GOLDENMILLION ENGINEERING (PVT) LTD
versus
METTALON GOLD ZIMBABWE (PVT) LTD

HIGH COURT OF ZIMBABWE
KUDYA J
HARARE, 18 and 19 February and 27 March 2013

Civil Trial

N Mapanzure, for the plaintiff
T Tandi, for the defendant

KUDYA J: On 13 December 2011 the plaintiff, a mining equipment supplier, issued summons out of this court seeking payment of the sum of US$325 119-65 being the invoiced cost of electrical goods that it sold and delivered to the defendant, a mining conglomerate, between 20 August 2009 and 12 December 2011, interest at the prescribed rate from 21 November 2011 and costs of suit. The claim was made up of goods worth US$ 78 485-61 delivered to Shamva Gold Mine, US$ 245 467-82 delivered to How Gold Mine, US$626-96 delivered to Redwing Gold Mine, and US$ 36 184-02 delivered to Mazowe Gold Mine.

The claim was contested by the defendant. In its plea the defendant averred in para 4 that:

> "While the defendant accepts that certain electrical goods were purchased by it from the plaintiff, defendant denies receipt of most of the goods to which the claim relates and puts plaintiff to proof thereof. The defendant further avers that plaintiff has been requested to provide a proper and correct summary of goods delivered in order for payment to be made but plaintiff is still to do so. The defendant further denies that any proper demand for payment has been made by the plaintiff as alleged."

Three pre-trial conferences were held on 5, 17 and 30 April 2012. On 5 April 2012 the parties agreed to meet on 13 April 2012 to reconcile figures. On 17 April they reported that they had made progress on possible settlement. On 30 April 2012 the parties indicated that they were not able to reconcile the figures or settle and the matter was referred to trial on three issues. The issues were:

1. Whether the defendant is indebted to the plaintiff in the sum claimed or any other sum at all
2. Whether defendant received all of the goods that form the subject of the plaintiff's claim and
3. Whether due and proper demand for payment was made to the defendant prior to the issue of summons

The plaintiff called the evidence of three witnesses. These were Ephraim Tatenda Gwatidzo, its Business Development Manager, Munodawafa Dzobo, its Finance and Administration Manager and Taunashe Chikuku a lecturer in Engineering at the University of Zimbabwe. In addition it produced a 295 paged bundle of documents as exh 1 and copies of the Bachelor's and Master's degree certificates of the university lecturer as exh 2. The defendant called the evidence of Godfrey Fore, its Finance Manager and Patrick Sana, its Group Mines Engineer. In addition it produced a 44 paged bundle of documents as exh 3 and an e-mail of 3 January 2012 from Ephraim Gwatidzo to the defendant's employee D Mhlanga and copied amongst others to Sana as exh 4.

The defendant company operates five gold mines in Zimbabwe. These are How Mine in Bulawayo, Mazowe Mine in Mazowe, Shamva Mine in Shamva, Arcturus Mine in Goromonzi and Redwing Mine in Penhalonga. The plaintiff supplied these mines with a variety of mechanical and electrical equipment. The defendant paid for some of the supplies but did not pay for others. The parties had a ten year mutually beneficial working relationship which at times saw the defendant place an order and make full pre-payments 30 to 60 days before the delivery of some of the ordered equipment. The plaintiff always delivered the ordered equipment without fail. Most of the sales were on credit to the defendant. The defendant complained against some of the equipment, specifically mixers, supplied that failed to perform to expectation. It withheld payment on other supplies delivered on credit against such malfunctioning equipment, hence the present claim.

The mechanically minded engineers Chikuku for the plaintiff and Sana for the defendant were in agreement on the three major components of a mixer. It was common cause that it is made up of a motor, gear box and wet-ends. The two witnesses described wet ends as blades that are used to mix (agitate) sludge in a tank in the gold extraction process.

I find it logical to determine the second issue that was referred to trial first. This is in line with the plea that challenges the plaintiff to prove the equipment supplied before establishing the invoiced cost.

The evidence led by the plaintiff's first two witnesses, Gwatidzo and Dzobo, was calculated, firstly to identify the goods that were delivered to and received by the defendant's constituent mines and secondly, to establish their invoiced costs.

Gwatidzo detailed the goods that were delivered to each of the four mines. He relied on the documented purchase orders raised by each mine, the delivery notes from the plaintiff that were acknowledged by the authorised signatories of the defendant at each mine and the tax invoices and statements for payment raised by the plaintiff that were delivered to and received by the defendant at each mine. He also produced a schedule of the goods in dispute for each mine extracted from the purchase orders and the delivery notes. It was common cause that the defendant is indebted to the plaintiff in respect of How Mine and Redwing Mine deliveries. The schedules for and the actual purchase orders, tax invoices, delivery notes and statements for How Mine are found on pp 33-92 of exh 1. The documents show that How Mine owes the plaintiff the sum of US$143 527-91. Pages 222 to 227 of exh 1 established that the plaintiff is owed US$626-96 by Redwing Mine. Apparently, according to Dzobo's uncontroverted testimony on that aspect, the reconciliation of the Redwing debt was conducted by Dzobo and Moyo, an employee of Redwing Mine. The defendant abandoned the defence raised in its plea in respect of the goods purchased and received by Redwing and How Mine together with their carrying values. The correctness of the debt due from Redwing and How mine is confirmed by the composite reconciliation done by the plaintiff for all the five mines for the period 28 August 2009 to 30 January 2012 on pp 236-238 of exh 1.

The equipment purchased by and supplied to Mazowe Mine is listed on p 95 of exh 1. It consists of a KE 5 motor protection relay control voltage 550V; KE5 (CTS) current transformer, core balance CT insulator lockout converter, MMI program unit; warman pump spares 4/3D impeller shaft sleeve DO75 and stop start push button. The detailed ledger of the Mazowe Mine account is fully captured on pp 93- 115 of exh 1. The accuracy of Gwatidzo's testimony on the quantities and cost of the delivered items was not placed in issue under cross examination. He established that as at 31 January 2012, the defendant was indebted to the plaintiff in the sum of US$ 47 733-04 on the Mazowe Mine account.

In his testimony Engineer Sana admitted that the equipment was delivered to Mazowe Mine. He also admitted that due payment is still outstanding on the equipment claimed in the summons. He countered the claim by seeking set off of the debt against the invoiced cost of four mixers that were delivered to Mazowe Mine and paid for, which failed to perform to expectation. Sana diagnosed the problem at Mazowe Mine. He found that gear boxes were

overheating and breaking their flanges and bending wet-end shafts. Engineer Sana's reports confirmed that all four mixers for Mazowe Mine that were ordered and paid for in full in the sum of US$107 175-17 on 25 August 2010 were delivered on 28 October 2010. That the four mixers were received at Mazowe mine is confirmed in the Mazowe Mine goods received note on p 4 of exh 3 (p 260 of exh 1). They failed to perform satisfactorily. In August 2011 in a meeting attended by Gwatidzo and Saweto for the plaintiff and Sana Mashingaidze and Mekani for the defendant, Gwatidzo promised to replace the four at the plaintiff's own cost as recorded in the e-mail of 30 August 2011. The replacements were delivered installed and commissioned on tanks 2, 4, 5 and 7 by the defendant and witnessed by the plaintiff's personnel. The commissioning history of the replacement Mazowe Mine mixers was set out by Sana on p 278-284 of exh 1. Page 279 shows that the four gear boxes were received on 28 October 2010 at Mazowe Mine. They had been successfully installed by 7 November. The motors on tank 2, 4 and 7 were overloading. The supply breaker was upgraded and blades changed. On 15 November all four mixers were successfully commissioned after the problems of 7 November were rectified. On 22 November all four tanks had high levels of siltation. Operations were stopped to allow the plaintiff to supply four variable speed drives that would drive all four mixers successfully. On 24 November after these had been fitted the mixers ran well. On 1 April 2011 tank 4 snapped due to an unstable gear box plate. On 15 April a motor coupling was affected by a loose drive key that was in off position and gear box number 5 failed due to overheating and the use of wrong blades. It was attended to but failed again on 1 May 2011 after the blade bent and snapped. On 3 November 2011 tank 4 and 7 were drained of carbon. On 16 November 2011 new mixers complete with electric motor, gear box, shaft and 3 pairs of blades were installed. After rubberising tank 4 accumulated high mud levels. It did not improve on 24 November. Tank 4 and 7 were not working on 25 November as they were still silting. The gear box and motor on tank 4 were fitted on tank 5 but agitation did not improve. On 30 November tank 4 did not have both motor and gear box. On 2 December tank number 5 was running well. A gear box was restored on tank number 7 on 5 December and it achieved perfect agitation. Tank 5 and 7 were still running well on 7 December. On 8 December all plaintiffs' gearboxes were removed for failing to perform and the contract was allegedly terminated.

Gwatidzo and Dzobo accepted that the only components of the mixers purchased on 25 August 2010 that were returned were two CIL Flenders gearboxes serial number MZ CIL number 4 and MZ CIL Number 5 gear boxes returned for repair under warrant on 14

November 2011, p 5 of exh 3. In addition the defendant returned to the plaintiff two 15kW AC drives serial numbers F0009MA11622330 and F009MA116022324 shown on its Goods Returned Advice Slip dated 13 December 2011. The defendant also returned two 60mm shafts complete with blades, one 60mm shaft, two gear boxes serial numbers 841687516-002 and 841687516-003 and two electrical motors serial numbers 0603004 and 0603005 to the plaintiff on 12 December 2011 under note number 00495 referenced 50812 on p 6 of exh 3 and 262 of exh 1. The latter were goodwill mixers that defendant rejected and which plaintiff then retrieved that were not part of the four purchased on 25 August 2010. Gwatidzo conceded that his e-mail of 28 November 2011 to Graham pointed out that the mixers including the new lot were not working but the four supplied were all working but not to expectation hence his call for a new design and for Graham to fly to Zimbabwe. Gwatidzo was unable to cost the value of the two gear boxes returned for repair on warrant. He disputed that all the goods worth US$107 175-17 were returned by defendant to plaintiff.

It seems to me that the two mixers returned on 12/13 December 2011 were not the ones purchased on 25 August 2010. Dzobo and Gwatidzo's version that these were goodwill replacement mixers is more probable than the defendant's testimony that they were 7, 5 kW purchased on 25 August 2010. These were 15kW and not 7, 5 kW mixers. In addition, the onus was on the defendant to establish that it rejected the two that were returned for repair on warrant. It failed to do so. It further failed to establish the fate of the remaining two 7, 5 kW mixers that were originally delivered on 25 October 2010. Again, it further failed to establish the basis for set off of the returned parts of two mixers that it returned for repair and not for refund. The onus lay on the defendant to establish the value of the two gear boxes. It failed to do so.

All the amounts paid by Mazowe mine for all goods delivered including the four mixers are reflected in the composite reconciliation account for the period 28 August 2009 to 30 January 2012 on pp 236-238 of exh 1. I am satisfied that the plaintiff proved that it is owed US$47 733-04 by the defendant for the Mazowe Mine account.

The equipment purchased by and supplied to the defendant by Shamva mine was listed in the schedule on p 221 of exh 1. It consists of the motor control centre for mixers; 15kw gear box repaired; LA100 (10-100amp) motor protection relay; 30.5 mm assembled die cast aluminium oil tight buttons stations pad lockable; Warman pump spares 6/4E impeller closed STD NIHARD shaft sleeve EO75 D21; Warman spares 4/3D impeller closed STD, NIE 4/3D; 15kw and 22kw mixer complete with wet ends, protection relay and commissioning

service factor; 15kw and 22kw VSD (550V); Machining of 22kw rotor and cut key way; Repairing of threads on DTV shaft; 20mm wire rope 12 x 7 (6/1) 6 x 7 (6/1); Electrical power analysers CA 8230; 3 phase electrical power energy analyser; 22kw drive end motor flange; 15kw rotor; 15kw and 22 kW mixer motors complete with gear boxes, 15kw wet ends shafts; Shafts for 15kw mixers; Motor protection relays GKE50 (KW), GKE 100 (37) KW, GKE 200 (75 KW), AND GKE50 (15KW) and accessories; Part no. 301 Esteritz Z23 d28 shank pinion, part 305 Z98 Bak 3 Helical gear wheel; Relays LA10, LA50 and LA 100; KA100 10-100AMP motor protection relay; Interposing CTs class 1 100/5; 630 amp 3 phase neutral 600V 3 position handle operated change over switch; Motor protection relay for 37 kW (50hp) complete with accessories; DTV pump shaft after repairs.

The detailed ledger for the Shamva mine account runs from p 117 to 221 of exh 1. The schedule of purchase orders is found on p 117 while the actual purchase order runs from pp 118 to 141. The schedule of delivery notes is at p 175 while the actual delivery notes run from pp 176-201. The schedule of tax invoices is at p 142. The tax invoices are found on pp 143-174. A schedule of statements is at p 202 while the detailed ledger with the full description of the equipment supplied is found at pp 203-220. The full reconciliation of all orders from, invoices to and payments from Shamva mine are on pp 217-220 of exh 1.

Gwatidzo stated that all the items listed, except for the motor control centre that was paid for in full, were delivered to Shamva mine. He stated that the invoiced cost of these items in the sum of US$109 454-82 was due and owing from Shamva mine. The purchase order, number 30730, for the motor control center is found on p 138 of exh 1. It was sold for US$99 407-26 but the defendant paid by electronic transfer the sum of US$100 000-00, as shown on the transfer form dated 9 September 2011. The motor control center was manufactured to the specifications of Shamva Mine. It was completed after summons had been issued. In either December 2011 or January 2012 the witness advised Shamva mine to collect the motor control center. They promised to send a vehicle to collect it but have not done so to date. The outstanding issue is for the defendant to decide whether the variable speed drives should be connected to the motor control center at Shamva mine where they were delivered or at the manufacturing hub of the plaintiff. His preference was that it was easier, convenient and preferable for the connection to be done at the manufacturing hub. Shamva mine has not collected the motor control center nor indicated its place of preference for the connection. The reluctance to collect the motor control center was admitted by both Sana and Fore and confirmed in the e-mail exh 4 where Mhlanga of the defendant revealed that Shamva mine

had been ordered to freeze all dealings with the plaintiff pending the resolution of the present matter.

Fore admitted that all the goods in respect of the claim in the summons for Shamva mine were delivered. He agreed with Gwatidzo and Dzobo that the motor control centre for Shamva mine was not delivered. He further stated that six variable speed drives purchased under order number 30742 placed on 23 February 2011 were not delivered. This order in respect of two 22KW mixers complete with gearbox, wet ends, protection relays, commissioning service factor; two 15KW complete with gearbox, wet ends, protection relays, commissioning service factor, five 22KW VSDs and five 15KW VSDs carried an invoiced cost of US$245 692-99. **T**he plaintiff, however, delivered on 24 October 2011 two 22KW mixers, two 15KW mixers and four 15KW VSDs but failed to deliver one 15KW variable speed drive and all five 22KW variable speed drives**.** The note in question is on p 194 of exh 1 and 17 of exh 2. The plaintiff wrote on the delivery note: "kindly note VSDs are being fitted into the panel and will be delivered as one unit later this week". Both Gwatidzo and Dzobo did not produce documentary proof that the six variable speed drives in question were delivered. They carried an invoiced cost of US$49 0006-10.

The defendant was invoiced for order 30742 on 23 August 2011 in the sum of US$ 245 692-99. It paid by electronic transfer the sum of US$145 000-00 on 18 May 2011. The electronic transfer form does not indicate the order number to which it related. The plaintiff appropriated this amount to order 5144 and not 30742. The defendant also paid a further US$100 000-00 for order 30742, as reflected on the electronic bank transfer on p 35 of exh 3 on 12 August 2011. The defendant set the invoiced cost of the six variable speed drives that were not delivered at US$ 49 006-10. The undelivered motor control center and six variable speed drives had a carrying value of US$149 006-01. The defendant sought set off of this amount against the proved debt owing to plaintiff. The defendant also raised the defence of set off against three mixers with an invoiced cost of US$196 686-89 that were delivered, paid for but failed to function within less than one year of commissioning. These were No 5 CIP 22KW mixer commissioned 4 November 2010 which failed on 17 November 2010, No 6 CIP commissioned 30 November 2011 which failed on 6 January 2012 and No 7 CIP 22KW mixer commissioned 8 November 2011 which failed on 1 December 2011. Fore produced an internal memorandum of 12 April 2012 found on pp 7-9 of exh 3 to justify the defence of set off against the equipment valued at US$196 686-89. In the report he indicated that two 22KW and two 12KW gearboxes were returned to the plaintiff for repair; one 15KW and one

22KW gearboxes were in the Shamva mine workshops awaiting dispatch to the plaintiff for repair; the plaintiff had changed horizontal shafts to vertical shafts to improve performance; the failure by the plaintiff's South African supplier to correct the problem of bending wet ends; and the failure to supply and commission order 30742 of 22 February 2011 notwithstanding that plaintiff's fitter Mudimu and Gwatidzo were virtually operating from Shamva Mine hence the decision by the mine to return the problematic equipment to plaintiff for repairs and redelivery to the mine after the repairs had been done. The plaintiff had supplied but failed to commission two years down the line. He did not believe the plaintiff was ready to deliver the motor control center. It was a small item that plaintiff could easily deliver and fix to the drives that were long delivered to the mine were it truly ready.

The evidence of Sana a holder of a Bachelor of Science degree in Engineering who is in good standing with the Zimbabwe Institute of Engineers and Engineering Council of Zimbabwe was calculated to show that the mixers supplied by the plaintiff and paid for by the defendant were latently defective. It was common cause that the mixers supplied by the plaintiff frequently broke down at Mazowe and Shamva mines while mixers of the same design and type worked well at How mine and Redwing mine. Sana, an engineer of 20 years experience in the mining field attributed the failures to latent mechanical defects. The plaintiff supported by the university lecturer and its own internal engineers such as Saweto attributed the frequent breakdown to operational ineptitude by the defendant's employees at Mazowe mine and Shamva mine. The findings in the commissioning reports of Sana of 25 November 2010 and 29 March 2012 highlight the nature of the break downs. The motor tripped as a result of overloading, the electric motor rotor shaft key-ways wore out at a high rate, electric and wet-end rotor shafts suffered frequent breakdowns, the wet-ends frequently bent. The gear boxes overheat and damaged gears, bearings and flanges. He attributed the breakdowns to poor design. Saweto attributed breakdowns to failure to follow operating procedures. Apparently the mixers were started with the blades embedded in silt without first freeing them. The report of 25 November 2010 indicated that at times the mixers were running efficiently and various corrective measures were put in place. The university lecturer is not registered with the Engineering Council of Zimbabwe as required by s 22 of the Engineering Council Act [*Cap 27:22]* and does not hold a practising certificate. He holds a BSc Engineering Honours 1992 and MSc in Manufacturing Systems and Operations Management 2007. He has been a lecturer at the University of Zimbabwe Mechanical Engineering Department for the past two years. He worked for Hwange Colliery, CAPS

Holdings and the Harare Polytechnic before that. He did not have experience of mixers used in gold mining. He had experience of mixers used in water purification and soap making. His area of competency is in design engineering. His opinion was that the problems highlighted by Sana were operational and not mechanical. He convincingly explained that blades are bent by rotating them in heavy slurry, which in turn overloads the motor, burns it and damages the gear box. The effect of the counteracting testimony of the university lecturer was that the defendant failed to prove on a balance of probabilities that the problem of the mixers was mechanical and not operational.

Fore further indicated in his testimony and in the internal memorandum of 12 April 2012 that Shamva mine owed the plaintiff US$83 988-09. He did not show how this amount was calculated. He then deducted it from the aggregate of the invoiced cost of the motor control center, six variable speed drives, the three non-performing mixers and the three electronic transfers of 18 May, 12 August and 9 September 2011. He concluded that the plaintiff owed Shamva mine US$261 704-99. The defendant sought the deduction of this amount from the proved invoiced cost of the sum owed to plaintiff.

I am satisfied that the plaintiff correctly computed the amount owed by Shamva mine of US$109 454-82 for the period 20 August 2009 to 30 January 2012. The reconciliation account for Shamva mine on pp 218-220 together with the composite reconciliation for all the mines on pp 236-238 of exh 1 show that the plaintiff correctly appropriated the bulk payments made for the payment of US$100 000-00 for the motor control center and the US$245 000-00 that included payment of the outstanding six variable speed drives to arrive at the amount owing. The evidence of Dzobo that he did the reconciliation with two employees of Shamva mine, Chiwaya and Mhlanga stood uncontroverted by these two men. Fore disputed that the plaintiff and defendant conducted a joint reconciliation contrary to the report made to the pre-trial conference judge on 17 April 2012 that the parties had conducted such reconciliation on 13 April 2012. As I will demonstrate in detail later on in this judgment, I am satisfied that the defendant has failed to establish the defences of set off or repudiation.

I turn to resolve the issues referred to trial. The first issue referred to trial is capable of resolution after the second issue. The evidence of Gwatidzo established that the goods forming the claim in the summons were delivered to and received by the defendant. His evidence was confirmed by delivery notes, Dzobo's testimony, the failure by Mr *Tandi* to put the delivery in issue and the testimony of Fore. The second issue is answered in the plaintiff's favour.

The next issue for determination is the extent, if any, of the defendant's indebtedness to the plaintiff. The plaintiff claimed in its summons the sum of US$325 119-65. In testimony, both Gwatidzo and Dzobo established the carrying value of the unpaid deliveries in the sum of US$301 342-73. The individual amounts claimed for three of the four mines changed in evidence. In the summons the plaintiff claimed US$ 245 467-82 for How Mine. In evidence it proved an indebtedness against How Mine in the sum of US$143 527-91. Mr *Tandi* conceded that the lower amount had been proved. The defendant conceded the claim of US$626-96 owed by Redwing Mine. The claim against Mazowe Mine in the summons was in the sum of US$ 36 184-02. The plaintiff established the value of the unpaid goods of US$47 7333-04. The amount attributable to goods supplied to Shamva was set in the summons in the sum of US$78 485-61. In evidence the plaintiff established a higher amount of US$109 454-82. The failure to accurately portray the outstanding amount against Shamva mine was according to the uncontroverted testimony of Dzobo caused by the defendant. It made bulk payments to the plaintiff without indicating against which mine account the money was to be appropriated. The result was that the plaintiff appropriated these bulk payments to a mine of its choice. When Dzobo carried out a correct reconciliation of the payments made against each mine with the assistance of Isa and Chakawa of Mazowe Mine and Mhlanga of Shamva Mine the initial appropriations were altered.

The evidence of Dzobo in this respect was not put in issue when he was cross examined. The plaintiff already knew before trial commenced of the change in its claim against each mine. It ought to have moved an amendment to the summons to reflect its changed claims. Mr *Tandi* urged me to award the lower claims in the summons and not the proved higher claims in respect of Mazowe Mine and Shamva Mine. In terms of the sentiments expressed by GARWE J, as he then was, in *Mtuda* v *Ndudzo* 2000 (1) ZLR 710 (H) at 719A-B I have a discretion to stray beyond the pleadings to determine the real issue between the parties that has been fully ventilated at the trial notwithstanding that it was not been pleaded. I discern no prejudice to the defendant if I were to find for the defendant in the higher amounts for both Mazowe Mine and Shamva Mine. The matter was fully ventilated at the pre-trial conference and during trial. In addition, the aggregate amount proved at the trial is less than the amount claimed in the summons. Again, the lesser amounts claimed were caused by the defendant's failure to indicate how some of the bulk payments it made were to be appropriated.

Accordingly, I find that the plaintiff proved that the defendant is indebted to it in the value of the unpaid goods of US$301 342-73.

In its plea the defendant placed in issue the quantity of the equipment delivered and the amount claimed. It did not plead set off but raised it as a defence in evidence. Set off must be pleaded and proved. INNES CJ stated in *Schierhout* v *Union Government* 1926 AD 286 at 289-290 that:

> "The doctrine of set off with us is not derived from statute and regulated by rule of court, as in England. It is a recognised principle of our common law. When two parties are mutually indebted to each other, both debts being liquidated and fully due, then the doctrine of compensation comes into operation. The one debt extinguishes the other *pro tanto* as effectively as if payment had been made. Should one of the creditors seek thereafter to enforce his claim, the defendant would have to set up the defence of *compensatio* by bringing the facts to the notice of the court-**as indeed the defence of payment would have to be pleaded and proved.** But compensation once established, the claim would be regarded as extinguished from the moment the mutual debts were in existence together."(My emphasis)

The defence of set off was pleaded in the local cases that dealt with it such as *Geoff's Motors (Pvt) Ltd* v *Lilfordia Estates (Pvt) Ltd* 1995 (2) ZLR 342(S) at 344H, *Mountain Lodge Hotel (1979) (Pvt) Ltd* v *McLoughlin* 1983 (2) ZLR 238 (SC) at 241H and *C C A Little & Sons* v *Liquidator R Cumming (Pvt) Ltd (in liquidation)* 1964 (2) SA 684 (SR) at 688 C-D. In the present matter it was not pleaded. I will however consider it on the basis that it was fully ventilated by the parties before summons was issued and during trial. In any event, it is only fair and just that as I decided to determine the issue of the increased claims of the plaintiff that were not pleaded I reciprocate by also considering it. After all what is good for the goose must be good for the gander.

The onus obviously lies on the defendant to establish on a balance of probabilities that the plaintiff is mutually indebted to it and that the debt is fully due. In *Commissioner of Taxes* v *First Merchant Bank Ltd* 1997 (1) ZLR 350 (S) at 353C GUBBAY CJ stated that:

> "At common law, set-off or *compensatio* is a method by which mutual debts, being liquidated and due, may be extinguished. It takes place *ipso jure*. If the debts are equal, both are extinguished; if unequal, the smaller is discharged and the larger is proportionally reduced."

It was common cause that the defendant made pre-payments in the aggregate sum of US$ 149 006-10 for the undelivered motor control center and the six variable speed drives. It was common cause that the plaintiff did not appropriate this amount to defray the proved debt of US$301 342-73. Rather it used the pre-payment in the manufacture of the motor control centre. At the closure of pleadings on 3 February 2012 the manufacture of the motor control

center was work-in-progress. It was not a debt that was fully due to the defendant. It was common cause that the defendant did not at any stage place the plaintiff *in mora* for the delivery of or cancel the contract of sale of the motor control centre and the undelivered six variable speed drives. The requirement to place a defaulting party *in mora* was emphasised by GARWE JA in *Zimbabwe Express Services (Pvt) Ltd* v *Nuanetsi Ranch (Pvt) Ltd* 2009 (1) ZLR 326 (S) at 330A-where he stated that:

> "The position is now settled that:
>
> > "Notice of cancellation must be clear and unequivocal and takes effect from the time it is communicated to the other party."

RH Christie *Law of Contract in South Africa* 3 ed at p 597. See also *du Plessis* v *Government of the Republic of Namibia* 1995 (1) SA 603 (HH) at 605E. A notice of intention to cancel must be such that the other party is or ought to be aware of its nature, but it is not necessary to use the word "cancellation". The intention to cancel may be made sufficiently clear in other ways. Kerr *Principles of the Law of Contract* 4 ed p 462."

Again, Christie, *op cit* at 555 states:

> "When the contract does not fix a time for performance there can be no *mora ex re* only *mora ex persona,* so a demand by the creditor is necessary in order to place the debtor in *mora."*

And again at p 562:

> "When no time for performance is fixed but time is of the essence, the debtor is not *in mora* and the creditor cannot cancel for non-performance unless a proper demand for performance has been made…..the concept of time of the essence relates to the consequences of a breach and not to the breach itself, so if no time is fixed there can be no breach by non-performance, whether or not time is of the essence, until the creditor has informed the debtor when he maintains performance is due."

Mr *Tandi* conceded that the contract of sale of the motor control center and the six variable speed drives was not cancelled expressly or by conduct. In my view, despite the tone of the communication to Graham in para 3 of the e-mail of 28 November 2011 that expressed the fears of Gwatidzo arising from the problematic mixers at both Mazowe Mine and Shamva Mine, the defendant did not cancel the contract. The correspondence between the parties at the time the problems arose was such that the defendant was content with repairs on warrant and replacement of defective parts. The report of Sana of 25 November 2010 and 29 March 2012 and of Fore of 12 April 2012 were written after the closure of pleadings. They were

internal reports that were not copied to the plaintiff. They made false conclusions concerning the termination of the contract of sale of the undelivered equipment and the faulty equipment. The reports indicate that the defendant did not repudiate the contracts of sale but sought remedial measures for the repair and replacement of the equipment. The defence of set off in respect of the prepaid equipment that was not delivered is not available to the defendant.

Sana gave contradictory evidence on whether the plaintiff delivered the four Mazowe mixers. His reports indicate that all four mixers were delivered for Mazowe initially on 25 October 2010 and were used on tank number 2, 4, 5 and 7. Indeed the reports show that the four were all replaced at the plaintiff's cost as agreed by Gwatidzo in the August 2011 captured in Gwatidzo's e-mail of 30 August 2011. Sana stated in his report of 29 March 2012 that four Mazowe mixers were replaced in October 2011 and fitted in November 2011. In his oral testimony he changed his testimony to suit the information on the goods returned notes on p 5 and 6 of exh 3. I agree with Mr *Mapanzure* that the two defence witnesses were, in that regard, unreliable and unworthy of belief.

The defendant failed to establish a case for set off against the Mazowe mine mixers. It did not establish the fate of the four mixers. The commissioning history of tanks 2, 4, 5 and 7 on which the mixers were used is replete with stop start operations. There is no evidence that the four 7, 5 kW fully motorised mixers complete with wet-ends were returned for repair on warrant or for credit. Only two gear boxes were returned for repair on warrant. The defendant remained with the motor and wet ends. This set of circumstances is inconsistent with either cancellation or repudiation of the contract. Certainly, the defendant has failed to establish that it is owed money on the four mixers. It has failed to establish set off against the four mixers.

The plaintiff also raised the defence of set off in regards to the equipment supplied to Shamva valued at US$ 196 686-89 it alleged was defective. The correspondence between the parties indicated that the parties worked together to resolve the problems. The external suppliers of the plaintiff held the firm view expressed by Saweto in exh 4 that the problems bedevilling the non-performing equipment were operational rather than mechanical. The evidence on record shows that the defendant only took the position that the problems were mechanical after the issue of summons. The technical report of Sana dated 25 November 2010 setting out the problems of commissioning the Mazowe mixers high light operational problems of overload that affected the motor and gear box and the problem of running the wet-ends in sludge that bent them. Until the time of closure of pleadings, the defendant was content with the repair and return of damaged equipment. The report of Sana defies his

conclusion that the mixers at both Mazowe and Shamva were a total failure. They were running but faced the problems that appear to me to be operational in the sense that the defendant's employees failed to follow laid down operating procedures in running the equipment.

Mr *Tandi* submitted that the defendant did not seek specific performance or cancel the contract of sale but repudiated it by refusing delivery of the motor control center and six variable speed drives. He further submitted that the defendant had purchased this equipment from another supplier. In another vein he submitted that the defendant had rescinded the contract on ground of breach by the plaintiff.

The remedies for non-delivery available to an aggrieved party in a contract of sale are set out in Mackeurtan's *Sale of Goods in South Africa* 5th ed by Dr Hackwill at 102-3 thus:

1. Sue for delivery (specific performance) with or without damages for delay in delivery and loss of use.
2. Declare the contract cancelled and claim damages where seller repudiates contract expressly or by conduct as in absolute refusal to perform, is express agreement to cancel on non-delivery or where time is of the essence-place buyer in position he would have been had seller delivered.
3. "Rescind the contract, and claim a refund of the purchase price, if it has been paid and restitutionary damages with interest.

In *Federal Tobacco Works* v *Barron & Co* 1904 TS 483 the purchaser refused to accept delivery of grain bags. The respondent sued the appellant in the magistrate's court for the price of 7 000 bags that it delivered but were refused.

At p 485 INNES CJ stated:

> "They are now suing for the purchase price and they cannot obtain it unless they prove that the goods were duly and timeously tendered. 'It has been contended that as the appellants lay by and made no demand for delivery, and took no steps to place the respondents *in mora*, they could not, when the goods were tendered repudiate the contract on the ground of a failure to deliver within a reasonable time. But I think the buyers were entitled to wait till the goods were offered to them, and then to set up the defence (if the facts allowed them legally to take it) that an unreasonable delay had elapsed, and that they were on that account not obliged to accept the bags and pay for them."

The learned CHIEF JUSTICE held that the delay of 6 months for the order whose outer limit was 4 months without approval of the purchaser was so unreasonable a delay justifying repudiation when delivery was tendered.

The defendant did not refuse delivery of the undelivered equipment. It froze its relationship with the plaintiff pending the conclusion of this matter. It did not establish as was done in *Federal Tobacco Works* v *Barron & Co* 1904 TS 483 that the delay in the delivery was unreasonable. It did not establish what the reasonable time for delivery was. It thus failed to establish repudiation of the contract for non-delivery. In regards to the Mazowe and Shamva mixers it fell into the dilemma noted in *Mackeurtan's Sale of Goods op cit* at p 97 which states that:

> "However, once a defect warranting rejection has been discovered the position is different, and the purchaser now has a reasonable time within which to elect whether he will return the article or keep it and claim a reduction of the price. If he does not elect to reject within a reasonable time he loses his right to do so, although he will not necessarily lose his right to claim a reduction of price while retaining the article…. what constitutes reasonable time is a question of fact."

The defendant has not established that it exercised its right to reject the defective equipment within a reasonable time. The evidence shows that it chose to keep the items and sought repair. By so electing it lost its right to repudiate the contract. Notwithstanding the fact that it did not lose the right to claim a reduction in the price of the defective equipment, it, however, still failed to establish the reduction due to it. The defence of set off raised by the defendant also fails on the ground that the contract of sale concluded with the plaintiff for the purchase and delivery of mining equipment subsists.

The third issue that was referred to trial was whether proper demand was made for payment before the issue of summons. It is clear to me that the letter of 21 November 2011 did not constitute a letter of demand. It did not set out the amount of indebtedness. It did not state the due date of payment. It did not threaten legal action. All it did was seek moral suasion of payment of an estimated amount of indebtedness. Interest at the prescribed rate will therefore be ordered to run from the date of the service of summons and not from 21 November 2011.

The plaintiff's claim succeeds.

Accordingly, it is ordered that:

> The defendant shall pay the plaintiff:
>
> a. The sum of US$301 342-73 being the value of goods supplied to the defendant at its special instance and request;
> b. Interest on the amount referred to in (a) above at the rate of 5% per annum from the date of the service of summons to the date of payment in full;

c. Costs of suit

Bherebende Law Chambers, the plaintiff's legal practitioners
Kantor and Immerman, the defendant's legal practitioners