CHEMIST SIZIBA
and
HAWKHOPE INVESTMENTS (PRIVATE) LIMITED
versus
RIJIK PEACY DANCKWERTS
and
CRAIG JOHN DANCKWERTS
and
DANBRO HOLDINGS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
GOWORA J
HARARE, 23 July 2008

E Matinenga, for the plaintiffs
E W W Morris, for the defendants

GOWORA J: The first plaintiff is a well known businessman with various interests in the business sector. The second plaintiff is duly registered company with limited liability. The third defendant is a company duly registered in accordance with the laws of this country. The first and second defendants are shareholders in the third defendant. The plaintiffs have issued summons against the defendants for a *declaratur* to the effect that the cancellations by the defendants of agreements of sale embodied in Annexures ‘F’ and ‘G’ be declared invalid.

The background to this dispute is as follows. The third defendant was the registered owner of immovable property known as Arlington Estate which measured some 626 hectares. This piece of land was then subdivided into three lots, Lot 4, Lot 5 and the Remainder. From the papers before me it is clear that the intention in subdividing the property was to undertake separate and different developments on the subdivided units. It is common cause that sometime in 1995 negotiations commenced between the first defendant and Hyatt International for the construction and development of a hotel and casino on one of the properties. It is also on the papers before me, which fact has not been disputed by the plaintiffs, that, on its own Hyatt had entered into negotiations with the government for the allocation to it of a hotel and casino licence. This endeavour did not succeed and it is at this stage that one Cephas Mandlenkosi Msipa entered the picture.

The first defendant was introduced to the said Msipa by his wife's cousin and requested the assistance of Msipa in obtaining a permit to operate a casino. Msipa was aware that the first plaintiff had contacts within government which would enable them to obtain the necessary permit and he therefore referred the first defendant to the first plaintiff (Siziba). This latter was obviously sure of his clout and he gave the necessary assurances. As a result the three decided to form a company in which they were shareholders for the facilitation and execution of their agreement. As a result a company called Toptol Investments Private Limited (Toptol) in which the first defendant held 34% shares and the other two 33% each came into being. Siziba was chairman of the board of directors. An enabling document was then issued to the company to operate a temporary casino at Lot 4 of Arlington. Armed with this, the entrepreneurs then set about the task of finding investors for the development of the casino and hotel complex to comply with the enabling document issued to Toptol.

There were agreements or arrangements entered into by the parties which are now the subject of the current dispute. Pursuant to the enabling document furnished to Toptol by the Minister of Home Affairs a Memorandum of Understanding (Annexure 'C') was drawn up. Subsequently two other agreements were drawn up and executed. The dispute is concerned with the nature of the agreements concluded by the various parties and whether or not there was compliance on the part of the parties to those agreements.

At the pre-trial conference the defendants moved for an amendment to their plea to incorporate a special plea in abatement. The plaintiffs were in turn granted leave to file their response to the special plea. A response was filed. At the trial however the special plea was not moved and it therefore falls away. This also puts paid to the issue that was based on the special plea.

The evidence adduced by the parties in relation to the agreements is as follows. According to Siziba when Annexure 'C' was formulated it was contemplated that some other person would come into the picture as an investor because at that time it had become obvious that Hyatt were no longer in the picture. In order to comply with the enabling document, the parties agreed that they should all look for alternate investors. An employee of Siziba then identified Ruby Castle as a possible investor. A meeting was then held with representatives of Ruby Castle and an agreement was then signed with them. The agreement with Ruby Castle was not concerned with the purchase of the land but with the management of the casino and

resort. Ultimately it transpired that they declined to invest in the project. It was at this stage according to Siziba that the first defendant approached him and asked if he would not be interested in purchasing the land in order to sell the project. At the time as the witness stated Ruby Castle's representatives were still around and the first defendant had to remove the land from an encumbrance with Zimbabwe Banking Corporation. He indicated that the first defendant had offered him the land in question for the price of $11 million but he had countered that the land was not worth the amount being placed on it by the first defendant. However the first defendant needed $11 million because the two lots, 4 and 5 were mortgaged to Zimbank and there was a threat from the bank to repossess the whole of Arlington Estate. It was therefore agreed that they would maintain the price of $11 million but this would now include lot 5. It was therefore as a result of this agreement that the agreements 'F' and 'G' were then concluded.

The version tendered by the first defendant is of course different to what Siziba stated. His evidence was to the effect that in 1996 a Mr Pritzker from Hyatt International had visited Zimbabwe due to an interest on the part of the hotel chain to develop a resort through Zimbabwe Investment Centre. The entity that would operate the casino and resort would be Regency International. Government however was not keen to give casino licences in Harare and in keeping with this policy indicated that the licence would be given to a resident. The defendant, Msipa and Siziba then came up with Toptol which was given an enabling document by the government. Hyatt however did not want to purchase the land. Siziba wanted to develop the resort with his own partners and when the defendant was called to a meeting with Fieldstone and Siziba it became very clear that there were other people interested in taking over the enabling document and develop the resort and casino. The defendant also felt that Fieldstone would assist Siziba to develop the resort and he felt he could no longer be involved in the project in the absence of Hyatt and he decided that he would part with his ownership of the land. Fieldstone was then tasked to look for a strategic partner. He relayed his views to Hyatt and Regency. The former felt it could remain in the management contract but Regency considered that it had lost ground. In November of the same year he received a phone call and went and met with Msipa. He learnt that Siziba had found an investor. It was hinted to him that Siziba would buy the land and he was given to understand that the investor was from Israel. Initially Siziba had only wanted to purchase lot 4 but on the day they signed the Memorandum

of Understanding he expressed an interest in Lot 5 as well. The evidence of the witness was to the effect that the memorandum was loosely based on the discussions he had had with Hyatt.

When it became apparent that Lot 5 had to be part of the deal they insisted on a commitment fee which was payable in US dollars and was non-refundable. It did not form part of the purchase price. According to the witness the memorandum encompassed the whole deal but the execution thereof was divided into two. The first related to payments to free the land from its encumbrance, which entailed a payment of $11 million dollars. This amount represented 25% of the purchase price which at the time in Zimbabwe dollars was $44 million when the US$ 2 million was converted to the local currency. The balance representing 75%, was to be paid as foreign currency in US dollars. This amount would be paid when the land became available for transfer to Hawkhope Investments Private Limited (Hawkhope) which is a company that had been set up to own the two pieces of land for the purposes of the project. He said that it had been explained to Siziba and Msipa that the company's shareholding certificate and statutory documents would remain in the possession of the defendant and his brother until such time as they would have been paid in hard currency which was US $1.5 million. In addition Toptol had agreed to buy his shares for US $500 000.00. The purchase of these shares was dependant upon the management agreement with Hyatt as provided in clause 3 of the MOU. If however Hyatt was not involved there would be no payment for his Toptol shares.

In order to give effect to Clause 2 of the MOU they tasked their lawyers to draw up a document to enable transfer of the immovable properties and thus Annexures 'F' and 'G' came into being. In order to have the two properties released from the mortgage the first defendant then was paid $9 million by Siziba. The purchase price reflected on the agreements was the sum of $5.5 million a piece and the payment of $9 million on the twp properties then left a balance of $1 million in respect of each of the properties. The two agreements were signed by Siziba on behalf of Hawkhope, whilst the first defendant represented the third defendant. The witness said that he had never signed transfer documents for the shares in respect of Hawkhope which is still owned by the third defendant. Further he and his brother had not resigned from their positions as directors of Hawkhope. They had also not signed a resolution for the action to be mounted against the third defendant. It is only convenient in my view, that

I therefore dispose of the question of the citation of Hawkhope before delving into the merits of the dispute.

In submissions the defendants prayed that I find that Siziba did not have authority to represent Hawkhope and thus institute proceedings in its name. Siziba had during cross-examination been challenged to provide a resolution authorizing him to bring a claim on behalf of Hawkhope to this court. Such resolution was not produced. Although neither counsel referred me to any authority it is trite that since a company or an artificial person can only act through agents, where legal proceedings are instituted in its name there must be some proof placed before the court that the litigation has been authorized by the company through a company resolution to that effect. See *Mall (Cape) (Pty) Ltd v Merino Ko-opersie Bpk 1957 (2) SA 347; Griffiths & Inglis (Pty) Ltd v Southern Cape Blasters (Pty) 1972 (4) SA 249 (C).* I find therefore that Siziba did not have authority to represent Hawkhope and to institute proceedings in its name. The company was therefore improperly cited and is not before me. Siziba therefore remains the only plaintiff.

There are quite a number of instances where the evidence adduced on behalf of the parties differs. For instance there was much argument about whether or not Hyatt International was still interested in the project or not. It does not seem as if that question is pertinent for purposes of resolution of the dispute between the parties, as the question as to whether or not the parties performed in accordance with the terms of their agreement, whatever its nature, did not depend on the inclusion of Hyatt in the picture. It seems to me that Hyatt is a red herring which I should avoid by all means. The parties were also quite content to conclude agreements with each other and other players without a stipulation on the participation of Hyatt in their project. In my view the contradictions are resolved by the documents produced as they apparently, more than the oral evidence adduced in court, reflect the reality of the transactions that went on in relation in to the understanding between the parties.

The first issue for determination was whether Annexure ‘C’ to the declaration was superseded by or formed part, of and was to be read with, Annexures ‘F’ and ‘G’. An unsigned copy of Annexure ‘C’ is attached to the summons. The document was not signed nor was it dated but it would seem to have been executed in November 1998. The two subsequent agreements were signed some time in January 1999. The actual date was not indicated. The parties to the dispute have given conflicting evidence about the import of the three agreements.

Whilst the plaintiff's evidence was to the effect that the later two agreements superseded Annexure "C" the defendants view is to the contrary. I need to comment at the outset that the very lengthy written submissions I received were in most instances not premised on the agreed issues as determined at the pre-trial conference, and thus my task is made much harder as I have to incorporate the submissions into the issues.

A question posed by the plaintiffs is whether in fact an MOU is an agreement. The contention made on behalf of the plaintiff is that the MOU is not an agreement and is just an understanding between the parties, and that at most it is a gentleman's agreement which sets out the basis of an "understanding" between parties. The legal practitioners for the plaintiffs have filed, in addition to submissions filed by their counsel, their own written submission. In discussing the issue of the MOU they have referred me to an extract from Words and Phrases by John B Saunders. The passage referred to deals with the meaning to be ascribed to the word 'understanding'. An English case is referred to in the passage and my perusal of the passage and the English authority quoted therein are distinguishable to the present. In that case the parties did not have a written document prescribing the terms of their arrangement. It would therefore be a futile exercise for me to embark on a discourse on what the court in the case cited to me said and how it defined the word.

It is important to examine the evidence of the plaintiff vis-a-vis the averments in the declaration. In paragraphs 16, 17 and 18 the plaintiff has pleaded the following:

16. In anticipation of an agreement being entered into between first plaintiff, the defendants, Toptol and Msipa on one hand and Ruby Castle on the other, a memorandum of understanding was drawn up in November 1998. A copy of the memorandum of understanding is Annexure 'C' hereto.

17. The commitment fee of $1 295 000.00, the then equivalent of US $ 35 000.00 was paid to the defendants on behalf of Ruby Castle by first plaintiff.

18 The expectation of agreement with Ruby Castle did not materialise. Consequently, Annexure 'C' fell away. The offer to purchase Lot 4 and 5 was extended to the first plaintiff on the same terms and conditions as had been extended to Ruby Castle and set out in Annexure .C. above.

I accept the submission by the defendants that the manner of pleading adopted in paragraph 18 of the declaration is indicative of the acceptance by the plaintiff that the MOU was an agreement in terms of Lots 4 and 5 were to be purchased. From my reading of paragraph 18 an impression is created that Ruby Castle was bound in terms of the MOU to purchase Lots 4 and 5 for the sum of US $ 2 million. There was no other document in which an offer was made for the sale of Lots 4 and 5 and clearly the offer was contained in Annexure 'C'. Ruby Castle signed only one other document and that was not concerned with the purchase of Lots 4 and 5. It is pertinent to note that in fact the conduct of the parties was in tandem with the requirements set in the MOU. To start with agreements for the transfer of Lots 4 and 5 were concluded. A new company Hawkhope was set up to be the beneficial holder of the shares in the companies owning the said properties. Payment for the release of the immovable property from an encumbrance with Zimbank was arranged and the encumbrance was removed paving the way for the transfer of the properties.

It is, in fact, in these proceedings difficult to comprehend the attitude of the plaintiff to the MOU. Notwithstanding what he pleaded and the evidence he gave, the fact remains that the MOU was not signed by Ruby Castle but by him. At the time the MOU was negotiated Ruby Castle had not yet entered the picture as it was envisaged that Hyatt would still play a role. It was his evidence that he had signed the memorandum on behalf of a 'buyer' as yet at that stage unidentified. A commitment fee, which was non refundable was required to be paid upon signature of the MOU. The plaintiff not only signed as 'buyer', but he also paid the commitment fee. He obviously felt bound to perform the 'buyer's' obligations as spelt out in the MOU and to show his commitment he paid the amount required.

In so far as this matter is concerned the plaintiff cannot deny that he signed a contract with the third defendant no matter what the parties chose to call it. Based on the definition of what an agreement is I now embark on the task of examining whether the MOU was an agreement.

I am not, in this case, tasked with defining what a memorandum of agreement is. What I am required to do is to examine the MOU and decide whether or not it constitutes an agreement entered into by the parties herein. I have not been referred by counsel for either side to any authority in which the nature of an agreement was examined. A contract is an agreement between two or more persons which gives rise to personal rights and corresponding obligations; in other words, it is an agreement which is legally binding on the parties. Per B

Van Heerden, D P Visser and G G Van der Merwe in their book Willies Principles of South African Law p 409 8ed. In Pattison and Another v Fell and Another[1] JAMES J. in considering what an agreement was had the following to say:

> "Now where parties have entered into an agreement intending to bind themselves by their words the Court will enforce the agreement if the contract contains sufficient information to enable the object to be accurately ascertained. This is often expressed by the maxim id certum est quod certum redid potest. See *Wessels Contract, 2nd ed, para 425.* In England the rule appears to be the same. Thus in *Scammell v Ouston 1941 (1) A.E.R. 14 at p. 26* LORD RUSSELL OF KILLOWEN is reported to have said the following:
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> "**There are many cases in the books of what are called illusory contracts-that is, where the parties may have thought they were making a contract but failed to arrive at a definite bargain. It is a necessary requirement that an agreement, in order to be binding, must be sufficiently definite to enable the Court to give it a practical meaning. Its terms must be so definite, or capable of being made definite without further agreement of the parties, that the promises and performances to be rendered by each party are reasonably certain."**
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> In my judgment when one considers the admitted facts in the present case the main terms which the parties intended to incorporate in the bond may be ascertained with reasonable certainty"

I respectfully associate myself with the remarks of their lordships in the two authorities quoted above. An agreement, whether concluded orally or in writing, is a relationship between two or more parties giving rise to the creation of personal rights on the one side and obligations on the other. Annexure 'C' gives to the buyer the right to purchase Lots 4 and 5 and to take transfer upon the performance by the buyer of certain specified obligations. The seller is entitled to receive payment upon the due performance by it of tasks involving the clearance from encumbrance of the immovable property with Zimbank. The seller was also obliged to instruct its legal practitioners to prepare documents to facilitate the transfers of the property. In my view the MOU has all the requirements that go with an agreement. The terms are definite and create obligations and promises which are reasonably certain. I hold the firm view that the parties to the same entered into an agreement the terms of which are capable of performance.

[1] 1963 (3) S. A 277 at 279A-C

I turn now to the discussion as whether or not the three documents, Annexures 'C' 'F' and 'G' constitute one single agreement. The first clause of the document Annexure 'C' is to the effect that Arlington Estate was at the time owned by Danbro Holdings (Pvt) Ltd. It then goes on to describe the extent of the three subdivisions. Clause 3 of the same speaks to the grant of approvals by the government for the construction of a hotel and casino on Lot 4. Clause 4 discusses the grant of a permit for the operation of an export processing zone on Lot 5. For the determination of this issue, it is Cause 6 which is pertinent. The clause is in the following terms:

> "The buyer has expressed an interest in purchasing Lot 4 and 5 of Arlington for a sum of US $ 2 million as well as 20% of the total issued shares of Toptol Investments (Pvt) Ltd for a sum of US $ 500 000.00. Clause 7 deals with the manner of payment for the land."

In sub-clause 1 thereof it is recorded that Danbro would conclude an agreement with Zimbank for purposes of release of Lot 4 and 5, presumably from the encumbrance that had been placed on the land. Sub-clause 2 in turn provides for the drawing up of a document detailing the agreement of sale in respect of the property for purposes of transfer. Finally Clause 9 provides that the buyers would have the right to commence developments within Lt 5 as soon as the land title deeds would have been transferred. All permits, licences and other documentation including the feasibility study would become the property of the buyers.

The buyer or buyers as the context may reveal is not identified. In his evidence Siziba went on at length to explain that he was not the buyer even though he had signed as buyer. He even went as far as paying the commitment fee of US $ 35 000.00 required to paid in terms of Clause 10 of the MOU. What cannot be disputed however is that the price for the properties had been set in the MOU. The two agreements 'F' and 'G' however reflect the price in Zimbabwe dollars which price is drastically lower than the amount quoted in the MOU. No explanation has been forthcoming from the parties as to why the documents to enable transfer of the property to Hawkhope quoted a price for the two properties which was considerably lower than the price that was reflected in the MOU. I refuse to speculate as to the cause. What is obvious however is that the buyer in the MOU was purchasing the two properties described therein. A commitment fee was paid in terms of the memorandum signed between the parties. Siziba sought details of the first defendant's foreign bank accounts to make payments into the same. In fax transmission to Siziba dated 7 September 1999 Danckwerts refers to the

outstanding balance of $ 2 million due on Annexures ‘F’ and ‘G’. In the penultimate paragraph he states:

> “If it is not your intention to complete the terms of the original MOU then please would you perhaps consider a plan to loan us sufficient funds for those remaining instalments and we would convert the $ 9 million already paid to Zimbank in February. All this could be settled immediately Fieldstone has secured the funding element for the project.”

Siziba has not filed a fax transmission from himself correcting the implication created by Danckwerts that the three agreements were tied together. On 9 August 2002 in response to a letter from the legal practitioners of Danckwerts, Siziba detailed the amounts that he had paid to Danckwerts. The amount of $ 9 million paid to Zimbank was paid in terms of ‘F’ and ‘G’. Payment of the sum of $ 1 295 000.00 was in respect of the commitment fee provided for in the MOU, which amount was the Zimbabwe dollar equivalent of US$ 35 000.00. Whatever the stance taken by Siziba may be, it is obvious that he was the buyer described in Annexure ‘C’ and he then went on to execute ‘F’ and ‘G’ on behalf of Hawkhope. The letter of 14 August 2002 from Atherstone & Cook reinforces this view, that the latter two agreements were tied to the MOU. Apparently Siziba himself was linking the three agreements as he never denied being the buyer under the MOU. In fact his inclusion of $ 1 295 000.00 in the payments he made reveals that he was taking all the agreements to be tied. To hold otherwise would be contrary to the parties clearly expressed intention in his evidence in chief Siziba stated that when the first defendant approached him ti interest him in the project, he, the first defendant had indicated that Hyatt International were interested in the project and were prepared to pay US $ 2 million for the land. It would then be a total loss on the part of the defendants for the same land to be sold some time later for a price which was less than a quarter of the price that Hyatt International had offered to buy it for. It would be irrational in my view for such an argument to be sustained. In my view Annexures ‘F’ and ‘G’ are the implementation of part of the MOU and are mainly concerned with the transfer of shares in Great Insight and Nyland to Hawkhope which transfer would in turn facilitate the implementation of the project of the casino and hotel to comply with the enabling document granted to Toptol by government.

The next issue was whether or not the MOU and Annexures ‘F’ and ‘G’ formed the entire agreements between the parties or whether in addition there was a verbal agreement and

what its terms were. Neither counsel made submission addressing this issue and I will therefore not delve into it.

Siziba arranged for the payment of an amount of $ 9 million. This money was paid to Zimbank in order to facilitate the release of Arlington Estate from mortgages that had been registered against the property in favour of the bank. According to Clause 6.1 of the MOU, the buyer's legal practitioners were to make payment to Danbro of an aggregate amount of 75% of US $ 1.5 million against the release of title deeds to Lots 4 and 5. The plaintiff in the guise of Siziba signed the MOU binding himself to the terms and conditions contained therein. Again in Annexures 'F' and 'G' Siziba, in the guise of purchaser, signed the agreement this time representing Hawkhope. Certain sums had to be paid to Danbro towards the purchase price of the properties and there was never any dispute on the part of Siziba that the sum of $ 9 million paid to Zimbank was not a debt due in terms of Annexures 'F' and 'G'.

Siziba paid an amount of $ 1 295 000.00 which was the Zimbabwe dollar equivalent of the US $ 35 000.00 required to be paid by the buyer under the MOU. There is no indication on the papers before me or even on the evidence that such amount was paid with any reservation. I believe the court should take into account the attitude of the parties to the contract at the time the agreement was entered into. It is also not the contention by Siziba that the US $ 35 000.00 is refundable. Rather, his stance is that it should be taken into account in calculating the amounts paid under Annexures 'F' and 'G'. If the condition attached to the payment of the US$ 35 000.00 was that it was non refundable, neither of the parties has indicated the legal premise upon which it would now become refundable. It is trite that the duty of a court is to give effect to the intentions of parties to an agreement, and that in that duty it is not the function of the court to rewrite such contract. The clause relating to the commitment fee is very clear and in the absence of any ambiguity it is not my function to add words to the text. It was the intention of the parties when they signed the MOU that the fee was non refundable and so it remains.

The contract, encompassing the MOU and Annexures 'F' and 'G' required payment of a total of US $ 2 million. An amount representing 25 % of this amount was to be paid in Zimbabwe dollars in an effort to release Lots 4 and 5 from an encumbrance. Of this amount, the plaintiff only paid $ 9 million out of a total amount of $ 11 million. There were repeated requests or demands for the payment of the outstanding sum of $ 2 million. The demands fell

on deaf ears. Instead the plaintiff was alleging that the Zimbabwe dollar equivalent of the non refundable fee under the MOU constituted payment under 'F' and 'G'. In addition the plaintiff claims that rentals from Lot 5 should be used to offset the balance of Z$ 705 000.00 to make up the sum of $ 2 million. It is the contention of the defendants that the property, Lot 5 is owned by Nyland Investments (Private) Limited which company is itself wholly owned by Hawkhope Investments (Private) Limited and not by Siziba and that as such any rentals paid in respect of occupation of the same accrue to the company and not to Siziba. The defendants have submitted that the assets of a company are distinct from those of its members. It is trite that a duly registered company is a person in its own right and is capable of owning property in its own name. where such property is owned by the company no other person has a legal right to claim or enjoy the fruits of such company. In *Salomon v Salomon & Co*[2], LORD HALSBURY L.C. made the following remarks:

> "I am wholly unable to follow the proposition that this was contrary to the true intent and meaning of the Companies Act. I can only find that the true intent and meaning of the Act from the Act itself; and the Act appears to me to give a company a legal existence with, as I have said, rights and liabilities of its own, whatever may have been the ideas or schemes of those who bought it into existence."

The concept was put even more succinctly in *Daddo Limited and Others v Krugersdorp Municipal Council*[3] by INNES CJ who said the following:

> "Nor is the position affected by the circumstance that a controlling interest in the concern may be held by a single member. This conception of the existence of a company as a separate entity distinct from its shareholders is no merely artificial and technical thing. It is a matter of substance; property vested in the company is not, and cannot be, regarded as vested in all or any of its members."

Thus the claim by Siziba that whatever Hawkhope owns he owns suffers a mortal blow. The law is clear that property vested in a duly registered company vests in the said company. If it were intended for the property to vest in the share holders there would be no need to incorporate the company as a separate legal entity. Accordingly the profits of the company, in this case in the form of rentals, belong to the company and not to Siziba. As a shareholder, if he were one, his only entitlement would be to dividends if the company does declare a dividend. A shareholder has no claim to the assets of a company or to its profits.

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[2] 1897 AC 22

[3] 1920 AD 530 at 550-551

This brings me to the discussion on the shareholding in Hawkhope. In none of the three document executed by the parties is there specific provision for the acquisition of shares in Hawkhope. In relation to the agreements signed by Siziba there is no indication on the evidence as to why he had signed for the company because clearly at that stage he did not have shareholding in the company. From the evidence of the first defendant I get the impression that shares would accrue to Siziba upon payment of the full amount set out in the MOU. Annexures 'F' and 'G' were executed in January 1999. The effect of the agreements was to transfer the shares in Great Insight and Nyland to Hawkhope. Siziba is not a shareholder of either Nyland or Great Insight. It appears however that shares in the two companies were then transferred from the two to Siziba and an entity called Wateredge Enterprises (Pvt) Ltd. He has not exhibited shares relating to Hawkhope. His evidence on how the shares were transferred to himself and Wateredge was to say the least unsatisfactory. He was unable to explain how the company and himself had entered the picture outside a transfer of shareholding from Hawkhope. Given that the shares in the two companies are owned by Hawkhope he cannot claim a beneficial interest in the properties owned by Great Insight and Nyland.

Over and above this the balance of the amount due under the entire agreement, which was payable in foreign currency has not been paid and Siziba denies that it is due. My view is that Siziba has not complied with his obligations in terms of the agreement. The declaratur that he seeks is not established on the evidence placed before me.

The last issue for determination is whether the defendants were entitled to cancel and further whether the said agreements were properly cancelled. Annexures 'F' and 'G' have in their text clauses dealing with breach of the agreement. They provide that in the event of breach by either party and failure to remedy such breach within a reasonable period then the other party shall be entitled to summarily cancel the same without prejudice to any claim such party may have for damages. On the documents that I have, the first demand for payment is contained in a fax transmission from the first defendant on 7 September 1999, the contents of which was to request payment of $ 2 million outstanding on the local part of the agreement of sale. A reminder to Siziba was given for the defendant to cancel the agreement if payment was not received within a reasonable period. Again according to the papers before me cancellation was through a letter dated 31 July from the defendants' legal practitioners. The letter was therefore written a period of more than two years after the initial fax, and three years after the

agreements had been negotiated and signed. I do not think that anyone in their right minds could argue that a reasonable period had not elapsed from the time the agreements were signed. The plaintiff has not showed proof of any payment apart from the $ 9 million paid to Zimbank soon after the signing of the agreements. Clearly the defendants had given the plaintiff a lot of leeway to comply with his obligations but he chose not to do so. The defendants, in my view had no option but to cancel the agreements. They were entitled to act as they did.

I find that the claim has no merit and the claim is therefore dismissed. The plaintiff is ordered to pay the defendants' costs of suit.

Mhiribidi, *Ngarava & Moyo*, legal practitioners for the plaintiff
Atherstone & Cook, legal practitioners for the defendants.