

(1) VALENTINE ZISWA (2) MARGARET ZISWA
v
(1) GRAEME SHAUN CHADWICK (2) LANDOS FARM
(PRIVATE) LIMITED

**SUPREME COURT OF ZIMBABWE
UCHENA JA, MAKONI JA AND KUDYA AJA
HARARE: 28 SEPTEMBER 2020 AND 29 JULY 2022**

L. Uriri, for cross appellants

E.T. Moyo, for cross respondents

**Judgment No. SC 92/22
Civil Appeal No. SC 160/15**

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KUDYA AJA: On 11 March 2015, the High Court granted part of the claim sought by Valentine Ziswa and his wife Margaret Ziswa (the cross appellants) against Graeme Shaun Chadwick and Landos (Pvt) Ltd (the cross respondents). The court *a quo* dismissed the claims of the cross appellants as against the second cross respondent in their entirety and granted part of the claims as against the first cross respondent. The cross appellants seek a reversal of the dismissal orders issued *a quo*.

The order issued by the court *a quo* reads as follows:

“In the result it is ordered that:

1. The plaintiffs’ claims against the second defendant are hereby dismissed with costs.
2. The plaintiffs’ claim (a) against the first defendant succeeds only in the sum of \$8 808 which the first defendant is directed to pay the plaintiffs.

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

The first cross appellant is Valentine Ziswa (Ziswa) while the second cross appellant is his wife Margaret Ziswa. I will cumulatively refer to them in this judgment as the lessor. The first cross respondent is Graham Shaun Chadwick (Chadwick) and the second cross respondent is Landos (Pvt) Ltd (the Company). Chadwick was a director in the Company, which he also used as his special purpose vehicle or agent to conduct his farming operations on Ziswa farm (the farm) and on three other surrounding farms, namely, Gijima, Kelvin and Landos.

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THE BACKGROUND

On 20 March 2015, Chadwick filed a defective notice of appeal against the cross appellants, which did not indicate the part of the judgment he sought to impugn. He, thereafter, filed a contested chamber application for condonation and extension of time within which to appeal on 11 January 2018, which was dismissed with costs on 21 March 2018. The effective disposal of the main appeal in this manner left the cross appeal pending.

FACTS

On or before 1 September 2008, Ziswa and Chadwick entered into a verbal agreement for the lease of the farm and the inventoried equipment. The description, quantities

and state of the leased equipment was recorded in the comprehensive inventory the parties drew in October 2008.

The tobacco season in Zimbabwe generally runs from September to August and sales generally take place between March and June. Chadwick was on the farm during the 2008-2009, 2009-2010, 2010-2011 and 2011-2012 seasons (hereinafter called the first, second, third and fourth seasons, respectively).

On 9 January 2009, Ziswa and Chadwick signed a 10-year lease agreement. On the same date Ziswa and his wife (the First Partner) executed a second “Joint Venture Agreement” (JVA) with Chadwick (Second Partner) for the “long term development” of the farm. The two agreements were backdated to 1 September 2008. Chadwick not only leased the farm and the inventoried property but in addition undertook to erect permanent structures (in each season) of an equivalent value to the seasonal rental payable. **Judgment No. SC 92/22
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In terms of clause 1 and clause 2, Chadwick leased “the land together with all buildings and other permanent improvements and certain immovables” for the ten year period from 1 September 2008 to 31 August 2018 for the purpose of growing “30 ha of tobacco, 40 ha of maize, 20 ha of wheat and any other crop agreed between the parties”.

In terms of clause 3, the rental payable would be “6 per cent on the US\$ of the gross turnover of the crops produced on the said land inclusive of bonuses and hailstorm insurances”. In respect of tobacco, the rent was to be paid into the lessor’s FCA by stop order raised at the auction floor, and cash payments were to be made in respect of other crops. In addition to the rental, Chadwick would, in terms of clause 4 (d) be responsible for the repairs

and maintenance of tractors and the inventoried equipment leased to him with effect from 1 September 2008. Lastly, clause 9 stipulated that:

“This agreement constitutes the entire agreement between the parties, and no representation or undertakings given by one of them to the other of them prior to the execution hereof, and no variation of the conditions hereof, shall have any force or effect unless recorded in writing and executed by the parties hereof. (The underlining covers the handwritten portions of the otherwise typeset agreement)”

The JVA substantially duplicates the lease agreement. Clause 3 thereof reads as follows:

“3. The rent payable by the lessee to the lessor shall be 6_per cent per centum of the gross turnover in respect of the crops produced on the said land and payment of such rent/lease shall be secured by means of STOP ORDER given by the lessee in favour of the Company against proceeds of tobacco sold through TOBACCO SALES FLOOR. Such PAYMENT shall be executed and registered as soon (*sic*) may be after the signing of this lease. 31 MARCH 3 APRIL 6 END OF JULY. MAIZE 1.5 TON MONTHLY.” (The underlined words and figures are handwritten)

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It was common cause that the two agreements are complementary and separate and distinct. The requirements of the JVA were additional to the rental payable.

It was also common cause that Chadwick was an active councillor for the Zimbabwe Tobacco Association (ZTA) for 6 years and had been its Vice-President for another 2 years. He introduced the ZTA proforma lease and JV agreements and together with Ziswa supplemented and annotated the terms and conditions therein by hand.

Chadwick grew maize during the first season only and abandoned it in subsequent seasons in preference to the more lucrative tobacco crop. He never grew wheat on the farm.

Chadwick did not abide by the direct deduction method prescribed in the agreements. He did not disclose to the lessor his prior preferential stop order obligations to the Zimbabwe Leaf Tobacco Company (Pvt) Ltd.

By 10 May 2010, Chadwick had repaired a weir, put in a pump and generator, laid underground irrigation pipes, erected a centre pivot, paid for the labour for the reconstruction of a burnt down tobacco barn, “maintained” all 14 barns by putting in place the necessary appurtenances for curing tobacco, repaired furnaces and sheds and at a cost of US\$2 700, constructed 11 two roomed staff houses.

By letter dated 22 February 2011, Chadwick offered to increase lease rental to 8%. The offer was not accepted. Instead, the lessor made the counter offer proposed in the detailed draft agreement, which the lessor signed on 13 March 2011. The counter offer was, in turn, rejected by Chadwick.

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Between 10 January 2012 and 18 May 2012, the parties failed to amicably resolve the lessor’s demands for arrear rentals, maintenance of the leased equipment and the repatriation of leased property that Chadwick allegedly took to other farms. In frustration, at the impasse, the lessor sought to exercise a lien over the tobacco produce that was on the farm. They were, by consent, interdicted by Chadwick and the Company, on 24 May 2012 in case No. HC 5477/12.

On 10 June 2012, the Ziswa instigated the arrest of Chadwick for theft of some of the 2008 inventoried property. The complete police docket compiled by Sergeant N’andu (IO) was produced by consent as exhibit 5. The IO first attended at the farm on 12 June

2012. On 19 June 2012, he conducted a verification or “exit” inventory with Ziswa and a proxy of Chadwick, at the direction of the Area Public Prosecutor for Rusape (APP).

By letter dated 2 July 2012, Chadwick cancelled the lease agreement and immediately vacated the farm.

On 5 September 2012, the APP declined to prosecute, adjudging the criminal complaint to be a civil dispute. On 26 September 2012, the lessor issued summons against the defendants claiming an aggregate sum of US\$456 699 under 13 heads. These comprised of the following claims:

- (a) arrear rentals of US\$64 160 for the fourth farming season;
- (b) a refund of rates and levies of US\$1 980 paid to the Makoni Rural District Council for the fourth farming season;
- (c) the lessor’s share of the hailstorm insurance proceeds of US\$5 500 in respect of the second farming season;
- (d) the outstanding developments for the first three farming seasons, represented by the value of the centre pivot that was removed from the farm, in the sum of US\$ 67 507;
- (e) other enumerated property valued at US\$ 187 707 that was also removed from the farm,
- (f) the estimated damages to recovered property of US\$15 905;
- (g) US\$7 600 for the damage to the fence and gates on the farm,
- (h) US\$15 008 for the repairs to the damaged tobacco barns and flue pipes;
- (i) US\$780 for removing the fourth season tobacco stalks

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- (j) US\$26 313 for vandalized overhead water storage tanks, pipes, workers houses, electrical underground cables, dams, pump unit, boreholes and transformer,
- (k) US\$15 000 for maize deliveries contractually due to the lessor during the second to fourth farming seasons,
- (l) US\$4 240 for the tobacco seedlings grown on the farm and sold to other farmers;
- (m) US\$45 000 damages for loss of income in respect of the 2012/2013 tobacco cropping season caused by the premature and abrupt termination of the agreements.

THE PROCEEDINGS A QUO

The lessor made the following contentions. The two agreements had separate and distinct obligations. The Company had a direct and substantial interest in the two agreements and was together with Chadwick, therefore liable for the various contractual breaches that gave rise to the 13 claims. The lessor's documentary and oral evidence established both liability and quantum in respect of claim (a), (d), (e), (f), (g), (h), (j), (k) and (l) at the higher rate of 8 per cent and not at the 6 per cent in the two agreements.

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The lessor abandoned claim (m) and conceded that Chadwick and the Company be absolved from the instance in respect of claims (b), (c) and (i) on the ground that the lessor had failed to establish the due amounts.

Chadwick conceded that the annotations formed part of the terms agreed by the parties on 9 January 2009. Counsel for Chadwick argued that the lessor failed to establish both liability and quantum. He submitted, on the authority of *Agricultural Finance Corporation v Pocock* 1986 (2) ZLR 229 (S), that the oral variation of the rental rate from 6 per cent to 8 per cent in violation of the non-variation clause (Clause 9 of both agreements) of

the agreements was inefficacious and invalid. He also relied on the twin principles of privity and sanctity of contracts enunciated in Christie: *The Law of Contract in South Africa* 6th ed 2010 Lexis Nexis p 269 to call for the dismissal of all the claims sought against the company.

Counsel, however, conceded that Chadwick was liable for unpaid rental of US\$8 808 for the fourth season and US\$36 000 for the LTC line [falling under claim (e)] and not the respective US\$64 160 and US\$84 000 sought by the lessor. He further contended that, as the lessor had failed to establish liability or where liability had been established, the quantum thereof in respect of claims (b), (c), (d), the remainder of (e), (f), (g), (h) and (j), the claims fell to be dismissed. Counsel requested the court *a quo* to discard the evidence of the valuator for the reason that it was unconventional and unprofessional. He argued that the valuation was in breach of the “objective” and “appreciable help” standards expected of expert evidence that are propounded in *Stock v Stock* 1981 (3) SA 1280 (A) at 1296E), *Gentiruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A) at 616 and *Menday v Protea Assurance Co Ltd* 1976 (1) SA 565 (E) at 569H and articulated in Schwikkard & Van der Merwe’s *Principles of Evidence*, Juta 2009 at p 83. He, therefore, prayed for the dismissal of claims (d) (e), (f), (g), (h) and (j), which rested on the valuator’s computations.

Counsel further contended that the claims ought to be dismissed for the further reason that the lessor had not amended the quantum to reflect the new amounts touted by the valuator some of which were higher than the individual breakdowns set out in annexures 2 and 3 to the summons.

THE FINDINGS A QUO

The court *a quo* made the following findings. The only effectual agreements were the lease and JV agreements dated 9 January 2009 and not the draft agreement of 13 March 2011. The operational rental rate was 6 per cent and not 8 per cent. This was because the offer of 22 February 2011 had not been accepted nor had the non-variation clause been invoked.

Ziswa was an inconsistent, unreliable, untruthful and greedy witness. He prevaricated on whether the tenure of the agreements was 5 years, 8 years or 10 years and whether the rental rate was 6 per cent, 8 per cent or 10 per cent. He was greedy because he unjustifiably claimed for municipal imposts, maize deliveries, seedlings and hailstorm insurance proceeds, which were all not covered by the two agreements. He also demanded for the value of the centre pivot, which he had categorically rejected as constituting a permanent structure.

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The court *a quo* also excoriated the valuator for flaunting his professional qualifications and experience at the expense of conventional valuation principles. It, therefore, discarded his depreciated replacement cost computations.

Chadwick, whose demeanour was highly extolled was found to be a truthful, good and reliable witness. His status as an accomplished tobacco farmer with 20 years' experience and who exuded confidence and conceded where he was liable endeared himself to the court *a quo* at the expense of Ziswa whose penchant for renting out instead of farming on his own account was deplored by the court.

Notwithstanding the contrary general findings on credibility of Ziswa and the valuator, the court *a quo* believed Ziswa's oral testimony on the US\$780 claim on tobacco

destalking and the chartered accountant's valuation of the LTC line. It, however, dismissed the rest of their evidence on the valuation of all the other claims. It further held that seedlings were not a crop as they could not be sold at the auction floors.

The court *a quo* dismissed the claims against the Company on the twin basis of lack of privity of contract and sanctity of contracts. It held that these cardinal legal principles could not be negated by Chadwick's directorship of the Company, his use of the Company's letterhead in correspondence with the lessor and bank account to effect payment of his lease obligations.

It issued the order that I adverted to at the commencement of this judgment.

Aggrieved by the order granted *a quo*, the lessor appealed to this Court on the following grounds.

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- “1. The court *a quo* erred in not finding that the reduction of part of the agreement between the parties to writing and the existence of the non-variation close notwithstanding, on the entirety of the evidence before the court the agreement between the parties consisted in part of the written portion and in part of the oral agreement sworn to by the cross appellants.
2. The court *a quo* erred for the stronger reason, in not finding that the second cross respondent was privy to the whole of the agreement between the parties and in dismissing the claim against it.
3. The court *a quo* erred in its treatment of the evidence and assessment of the cross appellants' claim with the result that the court misdirected itself in its gratuitous conclusions on the first cross-appellant's demeanour and motives culminating in the rejection of the cross-appellants' claims on this flawed basis.
4. The court *a quo* erred in not finding that the rent for the use of the cross-appellants' farm varied from 6 per cent to 8 per cent of the gross annual turnover realised on the farm.
5. The court *a quo* erred in any event in accepting the appellant's bare testimony that the sum of US\$21 000 paid to the cross appellants was towards the rental for the 2011-12 season and in deducting the same from the rental due and owing to the cross appellants.
6. The court *a quo* erred in its treatment of the evidence in concluding that the claim for the tonnage of maize was not within the parameters of the agreement of the

parties and in rejecting the cross-appellants testimony regarding the quantum thereof.

7. The court *a quo* erred in holding that the claims for the centre pivot and generator did not fall within the parameters of the developmental agreement.
8. The court *a quo* erred in holding that the seedlings produced on the cross appellants' farm but sold elsewhere were not produce for the purposes of the parties' agreement and in rejecting the cross appellants' quantification thereof.
9. The court *a quo* erred in finding, as it did, that there was no evidence to substantiate the cross appellants' claim (e) (property removed and not returned) and claim (g) (removed/and or damaged fences and gates) and in finding the property could have been unusable.

ALTERNATIVELY

The court *a quo* erred in any event in dismissing the said claims as opposed to granting absolution from the instance.

10. The court *a quo* erred in rejecting the evidence of Pange purely on the basis that he had used one as opposed to three quotations which had been sourced by the cross-appellants and had applied the general accounting depreciation formulae without a physical examination of the property in question.
11. The court *a quo* erred in not awarding the claim for the irrigation pump, which the appellant conceded in his evidence and offered to compensate for the same.
12. The court *a quo* erred in accepting as true the appellant's testimony based solely on the fact that he managed to impress the judge in terms of his demeanour."

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The cross-appellants sought the success of the cross appeal with costs, the amendment of the judgment *a quo* by granting, jointly and severally the one paying the other to be absolved, arrear rentals of \$67 502.40 for the 2011-12 season (being 8 per cent of gross realization of US\$843 780 from sale of 205 800kgs at US\$4.10 per kg), alternatively judgment in the sum of US\$50 626.80 being 6 per cent of the above gross realisation; judgment in respect of claims (d), (f) (j) and (i), judgment for the reduced sum of US\$364 729 as particularised in exhibit 3 and costs of suit against the cross respondents.

THE ISSUES

The issues that arise from the grounds of appeal are the following:

1. Whether the variation clause was waived by the parties to the lease agreement.
2. Whether second cross respondent was liable to the lessor's claims.

3. Whether or not the court *a quo* erred in dismissing the lessor's claims in respect of:
 - a. Rentals for the fourth season (a portion of claim (a)).
 - b. The value of the developments in lieu of the Centre Pivot (claim (d)).
 - c. Damages for missing equipment (including the irrigation diesel pump whose liability was conceded) (claim (e)) and for damaged property and equipment on the farm (claim (f)).
 - d. Repairs to tobacco barns (claim (h)).
 - e. Vandalized overhead water tanks, reservoirs, boreholes and staff houses and their connecting pump unit, cables, electrics and pipes claim (j).
 - f. Maize deliveries due for the second to fourth seasons (claim (k)).
 - g. Value of tobacco seedlings (claim (l)).
4. Whether or not the court *a quo* properly exercised its discretion in respect of costs.

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THE ARGUMENTS BEFORE THIS COURT

At the onset of his submissions before this Court, Mr *Uriri* for the lessor abandoned claims (b), (c) and (g). He persisted with the appeal against the dismissal of the entire claim against the company, the part dismissed in respect of claims (a) and (e), and the dismissals against claims (d), (f) (h), (j) (k) and (l).

Mr *Uriri* contended that the dismissal of the lessor's claims against the Company was erroneous. He argued that the resolution passed by the Company on 18 May 2012, authorising Chadwick to "represent the company in any legal matter against Mr and Mrs Ziswa" before the institution of action proceedings on 26 September 2012, showed that it had a direct and substantial interest in the two agreements. He further argued that the main credibility findings in favour of Chadwick and against Ziswa upon which the court *a quo*

premised its dismissal of the lessor's claims were, on the totality of the adduced evidence, irrational. He argued that notwithstanding the embodiment of the non-variation clause in the lease agreement, the lessor had contrary to the finding *a quo*, established that Chadwick had by conduct waived the lease rental rate from 6 per cent to 8 per cent on the second and subsequent seasons. He further argued that the valuation testimony of the chartered accountant had proved the damages suffered by the lessor as at the date Chadwick cancelled the agreements and vacated the farm. Lastly, he contended that the costs order granted *a quo* constituted a patent failure in the exercise of discretion warranting interference by this Court.

Per contra, Mr Moyo for Chadwick and the Company vehemently supported the impugned findings and conclusions of the court *a quo*. He argued that the claims against the Company were rightly dismissed because it was not privy to the lease agreements. He strongly contended that, having acted as an agent it could not be sued either separately or together with its principal. He further contended that the non-variation clause precluded the lessor from relying on any variation derived from an oral agreement or on the offer to increase the rate to 8 per cent which they did not accept. He submitted that an oral agreement could not waive a non-variation clause. He further contended that the court *a quo* had not relied on the demeanour of the witnesses only but also on the inconsistencies that characterized the evidence of the lessor's star witness, Ziswa. Lastly, he contended that the valuator's testimony was rightly discarded for being both unconventional and unprofessional. Counsel impugned his competence on two bases. The first was that he had relied on the quotations availed to him by Ziswa without conducting a physical inspection of the equipment. The second was that he had further relied on internet sites that he failed to disclose in ascertaining the life span of some of the equipment listed in exh 3.

ANALYSIS OF THE LAW AND THE FACTS

WHETHER THE VARIATION CLAUSE WAS WAIVED BY THE PARTIES TO THE LEASE AGREEMENT.

It is common cause that clause 9 of the lease agreement constitutes a non-variation clause. The effect of such a clause is set out by Christie in *Business Law in Zimbabwe* 2nd ed Juta p 107 in the following manner:

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

It is also clear that in terms of clause 9 of the lease and JVA agreements, a non-variation clause could not be altered by an oral agreement which was not reduced to writing and signed by both parties. *In casu*, the oral agreement relied upon by the lessor was neither reduced to writing nor signed by both parties. It would, standing on its own, be ineffectual.

Mr *Uriri* however argued that in the absence of a non-waiver clause, a non-variation clause can be waived expressly or tacitly by the conduct of the parties. He strongly contended that both the lessor and Chadwick waived the non-variation clause by their respective conduct in the following two respects. Firstly, the lessor waived the rental payments from the envisaged stop order method to direct payments and accepted the delivery of an agreed tonnage of maize in lieu of the actual production of maize on the farm. Secondly, Chadwick waived the rental rate from 6 per cent to 8 per cent and the unwritten obligation to pay for the Rural District Council imposts by assuming the duty to religiously pay them in the first three seasons.

A waiver is defined by GUBBAY JA (as he then was) in *Agricultural Finance Corporation v Pocock* 1986 (2) ZLR 229 (S) at 236F as:

“an abandonment or surrender with the necessary knowledge of a right accruing exclusively for the benefit of the appellant”

A waiver extinguishes a right and any concomitant obligation due to a party. In *Mutual Life Insurance Co of New York v Ingle* 1910 TPD 540, INNES CJ explained the legal position as follows at p 540:

"It seems to me that the mere intention, a mere mental resolution to waive a right not communicated to the other party cannot in law constitute a waiver or renunciation of the right by the person entitled to enforce it ... Until the intention to waive a right is communicated to the other party, or evidenced to him by some overt act, a change of mind is always possible and permissible. Otherwise a man might by an entry in his own diary, of an account of a casual conversation with a friend (quite unknown at the time to the party affected), find himself debarred from enforcing a right which on further reflection he was desirous of vindicating. After all, waiver is the renunciation of a right. When the intention to renounce is expressly communicated to the person affected, he is entitled to act upon it and the right is gone. When the renunciation, though not communicated, is evidenced by conduct inconsistent with the enforcement of the right, or clearly showing an intention to surrender it, then also the intention may be acted upon, and the right perishes. But a mere mental resolve, not so evidenced, and not communicated to the other party, but discovered by him afterwards, seems to me, (apart from considerations founded upon lapse of time) to have no effect upon the legal position of a person making the resolve" (my emphasis)

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And at p 551, the learned CHIEF JUSTICE further affirmed that:

“When a person entitled to a right knows that it is being infringed and by his acquiescence leads the person infringing it to think that he has abandoned it, then he would under certain circumstances be debarred from asserting it.”

The above cited exposition of the law was approved by this Court in *Chidziva & Ors v Zimbabwe Iron and Steel Co Ltd* 1997 (2) ZLR 368 (S) at 383C-D.

That a non-variation clause may be negated by an express or tacit waiver was adverted to in *Agricultural Finance Corporation v Pocock*, *supra*, at 233G-234F, where GUBBAY JA (as he then was) said:

“In 1964 the controversy as to whether a "non-variation except in writing" clause in a contract entrenched the requirement that any variation had to be in writing, was settled in the affirmative by the South African Appellate Division in *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere* 1964 (4) SA 760 (AD). That case decided that contracting parties could effectively stipulate that any variation of their agreement would be invalid unless the variation were to be written; consequently, any oral agreement which purported to vary the contract was to be disregarded. Whether such a non-variation clause would preclude a party from relying on an oral or tacit waiver by the other party of his rights under the agreement was left open. The point was raised by counsel in argument but the court refused to consider it because it was not covered by the pleadings.”

The answer, however, is to be found in *Impala Distributors v Taurus Chemical Manufacturing Co (Pty) Ltd* 1975 (3) SA 273 (T) in which HIEMSTRA J recognised that a non-variation clause will not prevent one party waiving a provision of the written contract that is exclusively for his benefit or waiving the right to pursue his remedy for a breach that has already occurred. The learned judge reasoned thus at 277D-E and H:

"But waiver, including oral waiver, decidedly plays a role in regard to this legal problem. It can, however, only have reference to a provision which is to the sole benefit of the one party. A provision, e.g. that rent must be paid, is solely for the benefit of the lessor and he can obviously unilaterally waive his right of collection. He can do this verbally and even by implication. This is not a variation of the contract. This is a *pactum de non petendo* which can exist alongside the main contract. In the alternative it is a unilateral legal act whereby the consent of the other party is irrelevant. In this way the true and valid oral waiver can be distinguished from the disguised one which is nothing more than a dissolution of the contract by agreement...

A situation may also develop where one party commits breach of contract in such a way that the other party is entitled to cancel the contract. The latter party could then orally waive his already existing right of action.”
(Underlining for emphasis)

The context in which Chadwick waived his right to pay 6 per cent eluded the court *a quo*. The court found that Chadwick was an accomplished tobacco farmer who had been the President of the ZTA for 2 years and its councillor for a further 6 years. The uncontroverted testimony of Ziswa was that the proforma lease agreement was printed from Chadwick’s computer. It was a standard form recommended by the ZTA. Ziswa’s assertion

that the straight rental from the lease would, in accordance with those guidelines, have been 12 per cent but was apportioned between the two agreements at 6 per cent was not disputed by Chadwick. Chadwick did not also dispute that the reason why the two comparatively identical agreements were drawn up under their respective titles was to divert the unwarranted attention of adherents of the Land Reform Programme who were averse to those who leased out “State farms” allocated to them.

The complementarity of the two separate and distinct agreements meant that Chadwick would invariably end up paying a 12 per cent rental, in the event that he failed to erect permanent structures valued at 6 per cent of the gross realization of the crop production in any given season. The facts and the probabilities arising from those facts therefore lend credence to Ziswa’s assertions that Chadwick waived his 6 per cent right in respect of the lease rentals. This is because the contemplated increase in the rate would not adversely impact upon their respective interests.

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Ziswa’s assertions of waiver by conduct are reinforced by two documents that emanated from Chadwick in November 2010. The first is an e-mail written by Peter Bailey (the Company’s paymaster) to mildred@landosfarm.com and copied to Graham and Jean Chadwick at graeme@landosfarm.com on 2 November 2010. The subject is “ZISWA”. The first two lines are relevant. He wrote:

“The position with Ziswa is as follows:
Sales \$501 296 at 8% is\$ 40 101”

Underneath these words Bailey breaks down the four dates between May and October 2010 when these amounts aggregating \$40 104 were paid and indicates that the amounts, which constitute the subject matter of the second letter were still owing.

The second is a 6 paragraphed letter written by Chadwick to Ziswa under the Company letterhead and as its managing director on 9 November 2010. Each of those paragraphs places the responsibility to pay the amounts due to the lessor on “Landos”. The first, third and fourth paragraphs assert that “Landos will pay you”. The second paragraph introduces Mr Bailey as the Company’s paymaster. The third, fourth and sixth paragraphs compute the outstanding rentals due to the lessor at 8 per cent.

The last of Chadwick’s conduct is his response to Ziswa’s demand on 19 January 2012 for the payment of outstanding arrears of US\$20 989 for the third season. The computations were done on the estimated tobacco under declared to Ziswa at the rate of 8 per cent. On three dates in February, March and April 2012, Chadwick paid US\$21 000 to the lessor. Although the court *a quo* held this amount to be payment for the rentals for the fourth season, I am satisfied for reasons that I will advert to later on in this judgment, that these amounts were paid to defray the demand for the third season arrear rentals of US\$20 989.

The above-mentioned letters and payments show that Chadwick commenced payments of rentals due under the lease agreement at the rate of 8 per cent during the 2009 - 2010 season and continued to do so during the 2010-2011 season. His consistent conduct in these instances clearly show that he waived his right to pay the lower rate enshrined in the lease agreement. It is apparent from the conduct of Chadwick that he waived his right to pay rentals at 6 per cent by paying at 8 per cent from the second and subsequent seasons. He is thus estopped from refusing to pay the rentals due for the fourth season at 8 per cent. The

court *a quo*, therefore, erroneously relied on the non-variation clause at the expense of waiver by implication that was crystal clear from the conduct of Chadwick.

In these circumstances, the first and fourth grounds of appeal ought to succeed.

WHETHER THE COMPANY WAS LIABLE FOR ALL OR ANY OF THE CLAIMS SOUGHT BY THE LESSOR

Mr *Uriri* argued that the Company was privy to the whole agreement in the following respects. Firstly, the lessor regarded Chadwick as a representative of the Company. Secondly, the Company, through its various employees, carried out Chadwick's obligations. It in fact exhibited its direct and substantial interest in the two agreements by being the first applicant in the urgent chamber application between the same parties in case No. HC 5477/12, so argued counsel. Thirdly, the correspondence that emanated from Chadwick was invariably on the Company's letterheads. Fourthly, the Company not only acknowledged indebtedness to the lessor but had the tobacco auction floor sales sheets issued in its name.

Mr *Moyo* made the contrary contention that the Company was a separate and distinct person from Chadwick. It could therefore not be vicariously liable for its director's personal debts. He further argued that the lessor had not demonstrated the preconditions for lifting the corporate veil such as fraud, dishonesty or improper motive. He further relied on the twin principles of privity and sanctity of contract to countervail Mr *Uriri*'s contentions. He further argued that in our law an agent cannot be sued in its own name for the contractual or delictual breaches of its principal notwithstanding its intimate involvement in the principal's farming operations or the use of its letterheads and personnel.

The basis provided in the lessor's further particulars for suing the Company was delictual. They averred that the Company breached "a general duty imposed on it by law to ensure that no damage would be caused on plaintiffs' property". This delictual basis was not pursued in evidence nor motivated in argument *a quo*. It was neither raised as a ground of appeal nor motivated in this Court. In fact, the second ground of appeal impugns the failure *a quo* to find the Company to have been privy to the two agreements.

I agree with Mr Moyo that the company was not privy to the two agreements. Rather it was an agent of Chadwick. See *Printing Registering Co v Sampson* 19 EQ 462 at 465. In any event, it is clear from our law, that where the principal is known, an agent cannot be sued for the contractual or delictual breaches committed by its principal. In this respect, MALABA J, as he then was, pertinently remarked in *Taunton Enterprises (Pvt) Ltd & Anor v Marais* 1996 (2) ZLR 303 (H) at 314B that:

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"The general rule is that a person who acts as an agent and contracts with a third party in the name of the disclosed principal is not a party to the contract and is not personally liable on the contract: *Wood v Visser* 1929 CPD 55; *Marais v Perks* 1963 (4) S A 802 (E); de Villiers & Macintosh *The Law of Agency in South Africa* 3 ed at 560"

The converse position that an agent cannot sue on behalf of a principal was also set out in *AMI Zimbabwe (Pvt) Ltd v Casalee Holdings (Successors) (Pvt) Ltd* 1997 (2) ZLR 77 (SC) at 83E-F thus:

"Without such a cession of action Casalee Zim cannot sue AMI on behalf of Casalee Belgium because an agent cannot sue on behalf of its principal - see *SWA Amalgameerde Afslaers (Edms) Bpk v Louw* 1956 (1) SA 346 (A) at 355C:

"... the auctioneer can sue for the purchase price without cession of action from the seller only if in the transaction he sold as principal."
... So if Casalee Zim is suing as agent it is out of court."

In the circumstances, the finding *a quo* that the lessor had no legal basis for suing the Company cannot be faulted. The second ground of appeal ought to fail.

WHETHER THE FINDING OF FACT MADE A QUO IN RESPECT OF ZISWA AND CHADWICK'S TESTIMONIES WAS IRRATIONAL

It is well settled in this jurisdiction that a court of appeal will only interfere with the findings of fact of a trial court where the findings are irrational. The *locus classicus* on the point is *Barros & Anor v Chimphonda* 1991 (1) ZLR 58 (S) 62G-63A where this Court said:

"It is not enough that the appellate court considers that if it had been in the position of the primary court, it would have taken a different course. It must appear that some error has been made in exercising the discretion. If the primary court acts upon a wrong principle, if it allows extraneous or irrelevant matters to guide or affect it, if it mistakes the facts, if it does not take into account some relevant consideration, then its determination should be reviewed and the appellate court may exercise its own discretion in substitution, provided always it has the materials for so doing."

To the same effect is *RBZ v Granger & Anor* SC 44/15 at 5-6 which held that:

"An appeal to this Court is based on the record. If it is to be related to the facts, there must be an allegation that there has been a misdirection on the facts which is so unreasonable that no sensible person who applied his mind to the facts would have arrived at such a decision. And a misdirection of facts is either a failure to appreciate a fact at all or a finding of fact that is contrary to the evidence actually presented."

See also *Hama v National Railways of Zimbabwe* 1996 (1) ZLR 664 (S) at 670, *Mettalon Gold Zimbabwe v Golden Million (Pvt) Ltd* SC 12/15 at 7 and *ZINWA v Mwoyounotsva* SC 28/15.

Mr *Uriri* contended that "the entire premise of the court *a quo*'s conclusions on Ziswa's testimony was his demeanour. (It) did not trust (him and) on that basis disregarded much of his evidence".

At page 12 of the judgment the court *a quo* held that:

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

The examples related to his initial reliance on the reduced tenure of 5 years and the lease rental rates ranging from 6 per cent to 10 per cent written into the draft agreement of 13 March 2011, the 10 per cent in his letter of demand, reliance on oral agreements for the maize and RDC imposts claims, claiming the value of the centre pivot that he had rejected, reliance on “poorly drafted lease agreement with endless uninitialed annotations as well as blank portions of important clauses”, suing the Company, inflated claims for arrear rentals, claiming arbitrary figures from hailstorm proceeds and seedlings, denying despoiling Chadwick in May 2012, disputing improvements made on the farm by Chadwick and proxy rather than personal farming.

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In comparison, at p 22-23 of the judgment, the court *a quo* said of Chadwick:

“Chadwick was clearly a good and reliable witness. His demeanour was always good. He readily made concessions where such was called for and admitted liability where clearly, he was liable. He struck me as one who exudes confidence with a lot of knowledge in tobacco farming and with a willingness to compensate fairly for what he benefitted. Where his evidence is to be contrasted with that of Ziswa, I would prefer his. Chadwick’s biggest undoing is that he appears to have run his activities at the farm by remote control and was clearly not hands on. He left most of his activities to his employees including the very important task of verifying equipment at termination.”

The assessment of evidence is an onerous task for a trial court especially in a case such as this where the oral evidence encompasses in excess of 300 pages and is accompanied by documentary exhibits in excess of 200 pages. Superior Courts in South Africa and in this country have, however, laid down certain guidelines that might ameliorate the difficult task.

The South African Supreme Court of Appeal cautioned against overreliance on demeanour in *Medscheme Holdings (Pvt) Ltd v Bhamjee* 2005 (5) SA 339 (SCA) at 345A-B thus:

“It has been said by this Court before, but it bears repeating, that an assessment of evidence on the basis of demeanour—the application of what has been referred to disparagingly as the ‘Pinocchio Theory’—without regard for the wider probabilities, constitutes a misdirection. Without careful evaluation of the evidence that was given (as opposed to the manner in which it was delivered) against the underlying probabilities, which was absent in this case, little weight can be attached to the credibility findings of the court *a quo*.”

In this jurisdiction, MUSAKWA J, as he then was, in *S v Makomeke* HH 118/11 at p 9, outlined the approach to assessing credibility, which is applicable in both criminal and civil trials thus:

“In *S v Sauls & Ors* 1981 (3) SA 172 (A) at 180E-G, DIEMONT JA said:

"There is no rule of thumb or formula to apply when it comes to a consideration of the credibility of the single witness. The trial judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told ... It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense."

In Zimbabwe, much the same approach has been adopted in *S v Nyati* 1977 (2) RLR 315 (A) at 318E-G”.

Again, though enunciated in the context of a criminal trial, in *S v Makanyanga* 1996 (2) ZLR 231 (H) at 235G GILLESPIE J graphically warned judicial officers against allowing the administration of justice to “be the hostage of the (witness) whose insincere but convincing blandishments must prevail over the stammering protestations of truth by the diffident (or) frightened” witness.

A proper consideration of the totality of the evidence on record shows that the court *a quo* misdirected itself in assessing the credibility of Ziswa and Chadwick. It

misconceived the material evidence led by Ziswa, which Chadwick either agreed with or did not controvert.

In my view, two critical factors emerge from the two common cause factors pertaining to the two agreements. The first is that although the two agreements are strikingly similar and complementary, they relate to two different aspects. They are complementary in that the blank spaces regarding the name of the farm and the date of commencement of the lease that were omitted in the lease agreement were provided in the JVA. The second is that the court *a quo* did not relate to the effect of the annotated terms of both agreements. At p 19 of the judgment, the court *a quo* found that:

“He agreed that he took occupation of the farm in terms of a lease agreement and that a second JVA was also signed. He confirmed that the lease agreement signed on 9 January 2009 together with its annotations contains the terms agreed upon by the parties and governed their relationship.” (My emphasis)

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It will be recalled that the annotations on the copies of the agreements produced *a quo* by the parties were the same. The annotations on clause 4 (c) of the lease agreement required Chadwick to produce 10 ha of maize for the lessor and 3 ha of other crops in addition to the rental payment.

In my view, reliance on the rate of 8 per cent did not relegate Ziswa to a “dithering”, “inconsistent” and “greedy” litigant. It does not appear to me that any of the “few examples” highlighted by the court *a quo* had the effect of eroding the probative value of Ziswa’s evidence. It does not appear to me that a vigorous pursuit of one’s perceived rights, even one based on a misconception of the relevant law and requisite proof could conceivably render a witness untruthful. In any event all the posited “few examples” relate to

the construction rendered by Ziswa to uncontroverted facts rather than to a falsification of those facts.

It seems to me that the findings *a quo* that Chadwick was a credible witness ran against the grain of the evidence. A dispassionate reading of his testimony under cross examination shows that he could not dispute and did not dispute the clear evidence on the entry inventory, which showed that he assumed control of the listed leased equipment. It is inconceivable that he would have been able to plough and prepare his four farms with one tractor when the lessor handed and he took over 3 functional tractors. He only complained that the equipment was scrap for the first time in evidence and never at any period during the four seasons he leased the farm. He was ambivalent on whether or not he removed equipment from the farm, and on whether he damaged any property. While he may have repaired some equipment during his tenure on the farm, it is apparent from exhibit 2 that he left the farm equipment and the lands in a desolate state. On his first visit to the farm the IO saw “pure vandalism”. His testimony to that effect was not impugned. Lastly, in his summary of evidence Chadwick deliberately misled the court that he had faithfully abided by all his contractual obligations. These and many other instances too numerous to mention portrayed him as the quintessential deceptive and untruthful witness that judicial officers ought to be wary of.

I, accordingly, agree with Mr *Uriri* that the court *a quo* misdirected itself on the credibility findings that it rendered. The third and twelfth grounds of appeal must therefore succeed.

WHETHER OR NOT THE COURT A QUO ERRED IN DISMISSING THE LESSOR'S CLAIMS IN RESPECT OF RENTALS FOR THE FOURTH SEASON

The appellant claimed rentals for the fourth season in the sum of US\$64 160 as constituting 8 per cent of the gross proceeds of the tobacco produced on the farm in that season. The duty to establish the gross tobacco realization lay with the lessor. In the lease agreement, Chadwick undertook to pay through a stop order system based on the tobacco sales sheet issued at the auction floor. He did not honour the stop order payment method. He was therefore unfaithful to his undertaking and falsely asserted that he abided by his contractual undertakings.

The lessor produced the 15 sales sheets availed to him by Chadwick. They relate to 3 auction floors and cover the period between 6 February 2012 and 19 March 2012. Each auction floor issued the sales sheets in sequential order. The last in sequence captures the total number of bales “sold to date”, their tonnage, average US\$ price per kg, both the gross and net realization as at that date. In respect of Tian Ze auction floor, sales sheet No. 13 dated 19 March 2012 was the last in sequence. The total bales sold as at that date were 798 weighing 85 648 kg at an average price of US\$4.31 realising a gross amount of US\$369 261.37. The last sales sheet issued by the Tobacco Sales Floor was No. 27 issued on 22 March 2012. The comparative figures were 823 bales weighing 70 211kg sold at an average price of US\$2.59 and grossing US\$182 002.08. The single sales sheet from the Zimbabwe Tobacco Leaf was dated 12 March 2012. A total OF 66 bales weighing 6 517kg were sold at USD4.11 per kg for a gross total of USD26 813.55.

The total tonnage sold as at 27 March 2012 was 162 326 kg. The rental computed at 6 per cent would have been US\$34 684.59 while the rental at 8 per cent would have been

US\$46 246, 13. However, the import of case No. HC 5477/12 was that Chadwick still had unsold tobacco on the farm. The thumb suck figures provided from the witness stand by Chadwick of 135 000kg sold at US\$3.67 were a “monstrous” lie. When he testified, he had the correct figures issued at the close of the fourth season. He chose not to disclose them at his peril.

The undisputed testimony of Ziswa that Chadwick’s section manager Kerstell Gentenbach advised him that the records on the farm showed that as at 19 June 2012, a total of 225 000 kg had been baled was, in the circumstances plausible. Ziswa, however computed the rental due to the lessor on estimates of 205 800kg sold at an average price of US\$4.10. On these figures a rental of US\$50 626.80 would have been due at 6 per cent while US\$67 502.40 would have been due at 8 per cent.

The court *a quo* erroneously accepted that US\$21 000 was paid in respect of the fourth season rentals. The evidence showed that Chadwick did not have a history of making payment from the stop order sales. He appeared to have paid towards the closure of the selling season. It cannot be coincidental that he paid US\$21 000 between February and April 2012 after receiving the lessor’s demand for payment in an equivalent amount. It is apparent that the US\$21 000 was paid to defray the outstanding rentals for the 2010-2011 season that had been demanded by the lessor.

I find that the lessor was entitled to 8 per cent of the established gross realization equivalent to US\$67 502.40. However, after accounting for the US\$ 8 808 ordered *a quo* in respect of this claim, the appellant would be entitled to US\$58 694.40.

In the circumstances, the fifth ground of appeal is upheld.

THE DEVELOPMENT VALUE *IN LIEU* OF THE CENTRE PIVOT

The evidence showed that in May 2010, Chadwick submitted a list of 17 permanent developments he made on the farm, amongst which was the centre pivot in question. In the letter dated 10 May 2010, Ziswa accepted the centre pivot as constituting permanent development. Chadwick removed it from the farm ostensibly to effect maintenance and repairs. He never returned it to the farm. On 12 April 2012, the lessor's erstwhile legal practitioners rejected the intimation by Chadwick that it constituted permanent development. In his evidence in chief Chadwick categorically stated that just like a tractor the centre pivot was not a permanent structure. The lessor was therefore correct to remove it from the list of permanent structures erected on the farm by Chadwick.

The court *a quo* misconstrued the lessor's claim to have been a return of the centre pivot. Rather, the lessor claimed the value of the centre pivot as representing the developments that should have been wrought on the farm for the preceding 3 seasons. The lessor reasoned that the centre pivot would have constituted the developments envisaged in the JVA for 3 seasons. While the lessor was prepared to accept the return of the centre pivot in lieu of the 3 seasons' development, Chadwick was not so inclined.

The undisputed evidence of the lessor was that the only permanent structures that were erected on the farm under the JVA were the 11 staff houses (at a cost of US\$2 700) and the payment for the labour used to reconstruct the burnt-out barn, whose cost was not provided. The desolate state of the property Chadwick claimed to have erected as permanent structures belies his testimony to that effect. The only permanent structures he built were the barn and the 11 houses. The finding *a quo* that Ziswa prevaricated on the permanent

improvements erected by Chadwick was therefore contrary to the evidence led. Rather, it was Chadwick who was ambivalent on the point. The evidentiary onus to show the cost of the barn shifted to Chadwick. He did not discharge it.

In terms of the undisputed contents of the lessor's letter of 6 February 2012, the total due for both the lease and JV agreements at 11 per cent was US\$41 219 for the first season, US\$67 375 for the second season and US\$72 875 for the third season. The lessor was entitled to 5 per cent of the first season gross realization and having been paid 8 per cent on the second and third seasons would be entitled to 3 per cent (in view of the finding that he was entitled to 8 per cent in each of these seasons) of the gross realizations due in the second and third seasons. My computations place these amounts at US\$18 735.91, US\$18 375 and US\$19 875, in each respective season. The lessor did not claim for the fourth season for which he would have been entitled to the sum of US\$18 409.75. The failure to claim for their just dues for the fourth season shows that they were not greedy litigants.

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The total amount *in lieu* of developments due to the lessor during the first 3 seasons would have been in the sum of US\$56 625.91 and not the amount claimed of US\$67 506. The value of the staff houses of US\$2 7000 would have to be abated from that amount. The lessor is accordingly entitled to the sum of US\$53 925.91 under this head.

The court *a quo* ought to have granted claim (d) in this proven amount. The seventh ground of appeal must, therefore, succeed.

MAIZE DELIVERIES DUE FOR THE SECOND TO FOURTH SEASONS

In his evidence in chief, under cross-examination and in re-examination Ziswa consistently asserted that his claim for the delivery of 50 tonnes of maize was based on the written agreements. In each instance, he however failed to locate the maize delivery clause in each of the two agreements. Conversely, Chadwick denied liability for the delivery of the 50 tonnes of maize on the basis that the claim was not located in any of the two agreements. He testified that he invariably delivered 12 tons of maize to the lessor out of the largesse of his heart during the second and subsequent seasons that he was on the farm. He estimated that the agreed 40 ha of maize would have yielded 200 tons of maize from which the lessor would have been entitled (at 6 per cent thereof) to 12 tons. Chadwick's testimony in this regard, however, unwittingly confirmed the truthfulness of Ziswa's testimony regarding the existence of the maize delivery agreement.

The delivery of a specific quantity of maize to the lessor, contrary to the denials of Chadwick and the findings of the court *a quo*, is embodied in clause 3 of the JVA agreement. In terms of that clause, Chadwick agreed and was therefore obliged to deliver to the lessor 1.5 tons of maize each month, constituting an aggregate quantity of 18 tons per season.

The failure by the court *a quo* to found liability on the basis of this clause constitutes a clear misdirection. I, however, agree with the alternative finding of the court *a quo* that the lessor failed to establish the value of his loss. I also agree with Mr *Uriri* that, in the circumstances, the court *a quo* should have absolved the defendant from the instance instead of dismissing the claim. This position will be reflected in the order that will ensue.

VALUE OF TOBACCO SEEDLINGS

In his testimony, Chadwick conceded that tobacco seedlings were a crop grown on the farm. The court *a quo* agreed with him that since seedlings that were disposed of to other farms could not be subjected to the stop order payment system, they were not the type of tobacco crop envisaged in the lease agreements. It was common cause that tobacco stolen on the farm or destroyed by hailstorm would have been subject to the rental clause, as long as it was produced on the farm notwithstanding that it could not be sold on the auction floor. By parity of reasoning, it is illogical to exclude seedlings merely because they could not be subjected to a direct deduction at the auction floor. The underlying reason for the rental payment was the production of a crop on the farm. The claim for seedlings nursed on the farm but sold or donated elsewhere did not exclude them from the reach of the agreement. While liability was thus established, it is clear that the quantum due was not established. Again, the court *a quo* ought to have absolved Chadwick from the instance and not dismissed claim (1). The eighth ground ought to partially succeed.

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DAMAGES FOR MISSING AND DAMAGED PROPERTY AND EQUIPMENT

In the judgment *a quo* at p 15 entry 2 dated 12 June 2012 of IO's running diary in the docket is reproduced. It reads:

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

On 15 June 2012 the public prosecutor directed the IO to compare the entry and exit inventories and physically ascertain whether any property was missing. On 19 June 2012, the IO made the following 12th entry in the running diary.

“Both the accused and the complainant have the inventory carrying the same information of farm implements which both of them have signed. I physically checked all the farm implements together with complainant and Richard Banda security officer who was representing the accused. We noted that some implements were available but were in the condition which did not satisfy the complainant. Some farm implements were missing. The accused said that he was in custody of most of the missing implements since he had access to the farm implements when he was running Ziswa farm after he had entered on (sic) a lease agreement with the complainant for the past four years until now.

While I was still on the farm, the accused brought back some of the farm implements which was (sic) in his custody. The complainant is now regarding the returned farm implements as recovered property.

The accused is willing to repair all the farm implements which are not working like the tobacco barns, boreholes, electric pumps and other implements. Complainant is not willing (sic) his implements to be repaired before the case is heard before the court. The final handover/takeover was then done and signed by both complainant and accused who was represented by his security officer, namely Richard Banda.”

The latter entry showed that whole items of equipment rather than just some parts on some of the equipment had been removed by Chadwick from the farm. This was in consonance with the concession to similar effect of Chadwick under cross examination on pp 534-537 of the record of proceedings. I reproduce excerpts of that cross-examination below.

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- “Q. Line 4 of your warned and cautioned statement says all the items on the inventory of stolen property which were at Ziswa Farm when I moved onto the farm can be accounted for as they would be moved from Ziswa Farm to Kelvin Farm where our work is, do you notice that?
- A. Yes
- Q. So, faced with an inventory of the property and the alleged stolen property you say it can be accounted for, that is your reply you notice that?
- A. Yes
- Q. After recording of the warned and cautioned statement did you return any property to Ziswa Farm?
- A. Yes, I think we did, a lot.
- (P 536)
- Q. So even whilst the police were still investigating you were bringing back some of the equipment?
- A. Correct.
- Q. And you accept that at the verification process there would have been a list of the missing equipment, correct?

A. As far as I am aware all of the equipment was returned otherwise, I would have been arrested, otherwise it would have been stolen property, so as far as I am aware every single item was returned and Assistant Inspector N'andu signed for it. But I would like Mr Banda to witness that because he was there, I wasn't.

(p 537)

Q. Okay, so let us sum up your evidence on this aspect, you are happy for us to say that you accept that some equipment was removed, some was returned but you don't know what was returned or the state in which it was when it was returned?

A. According to Banda.

Q. You would rather leave Mr Banda, you do not wish to talk about it, except to accept that it was removed and returned in some state?

A. Yes"

In the summons, the lessor sought compensation for missing property in claim (e) in the sum of US\$187 707 and badly damaged property in claim (f) in the sum of US\$15 905. In oral testimony he deferred to the depreciated replacement cost provided by the valuator he assigned to value the property. The valuator, a highly qualified and experienced chartered accountant was undoubtedly qualified for the job. It was common cause that he did not physically inspect the equipment. He relied on the information as to age and state of the missing and damaged property availed to him by Ziswa. He supplemented deficient information with on-line research. He was shown exhibit 2, the colour photographs of some of the damaged property. He received 34 quotations encompassing each item, which were sourced between 8 October 2012 and 30 October 2015. He prepared an excel spread sheet cataloguing the equipment on the entry inventory and denoting the description and quantities of each item, cost per unit, gross replacement cost, rate of depreciation, the depreciation, the depreciated replacement cost and the supplier of the cost per unit quotation. He applied IAS 16 to compute the depreciated replacement cost of each item. The categories comprised "tractors and related equipment", "building improvements", "building, irrigation, curing and water pumping equipment" and "tools".

The court *a quo* said of his evidence:

“Pange may be an accomplished professional but I have serious difficulties with his evidence. He appears to have been an armchair expert if not a disinterested witness content with only flaunting his professional qualifications and expecting the court to accept his testimony hook line and sinker without justification. He relied entirely on information fed to him by an unreliable witness Ziswa, who has been shown to have a penchant for inconsistencies and wanting to exaggerate claims....From where I am standing, the entire valuation process, except perhaps for the formula gleaned from international standards, was fictitious and extremely unreliable.”

In my view, these strong words blinded the court from appreciating what the task of the valuator was. It is clear that he could not, even if he was so inclined, physically assess the property listed in claim (e) for the simple reason that it was missing and was, therefore not to hand. While he could have inspected the vandalized property on site at the farm, some of that property was captured in graphic colour photographs which were produced *a quo* as exhibit 2. Lastly, his real task was to apply the depreciating rate and his general valuation expertise to the quotations sourced by the lessor. He indicated to the court *a quo* how he went about his task.

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The duty of an expert is to provide appreciable help to the court in arriving at an estimated value of the damages suffered by a party in the position of the present lessor. It is not possible to provide an exact value to such items. The only way he could help the court was to dispassionately apply his valuation knowledge to the task at hand. He discharged that task to the best of his ability. Indeed, even the sceptical Chadwick conceded at p 549 of the record of proceedings that the valuator used an acceptable accounting method, although he was not an expert in farming or agricultural equipment.

The nature of the evidence required in respect to compensatory damages was set out by this Court in the case of *Wynina (Pvt) Ltd v MBCA Bank* SC 27/14 at p 11 thus:

“It is an accepted principle of our law that some types of damage are difficult to estimate and the fact that they cannot be assessed with certainty or precision will not relieve the wrongdoer of the necessity of paying damages for his breach of duty. The principle is not a novel one and decided authorities have gone so far as to state that a

court doing the best it can with insufficient material may have to form conclusions on matters on which there is no evidence and to make allowance for contingencies even to the extent of making a pure guess. See *Esso Standard SA (Pty) Ltd v Katz* 1981 (1) SA 964.”

To similar effect was GREENBERG J in *Arendse v Maher* 1936 TPD 162 where he pertinently observed that:

“It remains, therefore, for the Court, with the very scanty material at hand, to try and assess the damage. We are asked to make bricks without straw, and if the result is inadequate then it is a disadvantage which the person who should have put proper material before the Court should suffer. The means that I have at hand are extremely unsatisfactory, but I propose to rely to some extent on the figures appearing from the decision in *Chisholm*’s case and to be guided by those figures.”

It seems to me that had the court *a quo* appreciated that in terms of clause 4 (d) of the two agreements Chadwick was “responsible for the payment of the cost of the repair and maintenance of tractors and equipment leased with effect from 1 September 2008” it would not have overly concerned itself with the state and condition of the items at his point of entry. The duty to keep the leased property in a good state of repair was his. The lessor established that he handed usable equipment to him. Chadwick used the property and instead of repairing it, cannibalized some of it and left the other in an unusable state, at exit. Once the lessor had provided the best evidence of the damages he suffered at the hands of Chadwick, he cast the evidentiary burden on Chadwick to show either that no damages were suffered or that they were incurred in a lesser amount. It was not enough for Chadwick to merely fold his arms and criticize the best evidence provided by the lessor without producing alternative evidence.

I am satisfied that the court *a quo* therefore misdirected itself in assessing the probative value of the valuator’s testimony. The assessment of the court *a quo* was inconsistent with the totality of the facts. The decision thereon was reached contrary to the evidence at hand. It stands to be set aside. The ninth ground of appeal in so far as it does not

relate to claim (g) [which was abandoned on appeal] and the tenth ground are accordingly upheld.

In respect of claim (e) the lessor claimed US\$187 707 as set out in Annexure 2 to the declaration. There are 40 sets of missing items. There are no quotations raised for 2 sets. (No. 5 and 22). The amounts claimed in the summons in most of the remaining sets were equivalent to the gross replacement values that appear in the chartered accountant's schedule (exh 3). There are other items in which the amounts in annexure 2 were either higher or lower than the depreciated replacement value in exhibit 3. I have in each of these instances adopted the lower amount for two reasons. The first being that the lessor could not be awarded the higher amount without amending their summons. The second being that the lower amount was the one the lessor proved.

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The total depreciated replacement cost for the proven 38 sets of items less the US\$84 000 granted *a quo* for the LTC electric line would be US\$68 257. The lessor is therefore entitled to this additional amount in respect of claim (e).

Claim (f) relates to the damages claimed for 23 sets of recovered property, which is listed in annexure 3 to the declaration in the sum of US\$15 905. The depreciated replacement cost established in evidence is in the sum of US\$13 831. The lessor is entitled to this amount under claim (f).

The established depreciation replacement cost for barn repairs in schedule 3 is US\$41 000 for claim (h). The claim in the summons is US\$15 008. In view of the plaintiff's failure to amend their summons to reflect the higher amount, the amount due to them is the

lower of the two amounts. They are entitled to the amount claimed in the summons of US\$15 008. It was therefore remiss of the court *a quo* to have granted absolution from the instance.

Claim (j) in the sum of US\$26 313 related to vandalized overhead water storage tanks, pipes, workers houses, underground cables, water reservoirs, cast iron pipes, pump unit, electrics at the borehole and on the transformer. Liability for this claim was established by Ziswa and the IO's oral evidence and reinforced by the photographs (exh 2). The bare denials of Chadwick were insufficient to offset this overwhelming testimony. Chadwick admitted that the cables were dug out from the barns for security reasons and restored at the next curing season. The only issue is whether the quantum claimed was established. The lessor did not prove the depreciated cost of effecting repairs to these vandalized items. The proper relief *a quo* should have been an absolution from the instance and not a dismissal of the claim. This will be reflected in the amended order of the court *a quo* that will ensue.

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IRRIGATION PUMP

The missing pump house pump, which Chadwick took responsibility for damaging forms part of the lessor's claim (e). It is accounted for in this judgment under that head. In the premises, the eleventh ground of appeal is upheld.

COSTS

The conduct of the second defendant in HC 5477/12 and in assuming a leading role in the first defendant's contractual obligations misled the lessor into believing that it had a direct and substantial interest which attracted liability against it in the present matter. This rightly disentitles it from a favourable costs order in this Court. In the light of my findings

above, the costs order granted against the lessor constituted a wrong exercise of the court *a quo*'s discretion.

In its judgment, the court *a quo* did not explain the basis for awarding costs in favour of Chadwick. There was no discernible basis for denying the lessor's costs against the first defendant on the ordinary scale.

In this Court, the lessor has substantially succeeded. In the result, the ordinary rule that costs must follow the result will issue.

DISPOSITION

Accordingly, it is ordered that:

1. The cross appeal succeeds in part with costs.
2. Paragraphs 1, 2 and 3 of the order of the court *a quo* is amended as follows:
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 - "1. The plaintiffs' claims against the second defendant are hereby dismissed with no order as to costs.
 2.
 - (c) The first defendant shall pay to the plaintiffs an additional sum of US\$58 694.40 in respect of claim (a).
 3. The first defendant shall pay to the plaintiffs an additional sum of US\$68 257 in respect of claim (e)."
3. The order of the court *a quo* in respect of paragraph 5 is set aside and substituted with the following:
 - "a. The first defendant shall pay to the plaintiffs the sum of:
 - (i) US\$ 53 925.91 in respect of claim (d).
 - (ii) US\$13 381 I respect of claim (f).
 - b. The first defendant is absolved from the instance in respect of claims (j) and (l)."
4. The order of the court *a quo* in respect of paragraphs 6 and 7 are set aside and substituted with the following:
 - "6.
 - a. The first defendant shall pay to the plaintiff the sum of US\$15 008 in respect of claim (h).
 - b. The first defendant is absolved from the instance in respect of claim (k).
 7. The first defendant shall pay the plaintiffs costs of suit."

UCHENA JA: I agree

MAKONI JA: I agree

Gasa, Nyamadzawo & Associates, cross appellants' legal practitioners

Scanlen & Holderness, cross respondents' legal practitioners