REPORTABLE **(95)**

CONSTRUCTION RESOURCES AFRICA (PRIVATE) LIMITED
v
CENTRAL AFRICAN BUILDING AND CONSTRUCTION COMPANY (PRIVATE) LIMITED
t/a CENTRAL AFRICAN BUILDING CONSTRUCTION

SUPREME COURT OF ZIMBABWE
BHUNU JA, MATHONSI JA AND KUDYA AJA
HARARE 10 NOVEMBER 2020 & 14 OCTOBER 2022

R.H. Goba, for the appellant

T.S. Manjengwa, for the respondent

KUDYA AJA: The appellant appeals against the whole judgment of the High Court dated 14 March 2012, wherein the court *a quo* granted an order for the eviction of the appellant. The appellant was evicted from the respondent's three immovable properties situated in Harare. The eviction awarded punitive costs as against the appellant and its legal practitioner Mr *D. Chinawa*.

THE FACTS

The appellant and the respondent are both companies that are duly incorporated in Zimbabwe.

The two companies signed two separate and distinct but interrelated agreements of sale on 29 November 2004, wherein the respondent was the seller while the appellant was the purchaser. The respondent was represented by Jose Eduardo Vieira, who together with his father (Luis Vieira), were its sole shareholders and directors. The appellant was represented by Danny Musukuma, who together with his brother, Lincewesi Musukuma, were also its sole shareholders and directors. The parties denoted the first agreement as "the agreement of sale" and the second "the deed of sale", which terms I hereinafter adopt in this judgment.

The agreement of sale encompassed the sale of specified movable assets for the sum of US$219 000 payable on the date of signature in Zimbabwean dollars at the auction rate prevailing on 26 November 2004 (the effective date). In terms of clause 5, interest would accrue from the due date of payment at the rate of 7½ per centum per annum calculated on a daily basis. The assets comprised office furniture and fittings, motor vehicles, radios, water pumps, generators and "workshop assets". It was, however, common cause that the appellant did not pay the purchase price for the movables on the date of signature but had managed to do so in the local currency equivalent as at the date of summons.

The deed of sale, whose effective date was 29 November 2004, comprised the sale of three immovable properties for the total sum of US$481 000. These are identified in clause 1 of the agreement as:

> "a) Certain piece of land situated in the District of Salisbury, Stand 272, measuring 3 145 square metres, (8 Whites Way, Msasa, Harare) and held under Deed of Transfer No. 6884/92 together with the permanent improvements situate thereon valued at US$296 000(Two hundred and Ninety-Six Thousand United States Dollars).

b) Certain piece of land situated in the District of Salisbury, Stand No. 195, measuring 4 794 square metres, (8 Lorely Close, Msasa, Harare) and held under Deed of Transfer No. 05691/94 valued at US$97 000 (Ninety-Seven Thousand United States Dollars).

c) Certain piece of land situated in the District of Salisbury, Stand No. 8 measuring 8 790 square metres, (8 Comet Close, Mount Pleasant, Harare) held under Deed of Transfer No. 3404/78 valued at US$88 000 (Eighty-Eight Thousand United States Dollars).

together with all permanent improvements thereto (hereinafter referred to jointly as "the Property")".

The purchase price of US$481 000 was payable in instalments on the dates and in the amounts specified in the attachment to the deed of sale, Annexure A. The amounts payable were apportioned between the United States dollar and Zimbabwe dollar. Default interest accrued at the rate of 7½ per cent per annum from the date of default to the date of payment.

By letter dated 30 November 2004, the respondent undertook, "upon settlement of the full purchase price for the Deed of Sale and agreement of sale", to deliver to the appellant "all share certificates of shares of the Company" and duly signed and stamped share transfer forms, the certificate of incorporation, memorandum and articles of association, the share register, the minute book and other company documents, hold the requisite meetings of directors and shareholders to transfer the company to the appellant and thereby procure the resignation of the directors, secretary, public officer and other officers of the company. In the same letter, the respondent further promised to procure the transfer of the company's post office box and all telephone and mobile communication lines to the appellant "upon signature" of the agreement of sale.

It was common cause that the letter did not alter, amend or supplant the terms stipulated in the agreements. It, however, appears to have clarified that the respondent was not sold as a going concern.

In December 2004, the appellant commenced the utilization of the movable assets and by 25 January 2005, the respondent had effected the undertakings premised upon the signature of the agreement of sale.

On an undisclosed date, Luis Vieira, as the Chairman of the respondent's board of directors purportedly "read, approved and signed 'Minutes of Meeting of Members of the Company held at Harare on 3 January 2005'". The minutes recorded that the Chairman, Managing Director Jose Vieira, Danny Musukuma and Mrs F Maio attended the meeting. The only business dispatched at that meeting was the appointment of Danny Musukuma "as a new director of the company with immediate effect." On 20 September 2005, Luis Viera also signed a CR14 form, which showed that on 3 January 2005, he and Jose Vieira resigned their directorships and were replaced by Danny and Lincewesi Musukuma while LAWAI resigned as Secretaries and were replaced by Samerstone Services. The CR14 was, however, lodged with the Registrar of Companies by Samerstone Services on 14 September 2006.

Between 11 March 2005 and 27 October 2006, the parties exchanged correspondence in which the respondent demanded payment of and the appellant invariably undertook to pay the outstanding purchase price.

On 1 August 2006, the Zimbabwe dollar was revalued by the removal of 3 zeroes under the Presidential Powers (Temporary Measures) (Currency Revaluation) Regulations, 2006 SI 199/2006.

As at 4 January 2006, the appellant had paid ZW$2 530 000 000, which as my computation will show later on in this judgment was equivalent to US$242 624.25 and purportedly owed ZW$ 1 480 578 188. These amounts were exclusive of interest. A further payment of ZW$500 000 (revalued) was rejected and returned to the appellant on 2 August 2006. The purported sum of ZW$ 1 480 578 188 was still owing on 25 October 2006.

By letter dated 7 November 2006, the respondent accorded the appellant 30 days' notice within which to rectify the breach failing which the agreement would be deemed cancelled. On 6 December 2006, the appellant tendered a cheque payment of ZW$2.5m "in full and final settlement". The cheque was rejected and returned to the appellant. On 12 December 2006, the respondent duly cancelled the deed of sale. The cancellation was premised on the appellant's failure to pay the United States dollar denominated portion of the purchase price either in hard currency or in local currency at the agreed rate of conversion.

On 9 January 2007, at the instance of Jose Eduardo Vieira, the respondent issued summons for the vindication of the immovable properties and concomitant eviction of the appellant therefrom. In its amended plea of 17 May 2007, the appellant conceded that the three immovable properties were owned by the respondent but denied being in occupation thereof. The matter failed to commence on the initial trial date on 12 July 2007 but eventually did so on 14 June 2010.

However, between 28 May 2008 and 9 March 2009, notwithstanding that the properties were *res litigiosa* and pleadings had been closed in the matter, the immovable properties were purportedly sold and transferred by the appellant at the instance of the Danny Musukuma board to some third parties. These third parties did not join and were not joined to the vindicatory proceedings.

THE CONTENTIONS *A QUO*

The proceedings in the court *a quo* and in this Court primarily revolved upon the deed of sale. Specious references were made to the agreement of sale in a bid to establish whether or not the appellant purchased the respondent "as a going concern" and whether or not it paid the aggregate purchase price for the immovable properties.

The respondent submitted that as it was the common cause owner of the immovable properties at the time of *litis contestatio* (the close of pleadings) by the appellant's rejoinder of 7 June 2007, and as it had established that the property was possessed by the appellant or its privies against its will, it was entitled to recover possession from whomsoever was in possession.

Per *contra*, the appellant contended that its sole shareholders and directors became the sole shareholders and directors of the respondent on 3 January 2005 and thereafter ran the respondent's affairs. It relied on the purported minutes of even date and the CR14 signed by Luis Vieira on 20 September 2005 and lodged by the appellant's secretaries (Samerstone Services) with the Registrar of Companies on 24 January 2006. It further contended that the common cause fact that the immovable properties were either occupied by the respondent's "current directors" or had been sold by the respondent at the instance of the new directors, negated the vindicatory action instituted at the instance of the former directors, long after they had vacated office. It also took the alternative contention that in the absence of a resolution by the Vieiras, as directors of the respondent, the institution of the proceedings was unauthorized and, therefore, an irredeemable nullity.

The appellant, additionally, contended that the 30 days' notice was defective in that it did not state "the exact sum due and owing" as envisaged by s 8 (1) and (2) of the Contractual Penalties Act [*Chapter 8:04*].

In reply, the respondent contended that the purported minutes were forged, the signature of Luis Viera on the CR14 was procured by Danny Musukuma by deceit and its lodgment with the Registrar of Companies a nullity. Its contention was premised on the appellant's failure to fulfill the conditions precedent necessary for the transfer of its equity and directorship embodied in the deed of sale and amplified in the letter of 30 November 2004. It also argued that the appellant's failure to establish the validity of the CR14 further proved that the Vieiras never lost their directorship and shareholding to the Musukuma brothers. Consequently, the acts undertaken at the instance of the Vieiras were valid while those that were instigated by the Musukumas were null and void and of no force or effect.

In respect of the alternative contention, the respondent argued, on the authority of *Smith v Kwanonqubela Town Council* 1999 (4) SA 947 at 952F-G and *Uitenhage Municipality v Uys* 1974 (3) SA 800 (E) at 806H-807H, that the defect had been cured by and at its Extraordinary General Meeting held on 17 February 2009. The respondent further disputed the construction rendered by the appellant to s 8 (1) of the Contractual Penalties Act.

<u>THE FINDINGS OF THE COURT *A QUO*</u>

At the close of the respondent's case, in a separate judgment handed down on 2 May 2011, the court *a quo* dismissed the application to absolve the appellant from the instance.

In the appealed judgment, the court *a quo* held that the appellant had paid the Zimbabwe dollar component under the first agreement in full. Regarding the deed of sale, it adjudged the sole witness called by the appellant, Danny Musukuma, to be an unimpressive and evasive witness and generally accepted the evidence of the respondent's sole witness Jose Vieira. It further held that the appellant had not paid the full purchase price in the currency apportionments and manner specified in Annexure A. It, consequently, found that the Vieiras could not have relinquished either their directorships or shareholding to the appellant's sole directors and shareholders. This finding was buttressed by the concession elicited from Danny Musukuma in cross examination that the purported minutes of 3 January 2005, which he produced in evidence, were fake. It was common ground that, firstly, no such meeting was ever convened, secondly Danny Musukuma never attended the said meeting and lastly, Jose Vieira did not and could not have been in attendance as his passport showed that he was not in Zimbabwe between 1 December 2004 and 1 November 2009.

The court *a quo* further held that the transfer taken at the instance of the Musukuma brothers constituted a fraudulent act, which could not bar the appellant from recovering its property from whosoever was in possession thereof. This was because the Musukumas knew that the appellant had not discharged the contingent obligation upon it to pay the full purchase price, which would have triggered the transfer of the equity of and power to run the respondent to them. They also knew that they were alienating res *litigiosa* properties.

On the authority of *Chatrooghoon* v *Desai & Ors* 1951 (4) SA 122 (N) at 127B-D and *Rautenbach v Venner* 1928 T.P.D 26, it upheld the respondent's contention that s 8 (2) of the Contractual Penalties Act [*Chapter 8:04*] did not require a plaintiff to state "the exact sum due and owing by the defendant" in the notice of cancellation. It reasoned that the exact amount of the local currency payable could only be known on the date the appellant elected to make payment.

It upheld the cancellation of the deed of sale on two grounds. The first was that the notice was in compliance with the provisions of s 8 (1) of the Contractual Penalties Act. The second was that the appellant had demonstrably failed to prove that the amount tendered on 6 December 2006 would have adequately discharged the outstanding debt.

The court a *quo* also upheld the respondent's contention that Annexure A required the appellant to pay the United States dollar denominated purchase price in the specified ratio of 45 per cent hard currency to 55 per cent local currency. It found that while the United States dollar monthly component was static, the local currency component, being dependent on the prevailing auction rate on the date of payment, could not and was not intended by the parties to be constant. The likelihood of the fluctuation of the local currency component of the purchase price over the payment period, in its view, militated against a constant instalment figure. Consequently, the constant local currency figures embodied in annexure A were only given as an example of what the appellant would pay if the future auction rates remained static. The court *a quo*, therefore, found that the appellant had not paid the hard currency component of the purchase price either in that currency or in the equivalent local currency amount.

The court *a quo* found the requirements for *actio rei vindicatio*, which are set out in *Chetty* v *Naidoo* 1974 (3) SA 13 (A) at 20B-C, were met. It further found that the appellant had failed to establish its right to retain possession of the properties which had passed to it on 29 November 2004. It, accordingly, granted the vindicatory relief and ordered the eviction of the appellant and its privies from the three immovable properties in question.

GROUNDS OF APPEAL

On 28 March 2012, the appellant filed 18 grounds of appeal. On 20 October 2014, it gave notice of its intention to substitute them with 6 grounds. At the commencement of the appeal hearing the Court, by consent of the parties, duly substituted the former grounds of appeal with the following:

“1. The court *a quo* erred in law in relating to a matter which had not been properly authorized and under circumstances in which those who could properly authorize it had not brought the proceedings.

2. The court *a quo a fortiori* erred in concluding that the plaintiff (respondent) was properly before it particularly given that those who litigated under its name had executed an extant public document in which they surrendered their interests in respondent.

3. The court *a quo* further erred in effectively invalidating respondent’s CR14 at no one’s motion and instance.

4. The court *a quo* erred in coming to the conclusion that the agreement between the parties had been properly cancelled under circumstances where no valid notice of cancellation had been given and there had been no jural act of cancellation exercised *ex nunc*.

5. The court *a quo* further erred and misdirected itself in coming to the conclusion that cause existed for the termination of the agreement between the parties (on the false

prompting of Mr. Vieira) and in then making an order which was not sensitive to the equities of the matter.

6. The court *a quo* erred in coming to the conclusion that "respondent" had met the requirements for an *actio rei vindicatio* and in even taking the view that respondent could sue for the vindication of immovables, the subject matter of the litigation.

PRAYER

The appellant prays for the setting aside of the order of the court *a quo* and the substitution therein with an order that the claim for eviction as per the summons be and is hereby dismissed with costs"

THE ISSUES

The six grounds of appeal raise the following issues:

1. Whether the respondent was properly before the court *a quo.*

2. Whether
   (i) The notice to cancel was precise.
   (ii) The deed of sale was cancelled.

3. Whether the requirements of the *actio rei vindicatio* were established.

THE ARGUMENTS BEFORE THIS COURT

THE APPELLANT'S CONTENTIONS

At the commencement of the hearing, Mr *Goba*, for the appellant, sought the admission of the certified record of criminal proceedings in the Regional Magistrate's Court in Case No. R 715/10. It was common ground that a prior application (Case No. SC 402/13) to lead evidence on appeal in this matter, which was based on the same record, was dismissed with costs by this Court on 15 March 2015. The Court, accordingly, dismissed the application as it had been authoritatively settled in the earlier proceedings.

Mr *Goba*, submitted that, in the absence of a resolution issued prior to the institution of action on 9 January 2007, the respondent could not properly litigate *a quo*. He anchored his submission on the CR14, the public document wherein the Musukumas and not the Vieiras, were depicted as the only subsisting directors of the appellant. He argued that in the absence of a resolution by the subsisting directors to institute the vindicatory action, the proceedings under appeal were improperly taken by the former directors. He also took the alternative point that even if the Vieiras were the subsisting directors of the respondent, the proceedings would have been afflicted by the absence of a resolution authorizing the institution of the proceedings. He further contended that the improperly instituted proceedings could not be cured by the purported ratification done at the instance of the Vieiras on 17 February 2009. He took the further alternative point that even if the appointment of the Musukumas was found to be defective, the acts undertaken by them as directors were not only deemed to be valid by the provisions of ss 12 and 13 of the Companies Act [*Chapter 24:03*] but were also saved by the provisions of s 170 of the same Act.

Counsel for the appellant also relied on the "immediate delivery" of the movables and goodwill on 30 November 2009 and subsequent delivery of the motor vehicles on 14 December 2004 and the telephones and postal box on 25 January 2005 to argue that the respondent had been disposed of as "a going concern", a term he interchangeably substituted with the disposal of the Vieiras' shareholding in the respondent. He argued that, on the authority of Christie's *Business Law in Zimbabwe* (Juta 1985 at p 150) and *Laing v South African Milling Co Ltd* 1921 AD 387 at 396, the delivery of the movables transformed the agreement of sale into a credit sale, the effect of which was twofold. Firstly, ownership of the movables passed to the appellant on the date of delivery and not on the envisaged date of full payment. Secondly, such a credit sale evinced a clear intention to not only dispose of movable assets and immovable properties separately, but of the respondent itself as a going concern. He sought to buttress his contention by reference to the immediate delivery of occupation of the immovable properties on the date of signature, the passing of profit in both agreements and the purported appointment of Danny Musukuma as the principal officer of the respondent.

Mr *Goba* further contended that the purported cancellation of the deed of sale was a nullity. He argued, firstly, that the phrase **"**of the breach concerned**"** in s 8 (2) (b) and (c) of the Contractual Penalties Act denoted the specification of the exact amount owing and not the mere generalization of the breach. Secondly, that the payment tendered on 6 December 2006, which was rejected and returned on 12 December 2006, adequately remedied the purported breach. That in any event, the court *a quo* overlooked the important fact that payment of the purchase price in foreign currency without the requisite exchange control authority was at the time illegal, hence the discharge of the payment obligation in local currency. He therefore submitted that the respondent erroneously cancelled the deed of sale while the court *a quo* also erroneously confirmed the cancellation.

Finally, Mr *Gob*a submitted that the respondent having failed to meet the requirements for vindicatory relief, the court *a quo* erred in ordering the eviction of the appellant. He, therefore, prayed for the success of the appeal, vacation of the order and its substitution by a dismissal order.

<u>THE RESPONDENT'S CONTENTIONS</u>

Per contra, Mr *Manjengwa* for the respondent made the following contentions. The action instituted by the respondent at the instance of the Vieiras on 9 January 2007, without the requisite resolution of the Vieiras as the lawfully appointed directors of the respondent was ratified by them on 17 February 2009. In terms of the pronouncement articulated by NICHOLAS AJA in *Moosa & Cassim NNO v Community Development Board* 1990 (3) SA 175 (A) at 181B, such ratification validated the proceedings, retrospectively to 9 January 2007. The appellant failed to discharge the onus on it to show that it had paid the full purchase price in the manner and method stipulated in Annexure A. The respondent had shown by credible and uncontroverted evidence that the CR14 lodged with the Registrar of Companies on 24 January 2006 was a fake document that was predicated on false minutes of a non-existing meeting. The averments in Luis Vieira's affidavit of 6 August 2009 that Danny Musukuma had taken advantage of his advanced age (85years old) and lack of fluency in the English language and company procedures and tricked him into appending his signature on the fake minutes and fake CR14 were not controverted by Danny Musukuma in his oral testimony *a quo*. The CR14 upon which the appellant nailed its defence was a proven nullity, which could not confer any rights of directorship on the Musukuma brothers. Clause 12 of the agreement of sale and the letter of 30 November 2004 precluded the appellant's appointees from exercising the rights of shareholders and directors prior to the full payment of the purchase price in respect of the two agreements.

He also argued that the two agreements did not transform the sale of the movable assets and immovable properties into the sale of the respondent as a going concern. A sale of assets, which precludes the passing of ownership and transfer of equity in the seller prior to the payment of the purchase price in full and the assumption of the seller's debts and human resources could not be regarded as the sale of a going concern.

He also argued on the authority of *Macape (Pty) Ltd v Executrix Est Forrester* 1991 (1) ZLR 315 (S) at 317H that the prescribed payments in foreign currency for the immovable properties did not contravene the provisions of the Exchange Control Regulations, 1996. That the specific text of clause 4 of the deed of sale denominating a portion of the purchase price in foreign currency rendered the agreement valid.

On the construction of s 8 (2), he maintained that the notice as worded was in full compliance with the phrase "the breach concerned". The respondent was not required to quantify the breach. The appellant's conduct and response of 6 December 2006 exhibited an appreciation of the ascertainable nature of the debt. The appellant breached the deed of sale by failing to pay the instalments delineated in both currencies and the concomitant municipal and utility bills in both alternative currencies and failed to remedy the breach in the 30 days prescribed in clause 13 of the agreement and s 8 of the Contractual Penalties Act.

Regarding the granting of the *actio rei vindicatio,* he submitted that the order could not be defeated by the disposal of the property after *litis contestatio* as at that stage the property would have become *res litigiosa*. He strongly argued for the dismissal of the appeal with costs on the higher scale.

<u>RESOLUTION OF THE ISSUES</u>

I proceed to resolve the issues *seriatim*.

WHETHER THE RESPONDENT WAS PROPERLY BEFORE THE COURT A QUO

In our law, it is trite that an artificial person, and especially a registered company, is a legal person distinct from its members, which can only litigate through an authorized natural person. The authority of such a person is generally conferred by a properly promulgated resolution issued by the artificial entity in accordance with its constitutive instruments comprising articles of association, a charter or constitution or even a legislative enactment. Where the institution of the proceedings is impugned, sufficient evidence must be availed, which satisfies the court that the litigation in the name of the artificial entity is being brought by an authorized natural person at its behest. See *Mall (Cape) (Pty) Ltd v Merino Ko-Operasie BPK* 1957 (2) SA 347 (C) at 351H-352A, *Cuthbert Elkana Dube v PSMAS* SC 73/19 at paras [38] and [41], *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Ors* 1995 (4) SA 790 at 803F, *Madzivire & Ors v Zvariwadzwa & Ors* 2005 (2) ZLR 148 and *TFS Management Co (Pvt) Ltd v Graspeak Investments (Pvt) Ltd & Ors* 2005 (1) ZLR 333 at 336F-337G.

In terms of article 13 (f) of the respondent's articles of association a minimum quorate of 2 directors is empowered to institute proceedings in its name.

It is axiomatic that a company, such as the respondent, acts through its directors. It must therefore follow that the answer to the first issue must perforce depend in part on who between the Vieiras and the Musukumas were the true directors of the respondent. Mr *Goba* impugned the finding made *a quo* in favour of the Vieiras. He argued that the finding was contrary to the CR14, a public document lodged with the Registrar of Companies, which showed that the Vieiras resigned their directorships and were simultaneously replaced by the Musukumas on 3 January 2005. He therefore contended that the Vieiras could not direct the respondent to institute proceedings, some 2 years after the termination of their tenure as directors.

It was, however, common cause that the CR14 in question was based on nothing. It was derived from the purported minutes of 3 January 2005. The minutes were a record of a meeting purportedly held on that date. The minutes were produced by the appellant's sole witness, Danny Musukuma, and signed at his instance, by Luis Vieira. At the time Luis Vieira was aged 85. He was proficient in Portuguese but not in English. He claimed that he was deceived into signing the purported minutes and the CR14 by Danny Musukuma. His claims were not disputed by Danny Musukuma. The probabilities also favoured his claims. It was common ground that at the time Luis Vieira purportedly resigned, the full purchase price had not been paid. It is highly unlikely that he would have resigned his directorship and handover his company to the Musukuma brothers before the appellant had paid the purchase price in full. It was also common cause that Jose Vieira was out of the country when the meeting was purportedly held. A proper assessment of the totality of the evidence adduced *a quo* clearly established that no meeting of the respondent was ever held on 3 January 2005, the purported minutes of that day were false and the CR14, which was founded on those minutes was not only fake but also invalid.

An invalid CR14 is a nullity. It could not therefore have conferred any rights of directorship on the Musukuma brothers. It would also not require a court order to set it aside. See *Ngani v Mbanje & Anor* 1987 (2) ZLR 111 (S) at 115E-F and *Jensen v Acavalos* 1993(1) ZLR 216

(S) at 220C-D and *Guwa & Anor v Willoughby's Investments (Pvt) Ltd SC* 31/2009 at p 3 and *TBIC Investments (Pvt) Ltd & Anor v Mangenje & Others* 2018 (1) ZLR 137 (S) at 147B.

Counsel for the appellant's further argument that the invalid appointment of the appellant's appointees to the directorship of the respondent and the acts undertaken by them were preserved by the provisions of ss 12, 13 and 170 of the Companies Act and therefore disentitled the Vieiras from exercising their own directorships is without merit. This is because the presumption of regularity or the Turquand Rule prescribed in s 12 and to which s 13 relates, applies to "any person having dealings with a company" and not to the directors or purported directors of such a company. Even then, such an outsider is not protected against the actions of the director or purported director where, as prescribed by proviso (i) to s 12 of the Companies Act, "he has actual knowledge to the contrary or if he ought reasonably to know the contrary." In my view, the provisions of s 170, which deal with the validity of the act of a director or manager whose appointment or qualification is later found to have been afflicted by a defect, like the provisions of s 12 and 13, were promulgated to protect the rights of outsiders who deal with such a director. They are, therefore, not relevant to the determination of the issue under consideration.

Mr *Goba* sought to buttress the validity of the CR14 by arguing that the respondent was sold to the appellant as a going concern. He relied on the risk and profit clauses embodied in the two agreements and the use of the respondent's name and the transfer of motor vehicles clauses in the agreement of sale. In this respect, clauses 10, 12 and 13 of the agreement of sale and clause 10 of the deed of sale provide as follows:

> "10. That all profit in the assets, the stock and the goodwill shall pass from the seller to the Purchaser on the effective date.

12. The Seller hereby authorizes and empowers the Purchaser to use the trading name "Central African Building and Construction (CABCO)" on its letterheads, advertisements, tenders and or official communications. <u>The purchaser shall have no entitlement however to advertise or hold out to third parties that it has acquired the shares in the Seller. In the event that the Purchaser breaches this clause in any way whatsoever, the Seller reserves itself the right to withdraw the consent set out in this paragraph</u>**.**

13. That for the avoidance of any doubt, the Seller undertakes to provide reasonable assistance to the Purchaser in securing the transfer of the vehicles hereby sold into the Purchaser's name. The Seller undertakes to execute all documents reasonably necessary to give expression to the transfer of ownership."

The risk and profit clause of the deed of sale stipulated:

> "10. That all profit in the Property shall pass from the seller on the effective date, from which date the purchaser shall be entitled to take occupation and shall be liable to pay timeously and in full rates, taxes, electricity, water, refuse removal and other charges or surcharges which are lawfully levied or rendered in respect of the Property, as if the purchaser was the registered owner thereof."

The above clauses must be considered in the context of the other clauses of the agreements. The subject matter of the agreement of sale is identified in clause 1 as "the assets listed in the annexed schedule". Clause 7 specifically "recorded that delivery of the Assets hereby sold shall be effected only against payment of the full purchase price." The restraint of trade clause (clause 11) precludes the respondent from engaging in the construction and building industry in any country in Southern Africa "either directly or indirectly or through its directors, servants or agents." The proviso to clause 12 in turn precluded the appellant from claiming ownership of the respondent.

In the same vein, the deed of sale in clause 7 provided that transfer of "the Property" would be effected by the respondent's conveyancers within a reasonable period after the appellant had fully paid the purchase price to it. Clause 9 precluded the appellant from undertaking structural changes on the Property without the respondent's written approval.

The sale of a company as a going concern entails the disposal of not only the assets of an entity as happened in this case, but also of its shareholding, trade creditors, debtors and the assumption of its human resources, which did not happen in this case. A proper reading of clause 10 of the agreement of sale shows that the respondent did not pass ownership of the "assets, stock and goodwill" to the appellant, as argued by Mr *Goba*. It only passed profit, that is, the use of these assets to the appellant. The other clauses of the two agreements that I have alluded to above further negate the contention that the sale of "the Assets" and "the Property" constituted the sale of a going concern. The two agreements speak for themselves. There was neither a disposal nor a purchase of the respondent's equity.

The sale as a going concern argument is therefore devoid of merit.

The impugned finding of the court *a quo* to similar effect is unassailable. I am, therefore, satisfied that the Vieiras were the true directors of the respondent at the time the vindicatory action was launched by the respondent.

In the alternative, Mr *Goba* argued that the vindicatory action was vitiated by the absence of a prior formal resolution by the respondent authorizing the institution of the proceedings in its name. He contended that such a failure could not be corrected by ratification. Mr *Manjengwa* took the contrary point that the institution of proceedings without a preceding formal resolution was saved firstly, by the concept of unanimous assent, which confers the same authority as would an actual resolution. Secondly, by the ratification, albeit some two years later, of the institution of proceedings at the Extraordinary General Meeting held by the proper directors of the respondent on 17 February 2009.

The concept of unanimous consent is derived from the English law principle of unanimous agreement. The concept prescribes that the consensual decisions made or approved, whether at the same time or separately by the sole directors or shareholders of a company outside the prescript of a formal resolution are valid and binding, provided that they are *intra vires* the memorandum, articles of association and constitution of the company. The principle places the transaction on the same pedestal with a transaction that is strictly compliant with the prescribed formalities of a resolution.

The foundation of the concept was laid out in the following four English cases, which are conveniently set out in *Sugden & Ors v Beaconhurst Dairies (Pty) Ltd* & *Ors*1963 (2) SA 174 (E) at 179H-180H. In *Baroness Wenlock v River Dee Company* (1887) 36 Ch. D. 674 at p. 681 COTTON LJ stated that:

> "And if there is no meeting which is the regular method of directing how the powers can be exercised where the power is not given to the directors; and the shareholders can assent to that which is proposed; the Court would never allow it to be said that there was an absence of resolution when all the shareholders, and not only a majority, have expressly assented to that which is being done. That, however, must be confined to cases where the act done is within the powers of the corporation."

In determining the validity of a contract of purchase concluded by a conflicted board of directors and for which no general meeting of members had been held to approve the agreement but where the evidence showed that they all knew of its terms and accepted them LORD DAVEY in *Salomon v Salomon and Co. Ltd* 1897 A.C. 22 at 57 said:

> "I think it an inevitable inference from the circumstances of the case that every member of the company assented to the purchase, and the company is bound in a matter *intra vires* by the unanimous agreement of its members."

Again, in In *In re Express Engineering Works Ltd.*, 1920 (1) Ch. D. 466 at 471 YOUNGER LJ said:

> "In my opinion the true view is that if you have all the shareholders present, then all the requirements in connection with a meeting of the company are observed, and every competent resolution passed for which no further formality is required by statute becomes binding on the company."

And in *Parker and Cooper Ltd v Reading*, 1926 (1) Ch. D. 975 at p. 984, ASTBURY J said:

> "Now the view I take of both these decisions is that where the transaction is *intra vires* and honest, and especially if it is for the benefit of the company, it cannot be upset if the assent of all the corporators is given to it. I do not think it matters in the least whether that assent is given at different times or simultaneously."

The concept was incorporated into the South African law in *Sugden & Ors v Beaconhurst Dairies (Pty) Ltd* & *Ors, supra*, at 180H-181A where O'HAGAN J said:

> "There is no reason, in my opinion, why the principles followed in these decisions should not apply to the facts of the present case. It is true that sec. 70 *dec* (2) prescribes the formality of a general meeting for the approval of a resolution to which the sub-section relates; but inasmuch as the sub-section was designed for the benefit of shareholders why should the shareholders not be able to waive compliance with the formalities that are ordinarily attendant upon the convening of a general meeting? In my view, where the only two shareholders and directors express - whether at the same time or not - their joint approval of a transaction contemplated by sec. 70 *dec* (2), their decision is as valid and effectual as if it had been taken at a general meeting convened with all the formalities prescribed by the Act.

In South Africa, the concept was entrenched in *Gohlke & Schneider & Anor v Westies Minerale (EDMS) Bpk & Anor*1970 (2) SA 685(A) at 693E and H, where TROLLIP JA pertinently coined the phrase "unanimous assent" thus:

> 'The articles, therefore, only empower a general meeting to appoint directors to fill vacancies caused by retirement or removal of directors, a situation which did not arise in the present case. I agree however with Mr *Coetzee* that the members must have inherent or general power to appoint directors to fill other vacancies caused, for example, by resignation, death, incapacity or disqualification. Usually, as a matter of practice, they would exercise that power by ordinary resolution at a general meeting. But the articles neither require that nor prohibit the power from being exercised by their unanimous assent achieved otherwise than at such a meeting. After all, the holding of a general meeting is only the formal machinery for securing the assent of members or the required majority of them, and, if the assent of all the members is otherwise obtained, why should that not be just as effective?'"

And at p 694C-E he continued thus:

> "This principle of unanimous assent has since been applied in several cases in our Courts (*Gompels v Skodawerke of Prague*, 1942 T.P.D. 167 at pp. 172-3, *per* GREENBERG, J.P. and MILLIN, J.; *Sugden and Others v Beaconhurst Dairies (Pty.) Ltd. and Others*, 1963 (2) SA 174 (E) at pp. 180-1, *per* O'HAGAN, J.; *Dublin v Diner*, 1964 (1) SA 799 (D) at pp. 800-1, *per* MILLER, J.). The English cases in which it has been adopted are collected by Gower in *Modern Company Law*, 3rd ed., at pp. 208-10, to which can be added the Irish case referred to in *Dublin v Diner* by MILLER, J., of *Peter Buchanan Ltd. and Macharg v McVey*, published as a note in 1955 A.C. 516at pp. 520-21.
>
> Because the principle, as applied in those cases, is a sound one, giving effect to the substance rather than the mere form of the members' assent, I think that we should accept it as being settled law. Consequently, the assent of all the members and Sarusas, as evinced by the agreement of 28th January, 1965, rendered clause 8 binding on all of them just as if they had approved it by ordinary resolution in general meeting."

The principle was adopted in this country by SMITH J in *Stuart Annandale v Material Finance (Private) Limited* HH 213/02 at p. 8 thus:

> "There might well have been no formal resolution approved by the directors at a meeting of the board of directors, but the fact remains that the directors did in fact agree to the sale of the shares. Paul Clinton was the one who negotiated the sale with Annandale and who actually entered into the agreement with him. The other director, his father, was the one who received a large part of the purchase price. He must have been well aware that the money he was being given was for the shares. …

> They participated therein, even if it was merely by accepting part of the purchase price. Their combined shareholding was such that, if a meeting of shareholders had been held, they would have been able to carry a resolution to approve the sale because their votes totaled 2002 whereas the sister held only 1000 shares. Accordingly, I am satisfied that the majority of the shareholders of EBC and of Material Finance were well aware of the sale of the CPI shares, and therefore of the Property, and had consented thereto."

And at p 11:

> "As they are all members of one family, they must have been well aware that this action had been instituted".

In *casu*, the vindicatory action was instituted for the good of the respondent on the authority of Jose Vieira, in his capacity as one of the two directors of the company. The conduct of the other director (Luis Vieira) showed that he was not only aware of the institution but fully supported it. The conduct of both directors further showed that they would have been able to carry a resolution to institute the vindicatory action. That conduct effectively falls into the ambit of unanimous assent. In the circumstances, the institution of vindicatory action by the respondent at the instance of Jose Vieira cannot be impugned.

I would also agree with Mr *Manjengwa*, that the ratification of the issuance of summons, albeit 2 years later, also validated the institution of proceedings. While the manner in which the ratification was done was rather unusual, it was not invalid. The Vieiras adopted these measures out of sheer desperation. Their attempts to involve the Registrar of Companies had been unsuccessful. The Musukuma brothers appeared to have succeeded in wrestling the respondent from their grip without fulfilling their contractual obligations. The very essence of ratification is that it is retrospective in effect. It takes place after the event. It is permissible in corporate life. The pronouncements made by the South African Supreme Court of Appeal in *Smith v KwaNonqubela*

Town Council 1999 (4) SA 947 (SCA) at 952F-G are pertinent. See also *Uitenhage Municipality v Uys* 1974 (3) SA 800 (E) at 806H-807H.

I am satisfied that the court *a quo* correctly found the respondent to have been properly before it. In the circumstances, the first, second and third grounds of appeal ought to fail.

<u>WHETHER THE NOTICE OF CANCELLATION WAS PRECISE</u>

Mr *Goba* submitted that the respondent was required by s 8 (2) of the Contractual Penalties Act to state the exact amount owing in the notice of cancellation. He argued that the failure to do so rendered the notice to be invalid. Mr *Manjengwa* took the contrary point that the notice was in exact compliance with the requirements of s 8 (2). The court *a quo* held that the provisions of s 8 (1) and (2) of the Contractual Penalties Act did not require the respondent to specify the exact amount owing.

S 8 (1) and (2) of the Contractual Penalties Act provide that:

"8 Restriction of sellers' rights

(1) No seller under an instalment sale of land may, on account of **any breach** of contract by the purchaser—

(*b*) terminate the contract; or

…………………………

unless he has given notice in terms of subsection (2) and the period of the notice has expired without **the breach** being remedied, rectified or discontinued, as the case may be.

(2) Notice for the purposes of subsection (1) shall—

(*a*) be given in writing to the purchaser; and

(*b*) advise the purchaser of **the breach concerned**; and

(*c*) call upon the purchaser to remedy, rectify or desist from continuing, as the case may be, **the breach concerned** within a reasonable period specified in the notice, which period shall not be less than—

(i) the period fixed for the purpose in the instalment sale of the land concerned; or

(ii) thirty days; whichever is the longer period." (My emphasis)

An instalment sale of land is defined in s 2 as follows:

> ""instalment sale of land" means a contract for the sale of land whereby payment is required to be made—
> (*a*) in three or more instalments; or
> (*b*) by way of a deposit and two or more instalments;
> and ownership of the land is not transferred until payment is completed;"

The general meaning and import of s 8 were espoused by this Court in *Asharia v Patel & Ors* 1991 (2) ZLR 276 (S) at 285B-C thus:

> "In order to constitute a notice of rescission the language used must clearly and unequivocally convey an intention to cancel the contract if the stipulated term is not fulfilled. This requirement is so stated in *Ponisammy & Anor v Versailles Estates (Pty) Ltd* 1973 (1) SA 372 (A) at 385F in these words:
>
> > 'Where time is not of the essence of the contract, but one of the contracting parties elects to make it so, giving a notice of rescission (a unilateral act), he should at least take care that the notice is clear and unequivocal, so that the other contracting party is aware of the consequences of a failure on his part to perform timeously.'
>
> See also *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd* 1985 (4) SA 809 (A) at 830E.'"

In the present matter, the deed of sale constituted an instalment sale of land to which the provisions of s 8 of the Contractual Penalties Act applied. The respondent was entitled to cancel it if the appellant failed to rectify the breach. It was common cause that the appellant was in breach, at the date on which the respondent accorded it the 30 days' notice. It was also common cause that the appellant received the notice prescribed in s 8 (1) on 7 November 2004. The appellant, however, argues that the notice did not provide the full details of the breach. Mr *Goba* contended that the failure violated the appellant's peremptory right, prescribed by s 8 (2) (b) and (c), to be advised of "the breach concerned". Implicit in his contention was the submission that a violation of a peremptory provision of a statute rendered the notice a nullity.

The phrase "the breach concerned" in s 8 (2) is no more than a mirror image of "any breach" and "the breach" that appear in s 8 (1). The word "breach" is not defined in the Contractual Penalties Act. I can only surmise that this is because the Legislature could not predict the multifarious breaches that could arise in contract. It is, however, an ordinary English word, which according to Thesaurus.com dictionary is a synonym, *inter alia*, of "break", "contravention", "infraction" and "violation". It seems to me that the purpose of the notice prescribed in s 8 of the Contractual Penalties Act is to, firstly, inform the defaulting party, in clear and unambiguous language, the infraction that he has committed and secondly, request remedial action from him. All that is required of the innocent party is to adequately advise the defaulter of the breach in a manner that leaves him in no doubt as to what the wrong entails. The contextual setting and factual conspectus of each given case, must, in my view determine the contested construction of the phrase. Naturally, each case depends on its own circumstances and no hard and fast rules to cover all cases are capable of formulation.

In *casu,* the breach, identified in the notice comprised the failure to "effect payment of the full purchase price together with interest", "timeously pay in full, all rates, taxes, electricity, water, sewage, refuse removal and other charges or surcharges" arising from the deed of sale that was entered into on 29 November 2004 in respect of Stand 272 (8 Whites Way), Msasa, Stand 195 (8 Loreley Close) Msasa and Stand 8 (8 Comet Close Mount Pleasant) Harare". The appellant was requested "to rectify the above breaches within 30 days failing which the agreement will be cancelled."

It seems to me that the above contents of the notice adequately notified the appellant of the breach. The conduct of the appellant after receipt of the notice, betrays the fallacy of

Mr *Goba's* contention. At the time the appellant received the notice, it did not exhibit any misapprehension of, or point to any inadequacies in, the notice. It did not, as it had always done in previous dealings with the respondent, request a meeting to discuss and compute its exact indebtedness. Rather, it submitted a cheque payment of ZW$2.5m "in full and final settlement" some 2 days before the deadline came to an end, thereby demonstrating a clear understanding of the notice. In consonance with the pronouncements made in *Chatrooghoon* v *Desai & Ors* 1951 (4) SA 122 (N) at 127B-D and *Rautenbach v Venner* 1928 T.P.D 26, to the effect that a plaintiff was not required to state "the exact sum due and owing by the defendant" in the notice of cancellation, I am satisfied that, in the circumstances of this case, the respondent was not required to state the amount owing.

I agree with the finding *a quo* and Mr *Manjengwa's* submission in this Court that the contents of the notice fell within the ambit of the provisions of s 8 (1) and (2) of the Contractual Penalties Act. The first rung of the appellant's fourth ground of appeal must, therefore, fail.

WHETHER THE DEED OF SALE WAS CANCELLED

The determination of this issue need not detain me. The contention that the notice of cancellation was not followed by a "separate jural act of cancellation" runs contrary to the evidence on record. The cancellation was not made on 7 November 2006, *ex tunc* (from a future date). Rather, on 12 December 2006, the respondent cancelled the deed of sale *ex nunc (*from now or immediately*)*, together with clamant demand for the appellant to vacate the properties. See *Jackson v Unity Insurance Co Ltd* 1999 (1) ZLR 381 (S) at 383C, *Waste Management Services (Pvt) Ltd v City of Harare* 2003 (1) ZLR 571 (S) at p 576F and *Econet Wireless (Pvt) Ltd & Anor v Mobile (Pty) Ltd v Anor* 2013 (2) ZLR 309 (S) at 325C. That letter was not controverted by the appellant. Cancellation, therefore, took place from the time it was communicated to the appellant. See *Bako & Anor v Bulawayo City Council* 1996 (1) ZLR 232 (S) at 240F. In the circumstances, the second rung of the appellant's fourth ground of appeal also fails.

WHETHER THE *REI VINDICATIO* WAS ESTABLISHED

The requirements for a vindicatory action were crystallized in *Jolly v A Shannon & Anor* 1998 (1) ZLR 78 (H) at 88B, where MALABA J, as he then was, stated:

> "The principle on which the *actio rei vindicatio* is based is that an owner cannot be deprived of his property against his will and that he is entitled to recover it from any person who retains possession of it without his consent. The plaintiff in such a case must allege and prove that he is the owner of a clearly identifiable movable or immovable asset and that the defendant was in possession of it at the commencement of the action. Once ownership has been proved its continuation is presumed. The onus is on the defendant to prove a right of retention: *Chetty v Naidoo* 1974 (3) SA 13 (A) at 20A-C; *Makumborenga v Marini* S-130-95 p 2. It follows that the action is based on the factual situation that prevailed at the time of the commencement of the legal proceedings."

Mr *Goba* submitted that the court *a quo* erred in granting vindicatory relief to the respondent when the immovable properties were either occupied by the directors of the respondent or had been sold and transferred by the respondent. My earlier finding that these "directors" were not, in fact and truth, the directors of the respondent, renders the submission unsustainable. In any event, the submission completely overlooked the fact that, in terms of clause 10 of the deed of sale, profit and possession of the immovable properties immediately passed to the appellant on 29 November 2004 and had not been restored to the respondent when its directorships were usurped by appellant's sole directors. The non-encumbrance by the seller in clause 8, the insurance by the purchaser in clause 11 and the caveat registration by purchaser in clause 16, of the deed of sale further entrenched the appellant's possessory rights.

The immovable properties became *res litigiosa* at *litis contestatio* on 7 June 2007. The meaning and import of these terms were enunciated in *Ex Parte Sheriff, Salisbury: Doyle v Salgo* 1957 (3) SA 740 (SR) at 741G-H, where HATHORN J said:

> "The principle relied on by the claimant is recognised in *Coronel* v *Gordon Estate and Gold Mining Co* 1902 T.S. 95 at p 101, and *Hall* v *Howe*, 1929 T.P.D 591 at 594. The principle is that where an action in *rem* relating to a thing is brought and *litis contestatio* (i.e close of pleadings) has been reached, the defendant in the action may not thereafter alienate or mortgage the subject matter of the action which is now *res litigiosa*, to the prejudice of the plaintiff. See also, *Lee Roman –Dutch law* 5th ed., p 238, note 10; *Lee Commentary on Grotius' Jurisprudence of Holland*, p 288; *Voet*, 44.6.3 (*The Selective Voet*, vol. 6, p 595)."

According to Silberberg & Schoeman *The Law of Property* 2nd ed at p 561, a plaintiff who obtains judgment can recover the property from third parties without issuing fresh proceedings because such a judgment is a judgment in rem, which binds the whole world. This view is founded on the remarks of BERMAN J in *Opera House (Grand Parade) Restaurant (Pty) Ltd v Cape Town City Council* 1986 (2) SA 656 (C) at 661E that:

> "The Roman-Dutch authorities, to whom reference has been made above, expressed the view that a *res litigiosa* could be alienated, saving always the right of recourse against third parties by summary process, see *Hall v Howe* 1929 TPD 591 at 594."

The further submission by counsel for the appellant that the court *a quo* erred in granting relief without the joinder of third parties to whom the properties were transferred was misplaced. It is trite that non-joinder of a party does not preclude the taking of judgment against a party such as the appellant, who alienated the property after the close of pleadings. In any event, it was common cause *a quo* that, the respondent had instituted separate proceedings against the third parties in question after it became aware of the alienation.

The final argument taken by Mr *Goba* was that vindicatory relief could not have been granted where as *in casu*, the amount owing was discharged in full in local currency on 6 December 2006. He contended that the respondent declined to accept payment in local currency in preference to hard currency, at a time when payment in hard currency between two locals for a local transaction was prohibited by the Exchange Control regulations. It is noteworthy that, while counsel for the appellant attacked the granting of the *actio rei vindicatio*, he did not impugn the court *a quo's* finding that the onus lay on the appellant to show that it had paid the purchase price for the immovable properties in full.

The contention, however, seeks the determination of whether or not the cheque payment of ZW$2,5m tendered on 6 December 2006 and rejected and returned on 12 December 2006 constituted payment in full, of the amount owing.

The parties did not assist the court *a quo* establish the aggregate amount that was paid by the appellant, towards the purchase price. Indeed, the court *a quo* held at p19 of its judgment that "it would be fair to say that witnesses for both parties struggled to state the precise sum due at any given time".

It is necessary at this stage to tabulate the payments reflected, first, in the respondent's "Schedule of Payments" of 3 May 2006 and second, in the appellant's Settlement Schedule of 25 October 2006.

The Respondent's Schedule of Payments

DATE	ZW$ AMOUNT	EXCHANGE RATE	US$ EQUIVALENT
Dec 2004	430 000 000	5 700	75 439
1 March 2005	125 000 000	6 051	20 658
30 June 2005	150 000 000	9 893	15 162
4 July 2005	100 000 000	17 100	5 848
Oct 2005	300 000 000	78 200	3 836
Nov 2005	100 000 000	66 000	1 515
Jan 2006	600 000 000	82 500	7 273
SUB-TOTAL	**1 805 000 000**		**129 731**
BALANCE	**142 567 250 000**	**250 000**	**570 269**
TOTAL	**144 372 250 000**		**700 000**

The Appellant's Schedule of Settlement

DATE	PAYMENT METHOD	ZW$ (MILLIONS)	AUCTION RATE	US$	
29/11/04		430	5 664.44	75 912.18	
10/12/04	cash	100	5 692.65	17 566. 51	
22/12/04	cash	30	5 692.65	5 269.95	
12/1/05	Direct transfer	300	5 924.94	50 633.42	
4/2/05	cash	150	5 924.94	25 316.71	
27/2/05	chq	125	6 051.33	20 656.62	
29/3/05	cash	300	6 082.06	49 325.39	
29/6/05	Chq	150	9 899.14	15 152.83	
4/7/05	Chq	100	10 150.26	9 851.96	
31/8/05	Cash	250	24 500.54	10 203.86	
6/9/05	Cash	5	26 003.36	192.28	
19/10/05	Bank cheque	300	26 004.45	11 536.49	
14/11/05	cheque	100	26 004.45	3 845.50	
3/1/06	cheque	600	26 004.45	23 072.98	
Sub total		**2 530**		**242 624.25**	
2/8/06	cheque	.5	300	16 666,67	
6/12/06	cheque	2.5	300	83 333,33	
Total		**5.960**		**342 624.25**	

I have interpolated the United States dollar equivalent amounts of the local payments made at the auction conversion rates supplied by the central bank on 30 June 2010 for the period 29 November 2004 to 6 December 2006[1].

The sole witness for the respondent, Jose Vieira testified that as at 7 November 2006, the appellant had, in respect of both agreements paid a total sum of ZW$1 805 000 000, exclusive of the interest due for late payment. He asserted that, converted at the auction rate prevailing on the date of each payment, the said amount was equivalent to US$ 129 731. The amount owing as at that date was in the sum of US$ 570 269, which was equivalent to ZW$142 567 250 000. The Zimbabwe dollar equivalent continued to balloon in tandem with the widening parity rate between the two currencies prospective to 1 February 2009, when Zimbabwe dollarized. His testimony was at variance with the sworn affidavit of Luis Vieira dated 14 November 2005. Luis Vieira asserted that the appellant had paid, as at that date, a total sum a ZW$1 930 000 000.

The sole witness called by the appellant, Danny Musukuma, produced the Schedule of Settlement, which showed that the appellant had, by 4 January 2006, paid a total sum of ZW$ 2 530 000 000, exclusive of the interest due for late payments. (He testified that the appellant did not pay any amount on 29 November 2004. I have therefore excluded the purported globular payment of ZW$430 000 000 shown in the Schedule of Settlement in computing the amount that the appellant had paid as at 3 January 2005.) This was, when converted at the auction rate

[1] Pp251-253 of the appeal record.

prevailing on each date of payment that was availed by the central bank, equivalent to US$ 242 624.25.

At the appropriate conversion rate, the ZW$500 000 000 that was rejected and returned on 2 August 2006 would have been equivalent to US$16 666.67, and cheque payment of ZW$2 500 000 (revalued) to US$ 83 333.33. However, as the later amount was paid in place of the earlier amount, the total paid inclusive of the rejected last payment would have been the revalued sum of ZW$5 030 000, which would have been equivalent to US$ 325 952.58, computed as at the relevant conversion rate on the date of each payment

In view of the congruence of evidence between the evidence of Danny Musukuma and Luis Vieira, I can safely find that as at 4 January 2006, the appellant had, in respect of both agreements, paid the aggregate principal sum of ZW$ 2 530 000 000. This amount was equivalent to US$242 624.25. The amount due in United States dollars was US$457 375.75 while its equivalent local currency would only be known on the date of payment.

Clauses 2, 5 and 6 of the agreement of sale provided that:

> "2. The Purchase Price payable by the Purchaser to the Seller is the sum of US$219, 000.00, **(Two Hundred and Nineteen Thousand United States Dollars)**, hereinafter referred to as the "purchase price.
>
> 5. In the event of any default in payment of any portion of the purchase price, interest shall accrue with effect from the due date of payment on the outstanding balance of the Purchase Price from time to time at the rate of 7 ½ per centum calculated on a daily basis.
>
> 6. The Zimbabwe Dollar equivalent of the United States Dollar shall be calculated at the auction rate prevailing in terms of the Zimbabwe Reserve Bank Auction System as at the effective date."

Clauses 2 and 6 show that while the parties fixed the purchase price in United States dollars, they intended payment to be made in local currency at the auction rate applicable on the effective date. The interest clause, clause 5, prescribed the payment of interest on the default amount from the due date. In this respect, the interest payable by the appellant accrued from 26 November 2004 and continued to do so at the rate of 7½ per cent until the unpaid instalment was liquidated in full.

The computation of the interest payable from the effective date to the last date of the payment of the purchase price in full required expert evidence. I have in mind such organizations as the Interest Bureau of Zimbabwe, whose expertise would have unraveled the total interest payable by the appellant. It may very well be that as the principal amount paid in local currency was equivalent to US$242 624.25, the purchase price in respect of the agreement of sale was paid in full. Perhaps this explains why the respondent did not sue on the agreement of sale.

The currency and method of payment, in respect of the deed of sale, were different. These were, in the main, governed by clauses 4 and 5, which stipulated:

> "4. That the Purchaser shall pay to the Seller the amount of US$481, 000.00 (Four Hundred and Eighty-One Thousand United States Dollars) for the Property (hereinafter referred to as "the Purchase Price"). That, for the purpose of conversion into Zimbabwe Dollars, <u>if necessary</u>, the rate shall be calculated at the auction rate prevailing in terms of the Zimbabwe Reserve Bank Auction Scheme as at the date of payment. (My underlining)
>
> 5. That the Purchaser shall pay the Purchase Price, free of interest, to the seller in Harare, free of bank commission and any bank special clearance charges or other such charges, as set out in Annexure 'A' hereto. Provided however, that should the Purchaser fail to effect payment of any one instalment on due date, interest shall accrue on such amount at the rate of 7½ per cent per annum from date of default to date of payment."

Annexure A apportioned payment at the rate of 45 percent in United States dollars and the balance of 55 per cent in local currency. The due dates were on the month-end of January, February, April, June, September, October, November and December and on 29 March, May, July and August 2005. It is apparent from the way the agreement was structured that the respondent intended to hedge the purchase price against the inevitable deterioration of the local currency during the lifespan of the agreement. The appellant, in turn, was in total agreement with the arrangement. The text of these two clauses, viewed in the prism of both the context and purpose of the agreement reveal a consensual intention of the parties to maintain and preserve the overall value of the purchase price at US$481 000 over the 12-month tenure of the agreement. The import of these clauses was that the appellant was obliged to simultaneously pay the static instalment of US$18 182 in United States dollars currency and an equivalent amount at the prevailing auction rate in Zimbabwe dollars, on each due date. The conditional conjunction, "if necessary" connotes the payment, in the last resort, of the static United States dollar component in local currency. In other words, the appellant would in the event that the appellant was for good cause unable to pay the hard currency component in United States dollars, pay it in Zimbabwe dollars, at the applicable conversion rate, on the due date. The effect being that the appellant would pay both the United States and the local currency component in local currency. It would essentially make a double payment in local currency but at the rate of conversion obtaining on the due date. In the event that the appellant failed to make payment on the due date, interest would commence to run from that date to the date of payment of the requisite instalment in full.

The consummation of an agreement by two *incolas* to make payment in Zimbabwe in foreign currency was not, at the time, prohibited by law. The contention by counsel for the appellant that such an agreement fell afoul the Exchange Control Regulations is incorrect. It runs against the pronouncements of GUBBAY JA (as he then was) in *Makwindi Oil Procurement (Pvt) Ltd v National Oil Company of Zimbabwe* 1988 (2) ZLR 482 (S) at 492D-F that:

> "I am firmly of the opinion that in the absence of any legislative enactments which require our courts to order payment in local currency only, the innovative lead taken both in *Miliangos (v George Frank (Textiles) Ltd* [1975] 3 All ER 801 (HL)) and the subsequent extensions to the rule there enunciated, and in *the Murata Machinery (Ltd v Capelon Yarns (Pty) Ltd* 1986 (4) SA 671 (C)at 673C-674B and 674E) case in South Africa, is to be adopted. This will bring Zimbabwe into line with many foreign legal systems. See Mann *The Legal Aspect of Money* 4 ed at pp 339-340.
> Fluctuations in world currencies justify the acceptance of the rule not only that a court order may be expressed in units of foreign currency, but also that the amount of the foreign currency is to be converted into local currency at the date when leave is given to enforce the judgment. Justice requires that a plaintiff should not suffer by reason of a devaluation in the value of currency between the due date on which the defendant should have met his obligation and the date of actual payment or the date of enforcement of the judgment. Since execution cannot be levied in foreign currency, there must be a conversion into the local currency for this limited purpose and the rate to be applied is that obtaining at the date of enforcement."

The contention is also contrary to the pertinent remarks made by this Court in *Macape (Pty) Ltd v Executrix Est Forrester* 1991 (1) ZLR 315 (S) at 320C-D that:

> "The essential point to be noted is that there is a clear difference between ss 7 and 8. The former proscribes only the actual payment. The latter proscribes both the payment and the underlying agreement to pay. In other words, when one is concerned with payments inside Zimbabwe it is perfectly lawful to enter into the agreement to pay. But without authority from the Reserve Bank the actual payment may not be made. By contrast when dealing with payments outside Zimbabwe it is unlawful even to enter into the agreement to pay without first obtaining the authority of the Minister whose powers have been delegated to the Reserve Bank."

And further at 321A:

> "The contract to pay is lawful. Actual payment in pursuance of the contract is unlawful, without permission. There is no reason why the court should not order payment, subject to the condition that authority is obtained."

Clearly, the payment clause in the deed of sale cannot be assailed on the basis of unlawfulness. It was a valid clause.

It was common cause that at the time of *litis contestatio*, the three immovable properties were owned by the respondent. The respondent established on a balance of probabilities that at the time pleadings closed, the appellant was in possession of these properties. The onus in the form of the evidentiary burden shifted to the appellant to show on balance that it had a right to retain possession of the properties. Instead, it dismally demonstrated that it had not paid the equivalent of the principal sum of US$457 375.75 towards the purchase price of the immovable properties. The tendered cheque payment of ZW$2.5m was only equivalent to US$83 333.33. It was wholly inadequate. The appellant therefore failed to justify possession of the properties in question, at the time pleadings closed.

I note that the question of the equities of the order made *a quo*, which was raised in the second part of the fifth ground of appeal was not canvassed in the court *a quo* or motivated in this Court. I consider it to have been abandoned and will, therefore, not relate to it.

The court *a quo* rightly granted the order of eviction against the appellant. In the circumstances, the fifth and sixth grounds of appeal must fail for lack of merit.

<u>COSTS</u>

The respondent sought costs on the higher scale. The prayer is in accordance with clause 15 of the deed of sale, wherein the parties agreed:

> "That in the event that the Seller consults legal practitioners in order to protect or pursue his rights against the Purchaser in terms of this Deed of Sale or in respect of the Property,

the Purchaser shall meet the legal practitioner and client costs incurred by the Seller and any collection commission properly incurred by the Seller with his legal practitioners."

I also find the conduct of the appellant to have been an unconscionable and unacceptable abuse of the respondent and the legal system. Costs on the higher scale are, therefore, warranted.

DISPOSITION

Accordingly, it is ordered that:

1. The appeal be and is hereby dismissed.
2. The appellant shall pay the respondent's costs on the scale of legal practitioner and client.

BHUNU JA : I agree

MATHONSI JA : I agree

Wintertons, respondent' legal practitioners

Kantor & Immerman, appellant's legal practitioners