course that in his evidence in chief he had said that he had been paid all his dues for all the years except the 2011-12 season.

Ziswa also admitted under cross examination that Chadwick had brought his own equipment which he used at the farm and that he repaired a barn that had been burnt down among other improvements at the farm. When confronted about other improvements effected by Chadwick he became evasive only saying he could not remember some of them.

Valentine Ziswa did not make a good witness at all. His demeanour was extremely bad and he was given to wild exaggerations of his claims. He struck me as someone actuated by an improper motive and determined to maximise on what he can recover from the tenant at all costs thereby reducing the claim to ridiculous levels. He just tried too hard. A few examples should suffice.

He prevaricated a lot on the duration of the lease agreement and the level of his percentage share of the gross turnover. He is the same witness who testified that the lease agreement was for 5 years, he changed to say it was for 8 years and then for 10 years. At the end one is left without a determinable duration period. He produced an agreement providing for rentals of 6% of the gross turnover. Although admitting that the initial agreement remained as the governing covenant of the parties, he claimed 8% of the gross turnover but failed to justify the basis of it. He also produced a letters of demand wherein he fixed his share at 10% all the time suggesting that he had this fixation about extracting more and more from the defendants which he could not justify.

There is also the question of the tonnage of maize that he claims. It was not enough that the claim for delivery of the maize could not be found in the agreement, he premising it on the remote reference to production of maize at the farm (maize which was not even produced except during the first year), he claimed 12 tonnes per year, then 18 tonnes, then 18 tonnes succeeding in creating confusion and giving substance to the allegation that his claim were always changing every year.

The same acquisitive tendency is exhibited in his claim for the center pivot and generator. As to how these items could be classified as constituting permanent long term

development projects even when he himself stated earlier that one of them did not, remains a mystery of gigantic proportions.

His problems were also compounded by the poorly drafted lease agreement with endless uninitialled annotations as well as blank portions of important clauses. He was then reduced to basis claims on alleged verbal agreements not contained in the lease which he said constituted the basing of his claim, a lease with a provision excluding anything agreed but not reduced to writing and executed by the parties. It is therefore difficult to impute the existence or incorporation of such alleged provisions negotiated outside the written agreement.

While relying on a document signed with Chadwick, Ziswa insisted that the second defendant, a separate legal person from Chadwick, was also liable to him. This is because Chadwick had introduced himself as its director, had used its letterhead in correspondence, he knew him before as being a director, several payments were made by Landos and he personally made visits to Landos. None of these would make a company liable for the debts of its director contracting in his person capacity.

Regarding the claim for arrear rentals, his summons claims rent for 2011/12. In his evidence he admitted being paid for 2009, 2010 and 2011 and not being paid for 2012. When his attention was drawn to the payment of \$21 000-00 made in 2012 which he admitted, he found himself in trouble. He swiftly changed to say the payment related to arrears, which arrears when he had been paid for the years before 2012?

Ziswa claimed the tenant had free access to the farm to conduct activities and had the keys. When his attention was drawn to the court order which he consented to on 24 May 2012, it became clear that he was not telling the truth. He was forced to admit that he had closed the barns, brought in his own guards and generally resorted to self-help.

His claim for hailstorm insurance, apart from confirming fears that he would claim anything, is comical to say the least. Here is a person claiming a percentage (which is exaggerated) of a crop allegedly destroyed by hail and covered by insurance. He does not even begin to set out the particulars of the claim but still insists on an order being granted to him in respect of an arbitrary figure. The amount of tobacco destroyed is not known, so is the value of the insurance and the gross amount paid to the defendant is also not known.

I have already commented on the claim for seedlings which again confirms my conclusion on Ziswa's attitude which is inclined towards enrichment at all costs. He never received or claimed for seed production until at the end of the lease. It is a claim that is laughable by all accounts.

In respect of the repairs to a barn by the tenant. He initially agreed that indeed one burnt down barn was repaired. He then changed to say that he provided the tenant with material to repair the barn. The question is why he would do that. He initially agreed that Mr Coleman the new tenant had re-constructed the barns damaged by the defendants. Realising that this would impact negatively on his claim, he again changed to say he had to pay the new tenant for those repairs. A clear pattern emerges here, of an unreliable witness intent on claiming even that which he is not entitled to.

Assistant inspector N'andu was a police sergeant at Headlands police station when he received a docket of theft in contravention of section 113 of the Criminal (Law Codification and Reform) Act [*Chapter 9 : 23*] on 10 June 2012 following a report made by Ziswa on the same date accusing Chadwick of stealing property from the farm. The allegedly stolen property was listed on the police form 162, a list that was to change significantly as the dispute between the parties simmered. As the investigating officer, he conducted the investigations in the matter.

He testified that in the course of his investigations he had visited the farm and compiled a list of the property allegedly stolen from it by Chadwick as well as a list of that which he allegedly removed and returned later in a damaged state. He made reference to the various inventories in exhibit 1 stating that he had inquired from Ziswa and Chadwick's representative Richard Banda, when he visited the farm at the instance of the public prosecutor for Rusape, if both of them had an inventory prepared at the time of commencement of the lease and ascertained that they had.

N'andu said he stood in between them confirming if the equipment listed on Ziswa's list was the same as that on Chadwick's list. As he did so he was ticking on the list to confirm that. According to him the ticks on the inventory at p 20 of exhibit 1 and p 92 of exhibit represent what was agreed by both sides as having been present when Chadwick moved in and not what was confirmed as being in existence at the end. After that verification exercise they then went through the second stage, that of inspecting the equipment one by one and Ziswa had complained that some of the property had been damaged. He obtained comments on the state of each item from Ziswa and recorded such comments as Ziswa made them. He did not record anything from Richard Banda who remained quiet throughout. He also refused to sign in acknowledgment of Ziswa's comments relating to the state of the items.

He took the comments as they were for production in court as they were part of the docket. N'andu identified the list at p 18 of Exh 1 as containing the comments on the

condition of each item he recorded from Ziswa during the inspection exercise as Mrs Ziswa took photographs. Considering that the comments were in respect of the state of the items at termination of the lease and were elicited from Ziswa only, we still have the difficulty that we do not know the exact state of the items at commencement to be able to determine that Chadwick indeed damaged the equipment. To the extent that the comments came from a very interested party given to exaggerations, we have to treat them with caution.

N'andu did produce the police docket of the criminal investigation that came to naught after the public prosecutor stood his ground and declined to prosecute. The result of N'andu's industry was captured by the public prosecutor on 5 September 2012 as:

“Prosecution declined. I agree with the opinion of the Regional Prosecutor in the docket. This matter must (be) solved civilly”.

The opinion of the Regional Prosecutor referred to contains very significant findings.

At p1 – 2 of that opinion, he stated:

“When the docket was brought to my attention I gave instructions to the IO to make further investigations. For my instructions see entry 8 and the IO complied with 8 and 12 and referred the docket back and brought the parties. I interviewed the IO in detail and he indicated that it is very difficult to say the accused person stole the property listed. The complainant, I interviewed him, and his wife. The wife of the complainant is materially agreeing with the evidence of the IO whereas the complainant is not consistent in his evidence. Some of the property have been used up, some of the property is now old, some have been repaired some are (sic) now in the scrap yard”.

If only Mrs Ziswa had been called to testify. She would have been of much assistance to the court than her husband. I am not the only one who found Ziswa's evidence inconsistent and contradictory.

On the crime of theft itself the Regional Prosecutor stated at p 3 that:

“The IO confirms that the property is still there.”

Little wonder he drew the conclusion that:

“From the evidence at the state's disposal it is clear that the complainant is trying to use the criminal justice system to settle contractual breaches between him and the lessee (accused) I suggest that the complainant should approach the civil court for remedy. To prosecute such a matter in my view would amount to abuse of the criminal justice system. After all there is no way the state can prove all the elements of theft here”.

That sealed the fate of the criminal charges preferred by Ziswa against Chadwick forcing him to revert to this court. It is important to note that independent investigations by the police concluded that property belonging to the plaintiff was still firmly located at the

farm and not removed. From the very beginning of the investigation N'andu recorded that fact in entry 2 on 12 June 2012 that:

“This date I went out to attend the scene of crime at Ziswa farm. Observations made at the scene were that farm equipment were (sic) not taken away as whole but some crucial parts were being removed from each and every equipment e.g on Boom Sprayer only nozzles and pump were removed and the other part was left behind. Almost all farm equipment and electrical gadgets were left like that. It was pure ‘vandalism’. Taking it from the accused’s version that he as ‘taking’ out his properties, leaves a lot to be desired considering the way he was removing the parts from equipment”.

Canaan Nyamombe is a builder by profession who, notwithstanding his lofty profession, agreed to perform security duties for Ziswa in July 2012. His brief was to ensure that no tobacco was sold without Ziswa’s knowledge and that all his property was secure. Together with two other men hired for the same purpose they secured tobacco bales stocked in the sheds and barns to ensure that none of them would leave the farm without Ziswa’s knowledge. Although he says they were tasked with looking after property, he still insists that property was being removed and damaged in their presence during the time that the lease subsisted, a situation very difficult to reconcile.

The last witness to testify on behalf of the plaintiff was Fanuel Phange, the managing partner at Mazhande & Co Chartered Accountants of Harare, who holds a Bachelor of Accountancy degree obtained from the University of Zimbabwe in 2001. He attained his articles at Price Waterhouse in 2004 and is an affiliate of the Institute of Chartered Accountants. He has worked overseas and South Africa. He stated that he has vast experience in asset valuation although this was his first valuation of farming equipment.

He testified that asset valuation entails coming up with the dollar amount at which an asset should be carried at a given date. He stated that there are different ways of doing so. The gross replacement cost of an asset is in essence the cost of acquiring a new one while depreciation is the demortisation or writing down of an asset. It is the taking away of a percentage from the original value of an asset.

He was consulted by the plaintiffs to come up with the depreciated value of all the assets whose value is being claimed from the defendants. He was told that the assets were not new when they were given to Chadwick. He was given the list of items involved and quotations the plaintiffs had obtained to replace them from which he extracted the prices of the various items and depreciated them. After undertaking the exercise he generated exhibits 3 and 3a showing that the depreciated values of Tractors and related equipment being claimed

is \$64 170-00, Building improvements \$62 179-00, Building, irrigation, curing and water pumping equipment \$203 890-00 and Tools \$34 490-00 giving a grand total of \$364 729-00 being claimed by the plaintiffs.

In light of the fact that the bulk of the assets were used, he advised his client that in estimating their value it would be best to use the depreciation replacement cost as it would be unfair to expect someone to replace a used item with a new one. That is accepted in accounting and covered by International Standard No 16. He however did not depreciate the 4 flat tractor tyres because the client advised him that they were replacing new and unused tyres. There were also used items which could only be replaced with new ones which were not depreciated. He had given different items different life spans depending on their nature in order to determine their depreciated value.

Under cross examination Phange conceded that he had not bothered to inspect the terms he was asked to depreciate. In fact he did not visit the farm but undertook the exercise from the comfort of his office, yet generally it is necessary to inspect. He conceded it was his first time to depreciate farm equipment although the concept is the same in respect of all assets.

Although it had been necessary to examine the items in question, he had relied on Ziswa's 'say so' who is the same person who gave him the quotations he had obtained from various suppliers. He had not even interviewed the suppliers on their prices but accepted everything as given to him by Ziswa. He had relied on single quotes and not the usual 3 quotes. He relied on detailed descriptions of items given to him by Ziswa and also conducted an online research on items. He did not explain why he had not gone to inspect or examine the items.

He conceded that it was possible that Ziswa could have supplied him with manufactured information about the equipment and created dates of purchase and that exhibits 3 and are not factual but based on assumptions made by Ziswa and that given different quotations for the items he would come up with different values. It is Ziswa who gave him the background of when he had purchased each item and how much he had expected to use each one of them.

Phange may be an accomplished professional but I have serious difficulties with his evidence. He appears to have been an armchair expert if not a disinterested witness content with only flaunting his professional qualifications and expecting the court to accept his testimony hook line and sinker without justification. He relied entirely on information fed to

him by an unreliable witness, Ziswa, who has been shown to have a penchant for inconsistencies and wanting to exaggerate claims.

Phange accepted that ordinarily it would be necessary to examine items being subjected to evaluation. He did not bother to do so. From where I am standing, the entire valuation process, except perhaps for the formula gleaned from international standards, was fictitious and extremely unreliable.

At the end of the plaintiff's case, Ms *Magundani*, who had taken over from Mr *Rutanhira*, made an application for absolution from the instance. The application was based essentially on 2 grounds namely that the plaintiffs rely on 2 agreements signed by the parties which do not establish the plaintiffs' case at all and that the plaintiffs' case as pleaded had not been established as the evidence led was inconsistent, Ziswa having changed his case as he went along. He now relies on evidence pointing to lesser figures submitted by an otherwise unreliable accountant.

The test to be applied in an application for absolution was stated by GUBBAY CJ in *United Air Charterers v Jarman* 1994 (2) ZLR 341 (S) 343 B – C as:

“The test in deciding an application for absolution from the instance is well settled in this jurisdiction. A plaintiff will successfully withstand such an application if, at the close of his case, there is evidence upon which a court directing its mind reasonably to such evidence, could or might (not should or ought to) find for him. See *Supreme Service v Station (1969) (Pvt) Ltd v Fox & Goodridge (Pvt) Ltd* 1971 (1) RLR (A) at 5D – E, *Lourenco v Raja Dry Cleaners & Steam Laundry (Pvt) Ltd* 1984 (2) ZLR 151 (S) at 158 B – E.”

The plaintiff led evidence in this court that the parties entered into an agreement in terms of which the defendants moved onto their farm on certain terms. The evidence given is that, while in occupation the defendants did not pay certain rentals due. They also unlawfully removed some equipment and damaged some of it. We have been shown certain pictures of property allegedly damaged by the defendants during the tenure of the lease. They would therefore want to be paid damages. In addition we have taken evidence to the effect that the values of this equipment have been depreciated to give rise to claims much less than what is claimed in the summons. Ms *Magundani* submitted that as the claim was not formally amended, absolution must be granted. It is trite that pleadings, and in particular, a claim, may be amended by evidence and that the court will make a finding based on that evidence regarding the quantum of damages. The same applies to the quantum of rental as being either 6 percent, 8 percent or 10 percent of the gross turnover.

The point was made by BEADLE CJ in *Supreme Service Station (1969) (Pvt) Lt v Fox & Goodridge (Pvt) Ltd* 1971 (1) RLR (A) at 5H – I that:

“...rules of procedure are made to ensure that justice is done between the parties, and, so far as possible, courts should not allow rules of procedure to be used to cause an injustice. If the defence is something peculiarly within the knowledge of a defendant, and the plaintiff has made out some case to answer, the plaintiff should not lightly be deprived of his remedy without first hearing what defendant has to say. A defendant who might be afraid to go into the witness box should not be permitted to shelter behind the procedure of absolution from the instance.”

See also *Munhuwa v Mhukahuru Bus Services* 1994 (2) ZLR 382 (H) 387 B – C.

In my view what was said in support of the application for absolution may well succeed in discrediting the case for the plaintiff. It however, cannot succeed in grounding an application for absolution. For these reasons I dismissed the application.

The first defendant, Graeme Shaun Chadwick gave evidence. So did Richard Banda Chadwick has been growing tobacco for 20 years, has sat on the Zimbabwe Tobacco Association board for six years, two years of which he was its chairperson. At the material time he was growing tobacco on four farms namely Landos, Ziswa, Kelvin and Gijima farms while residing at Landos Farm in Headlands. He is an accomplished farmer indeed with loads of experience in that field.

He agreed that he took occupation of the farm in terms of a lease agreement concluded with Ziswa and that a second JVA was also signed. He confirmed that the lease agreement signed on 9 January 2009 together with its annotations contains the terms agreed upon by the parties and governed their relationship. In particular he was liable to pay 6 percent of the gross turnover as rent and although he later offered to increase that to 8 percent following endless pressure from Ziswa who, at the time, was claiming rent of \$120 000-00 per year, that offer was not accepted. Therefore no contract came into effect on it leaving the parties firmly bound by the original agreement.

For the 2011–12 cropping year, he had paid \$21 000-00 to Ziswa as rent although he realised about 135 000kgs of tobacco which were sold at \$3,67 per kg giving a gross turnover whose six percent is therefore \$29 808-00 of which only \$21 000-000 was paid to Ziswa leaving a balance of \$8 808-00. He said that was eaten away by payments he made to Makoni Rural District Council and Zimra which he was not obliged to pay. He did not elaborate and did not even give specific figures of those payments, leaving us with a balance for the 2011-12 year of \$7 315-20 still due if we accept his figures for that year.

Chadwick confirmed that at the time of commencement of the lease an inventory had been prepared; p 92 of Exh 4, recording all the equipment found at the farm. The inventory did not contain a description of the state of the equipment at the time, most of which was badly worn out it would not have made sense to obtain its value, given that it was almost valueless. The inventory did not mean that he was taking over the equipment but was a mere record of what was on the farm. In fact, Ziswa barred him and his employees from touching some of his equipment like tractors limiting them to only a few. As Ziswa remained residing at the farm throughout the tenure of the lease, he had access to his equipment, used some of it like the tractor, and would have known what was happening to it as opposed to him who lived elsewhere.

Chadwick stated that during the lease, he used mostly his own equipment. Of Ziswa's equipment he only used a trailer (which he had to repair and fit with his own wheels as it had none), a water cart, irrigation equipment like pipes which again he had to repair and barns. The barns were in an atrocious state when he took over with one of them burnt to the ground. The sheds were dark and dingy and he had to effect a lot of repairs including electrifying the barns. He denied damaging the barns as, in his view, they could not have been in any worse condition when he took over.

By the time that he left, although he had repaired the barns, they had deteriorated again over the four years and one of them was supported by only three poles as opposed to the eight poles shown on one of the pictures in Exh 2. When he came, the reservoir had not been used for a very long time with no water pump or any form of water generation. He had to repair it and put it in a usable condition before use.

Chadwick stated that before he came in Ziswa had another tenant at the farm who left abruptly after contentious issues arose between them. He himself also rented a farm next to Ziswa's and remained his neighbour even after termination, among other farms he operated. He would use some of his equipment from those other farms at Ziswa's farm and would also move some equipment for use at these other farms depending on activities and need throughout the year and vice versa. There was never an intention to permanently remove any equipment.

He outrightly denied vandalising any of Ziswa's equipment as he had no reason to especially as he was to remain Ziswa's neighbour after termination. Most of the equipment was in a terrible state, if it had not been he would have used it.

Chadwick denied being liable to pay rates to the local authority asserting that the written lease agreement governing their relationship did not provide for that. In any event he would have no reason to pay rates for Ziswa's farm. There was a time when he paid the rates on Ziswa's behalf but this was to bail him out after the RDC had attached his Isuzu motor vehicle for sale in execution after Ziswa had failed to pay rates. Even then it was agreed he would offset that from rent at the end of the year. This explains the contents of his letter to Ziswa, p 31 of Exh 1.

In respect of the hailstorm claim, Chadwick agreed that they had a hail strike during that year but stated that it was so minor that the insurer advised him against making a claim as what would have been paid was so insignificant it was not worth the trouble. He therefore did not make a claim and did not receive anything meaning that there was unfortunately nothing for Ziswa either.

He stated that Ziswa was not entitled to claim the Centre Pivot and generator because they are simply movable assets which he was entitled to move with upon termination. In any event, Ziswa had confirmed in a letter from his lawyers that he did not want the Centre Pivot as it was not a long term development.

In respect of fences and gates, he denied removing or damaging any pointing out that although he did not regularly travel the perimeter of the farm he was aware that the fences were in a bad state when he moved in. Most of the fence had been stolen and what was left of it was on the ground. He had taken the trouble to repair the fences when he briefly moved his cattle onto the farm to an extent that Ziswa had thanked him at the end for a job well done after inspecting the fence.

Chadwick readily admitted failing to clear tobacco stalks before he left although he insisted that seed beds were cleared. He said this was caused by the acrimonious manner in which he was kicked out of the farm which meant that there was no time to do so. The situation at the farm had been rendered untenable and dangerous after Ziswa's son had pointed a firearm at his employees forcing them to beat a hasty retreat without clearing the stalks. He did send a tractor to the farm to perform that exercise much later but it was again denied entry.

We are therefore left with the plaintiff's claim of \$780-00 for hired labour to remove the stalks and the EMA penalty, which although not adding up, the defendant has to refund in some way.

On the pictures showing openings on the barn walls with no cables and dug out underground cables, he stated that every year he and his workers would put the cables there when required for use. They would remove them after use for safe storage to save them from being stolen. He however does not know if they remained in storage at termination. He rubbished the claim for maize saying it is not provided for in the agreement which only required him to grow 40ha of maize. Instead of doing so, he had increased tobacco production from 30ha to 40ha which meant that Ziswa would get more income from the proceeds of the tobacco. However, out of the goodness of his heart and at times after duress, he had given Ziswa maize the first and second years at the farm. He had no obligation to do so but understood that as a traditional man he needed it for his home.

On seedlings, Chadwick said that he produced them on both Ziswa farm and Kelvin farm and it is advisable to rotate seedlings between farms. He had used seedlings from Ziswa farm at Kelvin farm and vice versa. As is customary he would give away to neighbours seedlings that were surplus to requirement for free. He never sold any seedlings. In all his 20 years as a tobacco farmer he has never heard of a claim for seedlings. It's simply untenable because it amounts to a double claim. One would claim seedlings and then crop of it. The agreement provided for payment of rent from the sale of the final product not seedlings.

Under cross examination, Chadwick admitted that there was an understanding for maize which he said was merely an expression of gratitude not enforceable by the plaintiffs.

He admitted that he was not involved in the verification of assets exercise carried out at termination preferring to leave that to his employee who was to testify after him. He however asserted that all the property that had been removed like trailer, water carts and water pipes for use on another farms had been returned.

Chadwick again readily admitted removing the electricity line stating that he was happy to replace that line. He had obtained a quotation from ZESA for the line in the sum of \$36 000-00 (which he did not produce) as opposed to the plaintiffs' claim of \$84 000-00.

Chadwick was clearly a good and reliable witness. His demeanour was always good. He readily made concessions where such was called for and admitted liability where clearly he was liable. He struck me as one who exudes confidence with a lot of knowledge in tobacco farming and with a willingness to compensate fairly for what he benefited. Where his evidence is to be contrasted with that of Ziswa, I would prefer his.

Chadwick's biggest undoing is that he appears to have run his activities at the farm by remote control and was clearly not hands on. He left most of the activities to his employees including the very important task of verifying equipment at termination.

Richard Banda was clearly unreliable. This is because he saw it fit to deny even that which his employer had admitted. While Chadwick admitted removing electricity cables from the barns and underground pipes, Banda denied this insisting that all of them were left intact even when there are pictures showing gapping holes.

While Chadwick was quick to admit that at the time of termination there was a barn being supported by three or four poles to prevent the wall from falling, Banda was surprised to see poles in the picture. As far as he was concerned, when they left the farm, there were no poles at all. He however, agreed with Chadwick that at commencement of the lease most of the equipment was not usable and that the parties had overlooked to record the state of all the equipment and that most of it was never used except for a few like water cart and irrigation pipes.

I have stated that the first plaintiff maintains that their claim is based on the 2 written agreements complementing each other which contain a non-variation clause. Writing about the subject of restriction and non-variation clauses, the learned author K.H Christie, in his book *Business Law in Zimbabwe*, ed 2, *Juta & Co Ltd* at p 107 said:

“The parties may restrict their own power to vary or discharge their contract by subsequent, and some such restriction is very desirable in any contract between the parties, such as companies, that may be represented by any one of a number of authorised agents, in order to reduce the scope for argument about whether a formal written contract has been subsequently varied or discharged. The restriction may be in the form of a restriction clause providing that no subsequent agreement between the parties on a specified topic (e.g. subletting, cancellation) shall be valid unless it is in writing, or it may be in the form of a non-variation clause providing that no variation of any of the terms of the contract (including the restriction clause, if any, and the non-variation clause itself shall be valid unless it is in writing.

After some years of controversy the effect of such clauses was settled by the South African Appellate Division in 1964 (*SA Centrale Ko-op Graanmaats Chappy Bpk v Shifren* 1964 (4) SA 760 (A)). In the result effect will be given to a restriction clause, but it may be cancelled or varied by express agreement, formal or informal, unless entrenched by a non-variation clause which may be cancelled or varied only by the formal method it specifies.”

The *SA Centrale Ko-op* judgment (*supra*) is in Afrikaans but its *ratio* that a non-variation clause could not be altered verbally was adopted by this court in *Fillanion v Esat & Anor* HB 106/03.

In my view the moment the plaintiffs decided to rely on the written agreements of the parties, they brought themselves under the provisions of those agreements including the non-variation clauses. They could not, in the same breath, seek to import further intricate provisions, imagined or real not contained in the written agreement which were purportedly conclude in breach of the formal method of doing so contained in the non-variation clause. They simply cannot have it both ways or have their cake and eat it at the same time. I therefore agree with Mr *Rutanhira* for the defendants that any claim which is not provided for or is not in terms of the written agreement should of necessity fail.

I have already stated that there is no basis for holding a company liable for the obligations of its director in terms of a written agreement in which the company is not a party. It is certainly not enough to say that the company is liable because it paid some of its director's debts, or that it is the one which carried out farming activities or that its letter head was used in correspondence.

Public policy demands that men of full age and competent understanding should have the liberty to contract and when they have so contracted freely and voluntarily their contracts should be sacred and enforced by courts of law; *Printing Registering Co v Sampson* 19 EQ 462 at 465. That is the whole essence of the concept of sanctity of contract.

When a party has so contracted with one party he cannot be allowed to drag others with whom he has no contract into the contract merely because they associate themselves with a party to it. There was simply no privity of contract between the plaintiffs and the second defendant. It is a registered company with limited liability. It is a celebrated principle of our company law that upon registration a company acquires a fictitious legal personality of its own and exists separate from its members. Except in very limited circumstances the liability of its members and directors cannot be visited upon it and *vice versa*. Such limited circumstances have not been shown to exist in the present matter. Accordingly, I will not hesitate to dismiss all claims made against the second defendant.

Coming back to the claims against the first defendant, the plaintiffs on their own abandoned claim (m) in the prayer namely, the sum of \$45 000-00 for loss of income and damages allegedly suffered as a result of the termination for the agreement. Of the remaining claims, claim (b) for a refund of \$1 980-00 paid to Makoni Rural District Council, claim (c) for \$5 500-00 hailstorm insurance, claim (k) being \$15 000-00 value of 50 metric tonnes of maize, and claim (l) being \$4 240-00 value of tobacco seedlings, are based on alleged

agreements falling outside of the letter of the written covenant of the parties and are therefore hit by the non-variation clause.

In addition, I have already expressed my views about the evidence led to try and prove those claims. It is woefully inadequate, unreliable and at times contrived and clearly cannot on a balance of probabilities sustain the claims. They will have to be dismissed.

The plaintiffs have made a claim for rent arrears in the sum of \$64 160-00 for the 2011/12 farming season. On the evidence that has been led that claim has not been proved either, except for what is apparently admitted by the first defendant, whose evidence I have embraced as truthful.

Mr *Rutanhira* has also conceded that as the first defendant produced 135 000kgs of tobacco during that season, taking into account the \$21 000-00 paid for that year, a sum of \$8 808-00 remains outstanding. It should be paid.

Claim (d) is for the sum of \$67 506-00 as the replacement value of the centre pivot and generator. While the written agreement provided for long term development to be undertaken by the first defendant, I have pointed out that these items did not fall under long term development. The claim cannot succeed.

The plaintiffs have also proved, on a balance of probabilities claim (i) the \$780-00 expended on clearing tobacco stalks which the first defendant should have cleared before vacating the farm and ancillary expenditure related thereto. My reservations about the failure to balance the figures do not tip the scales against the plaintiffs. That claim should succeed.

The claim for \$187 707-00 as value of the property allegedly removed from the farm and not returned (claim (e)), cannot succeed either. This is because the evidence that any property was removed and not returned is either not there or unreliable. The same goes for claim (g) \$7 600-00 for removed and/or damaged fences and gates. I have cited the evidence of the investigating officer which is contained in the crime docket (Exh 5) pointing to the fact that even at a criminal level, there was nothing suggesting that any property was removed and not returned. That claim cannot succeed.

That leaves claims (f), \$15 905-00 being value of damaged property, claim (h), \$15 008-00 to repair barns, and claim (j), \$26 313-00 for allegedly vandalised items. In respect of those claims we have an admission made by the first defendant that he did remove the powerline from dam 1 to the other. He offered to replace it insisting that it is valued at \$36 000-00 in terms of a quotation which he obtained from ZESA. He did not produce the quotation in order to effectively refute the plaintiff's claim for \$84 000-00 to replace it. If the first

defendant could have replaced it at less than that amount, one wonders what was stopping him from doing so before the matter came to court. What is clear is that the first defendant is liable in that regard and he has failed in disproving the reduced value of \$84 000-00 when there is a quotation for \$87 016-00. The claim must therefore succeed.

Regarding the rest of the items allegedly damaged I am not satisfied that the plaintiffs have proved the claims. In fact vandalism has not been established at all. The police officer suggested in the crime docket that parts were being removed on certain items. These were not specified and no value was attached. The first plaintiff's evidence was unreliable while the first defendant denied the allegations. More importantly there is no evidence whatsoever of the condition and state of the equipment at the time that the tenant moved leaving me with absolutely nothing to gauge the extent of damage, if any, the value that could be attached to it and if the plaintiffs suffered any loss given the evidence of the first defendant which I have accepted that the bulk of the equipment was in atrocious state and of little value.

It had to be because Ziswa had been renting his farm prior to that and not engaging in any farming. As to how long that property had been lying there we are not told. If indeed it was in good condition an expression which Ziswa was careful not to use preferring the non-committal word; "usable", surely Ziswa would have been farming instead of giving away the farm to others as he continues to do. It is one thing to list items located at the farm. It is quite another for value to be attached to those items. In the end I am left with nothing with which I can find in favour of the plaintiffs.

Mr *Uriri* for the plaintiff conceded that the plaintiffs have not made a case for the relief sought in 3 of the plaintiff's claims namely claim (c) for \$5 500-00 hailstorm insurance, claim (b) the refund of rates and levies paid to Makoni Rural District Council in the sum of \$1 980-00 and claim (i) \$780-00 for the removal of stalks. I have stated that claims (b) and (c) must fail along with others while I am prepared to accept the evidence led on the removal of stalks on a balance of probability.

In my view absolution can only be granted in respect of claim (f) relating to property that was damaged or had certain parts removed as well as claim (h) for the repairs of tobacco barns. This is because I have accepted the evidence of the investigating officer as contained in the crime docket that some parts were removed. The evidence I have accepted is insufficient to prove the plaintiff's claim on a balance of probabilities simply because, it does not identify the property that had parts removed, the value of those parts has not been

proved and the condition of the property at the time of hand over is unknown. If the plaintiff were to patch up on that maybe he may live to fight another day.

The plaintiff s have only succeeded to the extent of a claim of \$92 808-00 out of a total claim of \$456 699-00 which translates to a 20 per cent success. The costs to be awarded to them must therefore reflect that ratio.

In the result it is ordered that:

1. The plaintiff's claims against the second defendant are hereby dismissed with costs.
2. The plaintiffs' claim (a) against the first defendant succeeds only in the sum of \$8 808-00 which the first defendant is directed to pay to the plaintiffs.
3. (a) The plaintiffs' claim (e) partially succeeds to the extent of the 4km LTC electric cable while the rest is hereby dismissed.
(b) the first defendant shall pay to the plaintiffs the sum of \$84 000-00 being the replacement value of the 4km LTC electric cable removed from the plaintiffs' farm.
4. The first defendant shall pay the plaintiffs the sum of \$780-00 being value of labour hired to clear tobacco stalks and related expenses.
5. The plaintiffs' claims (b), (c), (d), (f), (g), (j) and (l) are hereby dismissed.
6. Absolution from the instance is granted in respect of plaintiff's claims (h) and (k)
7. The plaintiffs shall pay 20 percent of the first defendant's costs of suit.

Gasa Nyamadzawo & Associates, plaintiffs' legal practitioners
Scanlen & Holderness, defendants' legal practitioners