

DAIRIBORD ZIMBABWE (PVT) LTD

Versus

KENNY CHIVANDIRE T/A
CHIVANDIRE DAIRY

HIGH COURT OF ZIMBABWE
CHILIMBE J
HARARE, 13 July 2022 & 8 February 2023.

Opposed Application

T. *Mpofu* for applicant.

T.R. *Mafukidze* for respondent

CHILIMBE J

“I make bold to say that it is not just for the sake of poetry that the old adage, context is everything, holds true. In so many scenarios, words alone ring hollow. Context gives life and meaning to what is said or written. Is a court of law then entitled, or *required*, to take cognisance of context when interpreting a contract? That is the question that this Court is called upon to answer.”- **Constitutional Court of South Africa.**¹

BACKGROUND

[1] That is indeed one of the questions which stands to be answered in this dispute. The applicant (“Dairibord”), is the country’s leading producer of milk and dairy products. Respondent (“Mr. Chivandire”), was described as the biggest dairy farmer of indigenous extraction in Zimbabwe. The two parties’ commercial relationship, based on the sale and purchase of milk, has since gone sour, so to speak. Dairibord thus approached this court seeking an order that; -

1. The Respondent’s notice of termination dated 24th January 2022, seeking to terminate the Forward Sale Agreement between Applicant and Respondent, be and is hereby declared void, and of no force and effect.
2. The Respondent shall pay costs of this suit on a higher scale of legal practitioner and client.

¹ *University of Johannesburg v Auckland Park Theological Seminary & Anor* [2021] ZACC 13, at [1]; a decision in which the South African Constitutional Court favoured a contextual approach toward interpretation of contracts, and cited with approval, *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) “*Endumeni*”. The Zimbabwean Supreme Court per MALABA CJ also followed *Endumeni* in *Zambezi Gas v Barber & Anor* SC 3-20.

THE DAIRIBORD-MILK PRODUCER ARRANGEMENTS

[2] Mr. Chivandire opposed the relief sought, as well as one material aspect of a largely common cause background to the matter as outlined by Dairibord's Human Resources and Administration Executive, Gilbert Takabarasha who stated thus; -

[3] As a manufacturer of milk and dairy products, Dairibord's lifeline lay in the constant supply of raw milk from dairy farmers. To that end, in 2020, Dairibord concluded "Milk Supply Agreements" with farmers (called "milk suppliers") as part of measures to secure supplies of raw milk. As an incentive, Dairibord also facilitated funding support to such dairy farmers from Stanbic Bank ("Stanbic"). This support was under an arrangement between Dairibord and Stanbic in terms of which Dairibord guaranteed loans extended by Stanbic to milk suppliers.

[4] Mr. Chivandire was one such "milk supplier", having concluded a Milk Supply Agreement with Dairibord in 2018. In August 2021, Dairibord assisted Mr. Chivandire to secure credit facilities from Stanbic in the sum of ZWL\$9,180,000. This loan was guaranteed by Dairibord and brought Mr. Chivandire's total indebtedness to Stanbic to ZWL\$25,471,000 as he had existing facilities with that bank. Prior to October 2021 and during the currency of Milk Supply Agreement, Mr. Chivandire was responsible for paying the loan instalments.

[5] In 2021, Dairibord devised another structure in a bid to enhance the milk supply and farmer funding arrangements. It thus introduced a new "Forward Sale Agreement" that year. The essence of the new agreement was to enable farmers to receive advance payments against future milk supplies. But Dairibord would not, under such arrangement, advance cash to the farmers upfront. Dairibord instead, arranged for the farmers in question to obtain loans from Stanbic, the disbursement of which then stood as the advance payments. The loans were pegged against the quantity (and therefore value) of milk farmers became obligated to deliver to Dairibord under the Forward Sale Agreements. Dairibord in turn, then repaid the loan instalments to Stanbic, leaving the farmers with the obligation to deliver a specific quantity of milk weekly to Dairibord and for a specific period.

[6] In practice, the arrangement entailed Stanbic debiting the amounts due as loan instalments to respective farmers` accounts. The farmer would in turn, furnish Dairibord with monthly bank statements reflecting these debits. Dairibord would then pay an equivalent amount into the farmer`s account with Stanbic to effectively reverse the bank`s debits.

[7] Gilbert Takabarasha stated that in respect of Mr. Chivandire, the following arrangements were put in place; -Dairibord firstly facilitated Mr. Chivandire`s access to an additional facility of ZWL\$9,180,000 on 9 August 2021 from Stanbic. Secondly, Dairibord then took over the loan instalments for the entire sum of ZWL\$25,471,000 being, as stated; Mr. Chivandire`s total liability to Stanbic. Thirdly, Dairibord then guaranteed the same exposure. Gilbert Takabarasha added that Dairibord used its standing to enable Mr. Chivandire to receive the additional ZWL\$ 9 million facility stating that the farmer would otherwise not have qualified for this additional accommodation.

[8] What formed the crux of the matter was Gilbert Takabarasha`s averment that Dairibord had taken the trouble to assist Mr. Chivandire restructure his loans as described above, because of the prospect of executing the Forward Sale Agreement with him. This contract, signed on 21 October 2021, effectively secured future supplies of raw milk. In fact, Dairibord secured, under that that Forward Supply Agreement, the right to receive raw milk deliveries from Mr. Chivandire at the rate of 2002 litres per week from October 2021 until 9 September 2024 and for a further three (3) years thereafter.

[9] Mr. Chivandire disputed that he bound himself to make future deliveries of raw milk to Dairibord under such terms on the basis of the structured loans which his counsel Mr. *Mafukidze* described as “old money”. He expected a fresh loan or “new money”, over and above the ZWL\$25 million. This “new money” was to be structured after the Forward Sale Agreement was signed. That became the irreconcilable position of the parties leading to Mr. Chivandire declaring that the parties had not been of one mind when they executed the Forward Sale Agreement on 21 October 2021. He therefore proceeded to address on 24 January 2021, a letter purporting to terminate the agreement. He added another salvo stating that the Forward Sale Agreement was also rendered invalid by failure to meet the essential elements of a contract of sale; - namely absence of a price (“*pretium*”), to confirm the exchange of the goods (“*merx*”).

[10] In fact, Mr. Chivandire then attacked the contract as “unconscionable” in an argument that for reasons set out below, I found peripheral to the key issue for determination. And so, nothing more will be said about that, save to mention in passing that the responsibility over the commerciality of business transactions remains vested in the parties to such deals. (See the remarks of MATHONSI JA in *Grandwell Holdings (Private) Limited v ZMDC & 2 Ors SC 5-20* [at page 6]; -

“ . In addition, the court will not excuse any of the parties from the consequences of the contract that they freely and voluntarily entered into with their eyes wide open. This is so even if the consequences are onerous or oppressive. See *Magodora & Ors v Care International Zimbabwe* 2014 (1) ZLR 397 (S) at 403 C-D.”

[11] Gilbert Takabarasha stated that the written agreement did not at all reflect the full terms agreed between the parties. The understanding was that the previously obtained loan amounts (“old money”), constituted the loan arrangement and stipulated in the contract and that no “new money was contemplated. In fact, Mr. Chivandire confirmed this understanding by participating as anticipated, from October of 2021 until 24 January 2022, when he unilaterally (and wrongfully) repudiated the Forward Sale Agreement.

[12] Mr. Chivandire’s purported notice of termination became the basis upon which Dairibord sought a declaratur to compel Mr. Chivandire to abide by the terms of the contract.

THE LEGAL ISSUES

[13] I must express my indebtedness to both counsel for their detailed and very helpful submissions. I must also state that the single issue whose determination will dispose of the dispute does not require the train to stop and linger at each and every one of the many sidings marked by both counsel in argument. That issue relates to whether or not there was a valid contract between the parties. A finding in the positive will deliver victory to Dairibord because the alleged invalidity of the termination notice has not essentially been disputed by respondent. On that basis, there will be no need to delve into specifics around the clauses in question. Similarly, if the conclusion finds the contract as invalid then the matter ends there.

THE RULE IN SUMBURERU v CHIRUNDA²

[14] I must commence with the point raised by Mr. *Mpofu* (for the applicant Dairibord), that respondent`s defence to the claim was incompetent in that it essentially amounted to a counter-claim. Although it was not raised as a point *in limine*, this argument carried the vestiges of one, which necessitates its disposal as such. Counsel urged the court to note that applicant was seeking, not so much a declaration of validity of the contract, but a declaration of invalidity of the respondent`s attempt to resile from it. The right to be established under the declaratory order sought, lay not in whether there was a valid contract between the parties. That according to counsel was beyond argument-the contract was valid. (In fact, by seeking to cancel it, the respondent paradoxically admitted that the Forward Sale Agreement was valid and extant.) The issue was whether or not the respondent had a right to terminate the contract in the manner that he did.

[15] To fortify his argument, Mr. *Mpofu* referred to the rule in *Sumbureru v Chirunda*, (supra) which was stated as follows by SMITH J at 242 G-H; -

“I agree with Mr. Chikumbirike`s submissions that in notice of motion proceedings the respondent should, according to the rules of court, in the opposing affidavit, confine his opposition to a defence. He should not, in the opposing affidavit, launch an attack on the applicant and make a claim in reconvention.”

[16] According to Mr. *Mpofu*, respondent`s defence amounting as did to a counter-claim became a “sword rather than a shield”, to use the terminology in *Sumbureru v Chirunda*. I was not persuaded by this argument. Taken logically, the argument, in my view simply evolves back to a declaration of validity of the contract and below are my reasons; -

[17] The specific procedural rule in *Sumbureru* cannot be separated from the general considerations governing the conduct of litigation in our courts. Which means that Mr. *Mpofu*’s argument, as I understood it and in paraphrase, effectively stood on two principles (a) the requirements for declaratory relief and (b) adherence to the rules of court.

[18] Regarding the first pillar, counsel argued that Dairibord had elected to enforce one, and one right only out of the entire suite of rights available to it under the contract. This was the

² 1992 (1) ZLR 240 (H)

right to a proper termination of the contract in terms of the requisite provisions being clauses 9 and 10 of the Forward Sale Contract. To that extent, argued counsel, the court had to confine itself to the determination of that right and that right alone. This being the reason why Dairibord had approached the court seeking nothing else besides a declaration of rights issuing from clauses 9 and 10 of the agreement. Dairibord was not even seeking specific performance nor other relief residual to breach of contract. It was therefore improper, so went the argument, for Mr. Chivandire to raise the primary issue of validity of contract.

[19] A quick examination of the legal requirements of a declaratur would be a good point to start from in addressing this issue. A party seeking declaratory relief must, among other grounds, establish the existence of a present or future right³. Dairibord argues that the right it seeks the court to declare emanates from the Forward Sale Agreement. Given this simple position, I was unable to establish the basis upon which respondent Mr. Chivandire, as a party to a suit wherein declaratory relief was sought, could then be estopped from raising as a defence to such declaratory relief, a challenge to the validity of the contract. In *University of Johannesburg v Auckland Park Theological Seminary & Anor (supra)*, the South African Constitutional Court cautioned thus in [63]; -

‘It is perspicuous that when a court determines the nature of the parties’ rights and obligations in a contract, it is involved in an exercise of contractual interpretation’

[20] Interpretation of a contract involves questioning the validity of the contract as a matter of primacy. Secondly, migrating into the area of procedure, it is trite that the cause of action pleaded by a claimant will dictate the nature of the defence that can be validly raised against it, and that becomes part of the procedural obligations which a respondent must fulfil before a court. In the present dispute, notwithstanding the manner in which the relief sought has been framed, the cause of action remains whether or not respondent Mr. Chivandire, breached the terms of the contract between the parties.

[21] For completeness, “*cause of action*” was defined as follows by MALABA J (as he then was) in *Peebles v Dairibord Zimbabwe (Pvt) Ltd* 1999 (1) ZLR 41 H at 45 E -F; -

“A cause of action was defined by LORD ESTHER MR in *Read v Brown* (1888) 22 QB 131 as every fact which it would be necessary for the plaintiff to prove if traversed in

³ *Recoy Investments (Pvt) Ltd v Tarcon* 2011 (2) ZLR 65 (H); *Mpukuta v Maker Insurance Pool & Ors* 2012 (1) ZLR 192 (H)

order to support his right to the judgment of the court. In the same case, LORD FRY at 132-133 said the phrase meant everything which if not provided gives the defendant an immediate right to judgment. In *Letang v Cooper* [1965] 1 QB 232 at 242-3 DIPLOCK LJ (as he then was) said a cause of action is simply a factual situation the existence of which entitled one person to obtain from the court a remedy against another person.” [underlined for emphasis]⁴

[22] Given that position, the respondent Mr. Chivandire was properly placed to refute any material allegations raised in the founding papers and such rebuttal includes the contra-position that the agreement was invalid. Such defence does not become misplaced for any reason, given the nature of the applicant`s claim and causa. This position is also consistent with the authorities` guidance on the nature and purpose of an opposing affidavit-to dispute material allegations made in plaintiff`s causa⁵.

[23] Additionally, the rule in *Sumbureru v Chirunda* is a rule of procedural law dictating how a party must not answer the claim of another. That will be appreciated further, when one refers to the fuller facts of the trial proceedings before the court in that matter, and the resultant interlocutory applications interspersing that main action. This context will provide texture to the court`s conclusion that respondent improperly turned his shield into a sword and the following observation at 242 D to E is apt; -

“Order 32 of the High Court Rules ,1971, which deals with applications on notice of motion, does not provide for claims in reconvention as is provided for in the case of trials-see Order 18.”

[24] Finally, I note that Gilbert Takabarasha`s answering affidavit did not specifically raise the impropriety of Mr. Chivandire`s defence (that it was a de facto counter-claim). Granted, this matter was then raised at the hearing as a point of law and properly so. I note however that this complaint was premised on an alleged breach of the rules. It thus became a matter which the court could, subject to a proper exercise of discretion, proceed to condone. A background based in fact is usually helpful to a court`s inquiry into condonation. In view of

⁴ See also *Mukahlera v Clerk of Parliament & Ors* 2005 (2) ZLR 365 and the authorities cited therein on the point.

⁵ *Fawcett Security Operations (Pvt) Ltd v Director of Customs & Excise & Ors* 1993 (2) ZLR 121 (S); *Chiwhayi Enterprises (Pvt) Ltd v Atish Investments (Pvt) Ltd* 2007 (2) ZLR 89 (S)

the above reasons, I dismissed the argument advanced on behalf Dairibord that Mr. Chivandire was precluded from raising as a defence, the question of validity of the contract.

THE PRINCIPAL TERMS OF THE FORWARD SALE AGREEMENT

[25] An examination of the key terms of the Forward Sale Agreement becomes relevant in the inquiry to establish (a) whether or not the parties were *ad idem*, (b) whether the Forward Sale Agreement met the essentials of a valid contract of sale, (c) the issue of the bank loan as (i) a component affecting calculation of the *pretium* and (ii) condition precedent affecting *consensus ad idem* between the parties and (d) the effect of the non-variation clause.

[26] I may state at this stage that the problem of ambivalence of contractual terms which normally bedevils similar disputes did not arise in this matter. The written memorandum was clear and definite in its terms. The only issue around it related to the applicant's contention, that the contract did not embody all the terms agreed and understood by the parties and that such terms had to be read into the contract.

[27] Clause 4 of the agreement detailed the modalities regarding delivery of the raw milk by Mr. Chivandire to Dairibord. He was obliged to deliver 2002 litres every week until an "Agreed Quantity" was delivered in full. This "Agreed Quantity" was defined in Clause 1 of the Forward Sale Agreement as follows; -

"Agreed Quantity" means the quantity of milk purchased in advance in terms of this Agreement calculated by dividing the Net Loan Proceeds by the price per litre agreed by the parties in terms of Clause 3.6"

[28] The term "Net Loan Proceeds" though capitalised was neither defined nor provided for anywhere in the agreement, Clause 3.6 proceeded to set out the formula for fixing the price per litre of raw milk as follows; -

"The price per litre to be used by the parties (meaning "Parties" as capitalised and defined) for purposes of calculating the Agreed Quantity of Milk shall be determined by the parties immediately upon submission of the loan application documents to the Bank [Stanbic] but before the Loan is availed to the Seller [Mr. Chivandire]."

[29] This price-fixing clause 3.6 was preceded by clauses 3.1 and 3.2 which went thus; -

3.1 The Buyer shall make such arrangements with the Bank as are necessary to enable the Seller to access a loan facility, for the purpose of funding the Seller's dairy farming activities and the procurement of farming inputs by the Seller.

3.2 The loan facility shall be advanced on the standard terms and conditions of the Bank, and the Seller shall execute such agreements and provide such supporting documents as may be required by the Bank for the loan facility application to be approved.

[30] It is common cause that no such loan was facilitated. Dairibord argued that these clauses had to be read with the unexpressed understanding between the parties. The total loan facilities previously availed to Mr. Chivandire totalling ZW\$ 25 million constituted the loan contemplated by clauses 3.1 and 3.4, and therefore the factor in clause 3.6 which fixed the pricing of the raw milk using the following formula; -

$$P = \frac{NLP}{AQ}$$

[31] Where: -P= the Price of Raw Milk or (*pretium*)AQ= the Agreed Quantity of raw milk or (*merx*) and "NLP" the Net Loan Proceeds. On the basis of this understanding, the contract of sale stood perfected at inception according to Gilbert Takabarasha. On the basis that the sale price was ascertainable based on such formula, this court has held that a contract of sale where the *pretium* is fixed by a formula becomes valid barring other impediments such absence of consensus ⁶. In the present dispute the veracity of this formula depends on whether it can be accepted that the parties agreed that the old loan facilities would constitute the NLP component of the pricing formula. In the absence of such agreement, then the contract of sale would be handicapped by lack of one essential element-absence of the *pretium* in a sale agreement. The condition regarding fixing of the price was never fulfilled thus invalidating the agreement that was the argument raised by Mr. *Mafukidze*.

THE "WHOLE AGREEMENT" OR "NON-VARIATION CLAUSE"

[32] Mr. *Mafukidze* further submitted that the contract between the parties had to be construed strictly within the confines of the written memorandum constituting the Forward

⁶ See *Chikoma v Mukweza* 1998 (1) ZLR 541 (S); *Warren Park Trust v Pahwaringira & 4 Ors* HH 39-09.

Sale Agreement. It would be improper to read any other terms into the contract. It was also the very same contract that carried in clauses 14 and 15 indisputably clear, restrictive and non-variation provisions that limited parties to the four corners of their written memorandum.

[33] Mr. *Mpofu* raised a further legal point in seeking to avoid the limitations of the *caveat subscriptor* rule as well as the non-variation covenants. He urged the court to follow the approach adopted by the Supreme Court of Appeal of South Africa, together with the Constitutional Court of that same jurisdiction, starting with the *Endumeni* case (see footnote 1 above). The superior courts in South African had since made a firm pronouncement in favour of what is now termed “a unitary approach” to interpretation; -one which holistically and simultaneously considers text, context and purpose in interpreting contracts.

[34] This approach by South African courts not only relaxes, but outrightly rejects some of the classic tools that have been used in the interpretation of contracts over the ages. It is a much wider, and more liberal approach which impacts the entire spectrum of rules and principles used in the interpretation of contracts including the parol evidence⁷ and *contra-proferentum* rules⁸ in addition to non-variation clauses⁹.

[35] In essence, the South African approach is that one should no longer look to context and extraneous evidence to aid the interpretation of only those contracts afflicted by ambiguity. It proposes such approach in all instances of contractual interpretation. The old position can be summed up by a passage from Gibson`s Wille`s Principles of South African Law (7th Edition Juta) where at page 347 the learned author opines; -

⁷Expressed by the statement of WATERMEYER JA in *Union Government v Vianini Ferro-Concrete Pipes (Pvt) Ltd* 1941 AD 43 at P 47, “Now this Court has accepted the rule that when a contract has been reduced to writing, the writing is, in general, regarded as the exclusive memorial of the transaction and in a suit between the parties no evidence to prove its terms may be given save the document or secondary evidence of its contents, nor may the contents of such document be contradicted, altered, added to or varied by parole evidence.”

⁸ The classic authorities on the contra-proferentum rule include *Cairns (Pty) Ltd v Playdon & Co Ltd* 1948 (3) SA 99 (AD), at 123; *Commercial Union Fire, Marine & General Insurance Co Ltd v Fawcett Security Organisation Bulawayo (Pvt) Ltd* 1985 (2) ZLR 31 (SC); *Presbyterian Church of Southern Africa v Shield of Zimbabwe Insurance Co Ltd* 1991 (2) ZLR 261 (HC).

⁹ See Christe-Business Law in Zimbabwe (Juta 1998) page 107 where the learned author opines on the enforceability on non-variation clauses; -and *Chikoore v Bere & Ors* SC 11/07; *Munyani v Liminary Investments & Anor* 2010 (1) ZLR 138.

“If the language of the [written] contract is clear and unambiguous, effect must be given to its grammatical meaning, that is, its ordinary or plain or popular meaning and the question of intention is inadmissible. *Cum in verbis nulla ambiguitas est, non debet admitti voluntatis quaestio*, that is, no evidence is admissible for the purpose of ascertaining some intention of the parties which was not expressed in the contract. The intention of the parties must be gathered from the language in the contract and not from what either of them may have had in mind.”

[36] This is the approach discarded by *Endumeni*, as well as the recent decisions of *University of Johannesburg v Auckland Park Theological Seminary* (supra) and *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* 2022 (1) SA 100 (SCA). The South African Constitutional Court held thus in *University of Johannesburg* at [66]; -

“The approach in *Endumeni* “updated” the previous position, which was that context could be resorted to if there was ambiguity or lack of clarity in the text. The Supreme Court of Appeal has explicitly pointed out in cases subsequent to *Endumeni* that context and purpose must be taken into account as a matter of course, whether or not the words used in the contract are ambiguous. A court interpreting a contract has to, from the onset, consider the contract’s factual matrix, its purpose, the circumstances leading up to its conclusion, and the knowledge at the time of those who negotiated and produced the contract.” [Underlined for emphasis].

[37] I comment as follows on this point; -the approach by South African courts carries significant implications on the jurisprudence behind the law of contract as presently configured in Zimbabwe. Apart from the *Zambezi Gas* case, where the court cited *Endumeni* during an inquiry focussed on statutory interpretation, I was not referred to any other local decision that has robustly interrogated the approach in *University of Johannesburg* and kindred authorities. I do not believe I was sufficiently addressed to be able to proceed and make a definitive finding on the principle in *University of Johannesburg*. It would, in my view, be necessary for a sober analysis of such decisions to be conducted against the galaxy of existing binding authorities in this jurisdiction. On this basis, I will defer a conclusive finding on the point to another day and follow the traditional authorities.

DISPOSITION

[38] The Forward Sale Agreement, as it stands is explicit in as far as the terms between the parties are concerned. The parties set out their terms with clarity in their written memorandum. There parties are acutely divided between the issue of the “old money” and “new money” facilities and respondent argues that they lacked consensus necessary to establish the contract. The Forward Sale Agreement bars the introduction of terms or considerations other than those captured therein. This ousts the attempts by Dairibord to impute other terms in order to shed light as to what exactly was the intention of the parties.

[39] The parties were thus at cross-purposes and I can do no better than refer to the remarks of UCHENA JA in *Telecontract (Private) Limited T/A Telco v Sparrow Haulier (Private) Limited* SC 41-17 at page 7 of the cyclostyled judgment; -

“It is trite that for a contract to be valid there must be a meeting of the minds of the parties. In short, the parties must have the same mental conception of what they are agreeing to. That is called *consensus ad idem*. In the absence of *consensus ad idem* there can be no valid contract. In the case of *Household Fire and Carriage Accident Insurance Co Ltd v Grant* (1879) 4 Ex D 216, THESIGER LJ said: “Now, whatever in abstract discussion may be said as to the legal notion of its being necessary, in order to the effecting of a valid and binding contract, **that the minds of the parties should be brought together at one and the same moment, that notion is practically the foundation of English law upon the subject of the formation of contracts**”. (emphasis added) In *Smith v Hughes* (1871) LR 6 QB 597, BLACKBURN J put it as follows: “I apprehend that if one of the parties intends to make a contract on one set of terms, and the other intends to make a contract on another set of terms, or, as it is sometimes expressed, **if the parties are not *ad idem*, there is no contract, unless the circumstances are such as to preclude one of the parties from denying that he has agreed to the terms of the other**”. (Emphasis added)”

[40] One may ask in passing as to what exactly precluded Dairibord, as (presumably) the drafters of this contract, from simply capturing the terms of the contract correctly? The absence of a rational explanation to that effect renders applicant`s case rather tenuous. It creates difficulties in that the inferences to draw do not necessarily exclude the defence by Mr. Chivandire that the contract betrays the parties` lack of consensus.

[41] In the absence of consensus, there was no contract and additionally so, no fulfilment of the essentials of a valid contract of sale given the absence of the *pretium*. On that basis and the foregoing considerations, the applicant's claim cannot succeed. I will not dwell on the issue of costs apart from saying that this is a matter in which parties sought to properly test their rights following a fall-out in a commercial relationship. As such, an ordinary award of costs should adequately expiate the successful party.

It is therefore ordered; -

That the application be dismissed with costs.

Mawere & Sibanda-applicant's legal practitioners
Bere Brothers-respondent's legal practitioners

CHILIMBE J____8/2/23