GOLD DRIVEN INVESTMENTS (PVT) LTD
versus
FRANCESCA TENDAYI NYABADZA

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 5 November 2013, 6 November and 20 November 2013

Civil Trial

Ms *D Ndawana* with Ms *C. Mabhande,* for the plaintiff
T.C. Masara, for the defendant

MATHONSI J: The plaintiff is a duly incorporated company which has an agreement with the Ministry of Agriculture and the Tobacco Industry Marketing Board ("TIMB") in terms of which it is permitted to enter into contracts with tobacco farmers to fund the growing of flue-cured tobacco which would then be purchased directly by the plaintiff. The defendant is a commercial tobacco farmer carrying out her trade at Two Journey's End Farm in Wedza District.

The plaintiff sued the defendant out of this court for payment of US$18 639-00 together with interest at the rate of 17% per annum from 31 August 2010 to date of payment and costs of suit on a legal practitioner and client scale. It averred in its declaration that it entered into an agreement with the defendant for the provision of crop inputs in pursuance of which it supplied the defendant with inputs worth US$18914-00 for the production of flue-cured Virginia tobacco for sale during the 2009 to 2010 tobacco selling season.

It further averred that the defendant was obliged to market the entire tobacco crop exclusively to the plaintiff in line with the TIMB regulations as the plaintiff was entitled to recover the debt from the proceeds of the sale of the tobacco at the end of the 2009 to 2010 season. In breach of the agreement, the defendant failed to deliver adequate tobacco for marketing and sale to recover the debt only succeeding to deliver tobacco worth $275-51 thereby entitling the plaintiff to payment aforesaid. The plaintiff also relied on an acknowledgment of debt allegedly signed by the defendant.

The defendant has opposed the claim and in her plea she denied ever signing an acknowledgment of debt although she agreed entering into an agreement with the plaintiff.

She completely denied being loaned any crop inputs or financial assistance by the plaintiff maintaining that it was in fact the plaintiff which failed to discharge its obligations in terms of the agreement of the parties as a result of which the defendant made a loss on her crop for that season.

The defendant also counter-claimed for payment of the sum of US$75 475-00 being alleged loss of income occasioned by the plaintiff's failure to provide her with flue-cured tobacco field production support either in material form or financially, as a result of which she was unable to pay her hired workers. She further stated that the plaintiff failed to provide any form of extension, monitoring and advisory service to her in breach of the agreement.

The parties agreed at the pre-trial conference on the issues for trial being;

1. Whether or not the defendant signed an acknowledgment of debt
2. Whether or not the defendant is indebted to the plaintiff in the sum of US$18 914-00 together with interest of 17% per annum.
3. Whether or not the plaintiff failed to discharge its duties in terms of the agreement of the parties.
4. Whether or not the defendant is entitled to damages in the sum of $72 475-00
5. Whether or not the defendant is obliged to pay the plaintiff's costs on a legal practitioner and client scale.

The plaintiff led evidence from 2 witnesses namely, its production manager Tapiwa Moga and its agricultural extension officer, Ray Thompson Tawanda Dobby. It was the evidence of Moga, whose duties involve the procurement of inputs for farmers selected by the plaintiff's field officers using a set criteria, that the defendant was one of the farmers selected after she had been recommended by the plaintiff's bankers, Premier Banking Ltd. After an assessment was conducted at the defendant's farm, the parties entered into a written agreement dated 28 August 2009 which was produced as an exhibit.

Moga stated that although the defendant had initially been contracted to grow flue-cured tobacco on a 30 hectare field, that was later varied to 20 hectare owing to challenges faced in the procurement of inputs. She was then supplied with inputs listed in the Inputs and Loan Distribution Record as read with the Farmer Input Distribution Record, both produced as exhibits, with the latter containing dates, description of the items collected, the quantity and price of each and the signature of the farmer appended upon collection of the items. It is also counter-signed by a representative of the plaintiff.

The witness explained how the inputs supplied are enough for a 20 hectare tobacco field giving statistics. In respect of the 3 budgets from TIMB, Agritex and Kutsanga produced by the defendant to make the point that she was provided with inadequate inputs, Moga shot this down by saying that those budgets are not only irrelevant by reason that they relate to prices for 2013, I note that they do not refer to the 2009-10 season at all, but also that they include some inputs which we not included in the plaintiff's scheme. For instance, the plaintiff's scheme excluded land preparation and labour. In any event, the witness stated, every organisation has its own budget for tobacco production.

Moga went on to say that the defendant was supplied with all the inputs listed on the distribution records namely, Compound C, Ammonium Nitrate, Termik, Dursban, Fenvelerate, Tamaron, Lasso/Alachlor, Decanol and Diesel all valued at $18 914-00. He added that each time the defendant collected the inputs either in person or through a proxy, whoever collected was made to sign in acknowledgment of receipt as appears on the exhibit. In his view, the defendant's denial of receipt of the inputs is not an honest one and cannot be sustained.

He stated that the defendant had indeed acknowledged indebtedness in that amount by signing a stop order form which, as is the procedure, is submitted to the Ministry of Agriculture and TIMB to enable them to deduct money belonging to the farmer after the sale of tobacco and pay it to the contractor, in this case the plaintiff. It is for that reason that $275-51 was deducted from the defendant's dues and paid to the plaintiff by TIMB. He referred to a letter produced as an exhibit, from TIMB dated 25 September 2012 which stated that the defendant had a stop order number 8178 lodged by the plaintiff in the sum of $20 237-98. That stop order could no longer be located. He explained that the figure of $20 237-98 included interest which had been factored in.

On interest, Moga testified that the plaintiff's terms and conditions for the tobacco growing and marketing scheme include interest on overdue accounts which was the CBZ lending rate of 12% plus 5% per annum giving 17% being claimed by the plaintiff.

He stated that the defendant had only delivered 907 kgs of very poor tobacco to the auction floors which tobacco fetched small sums of about 50c, 30c with the lowest price being 15c per unit. This is the kind of low grade tobacco normally associated with residue from good tobacco which would have been graded and removed. This is particularly so considering that during that selling season the national average price was $2,88 per kg. In his

view, there is no way that amount of tobacco could have come from a 20 hectare tobacco field they had financed as it was too little.

Moga said that he had visited the defendant's farm making follow ups in the company of Dobby. During that visit he had observed that the defendant had only managed to put up a crop on only 11 hectares instead of 20 hectares and was in the process of curing the crop. Everything was in order and the defendant seemed on course for a good harvest. Her only problem was that she requested packaging material. The defendant had not complained of any problems in the production of the crop through the field officer overseeing her farm.

Moga complained of the problem of side marketing being experienced by the industry which results in farmers defaulting on their loans because they would have diverted the tobacco crop and sold it using proxies thereby preventing financiers from recovering debts owed to them. He took the view that the defendant was also guilty of side marketing because the tobacco crop he and his field officer had found at the defendant's farm was not only of high quality but was much more than what was eventually delivered to the auction floors by the defendant, the latter having only delivered 9 bales of chaff tobacco weighing only 907 kgs which was of very poor grade. In their professional assessment, they had estimated a yield of about 1500 kgs of good quality tobacco per hectare from the defendant's field. They were thoroughly disappointed.

Under cross-examination the witness readily conceded that the written agreement of the parties had provided for the provision of inputs by the plaintiff to cover a 30 hectare crop of tobacco. However due to the economic challenges that prevailed at the time, the plaintiff had only managed to provide inputs for a 20 hectare crop and the variation of the original agreement was mutually agreed although not reduced to writing. He also readily conceded that the defendant did not sign the acknowledgment of debt relied upon by the plaintiff which was instead signed by a representative of the defendant who also signed for some of the inputs collected on behalf of the defendant. Clearly the signature on the acknowledgment of debt is the same as one affixed on the Farmer Input Distribution record, produced as an exhibit, on 14 August 2009 accepting receipt of Compound C, Dursban, Decanol and Fenvelerate. Indeed the defendant acknowledged the signature as being that of her representative who was however not named.

The witness affirmed that the plaintiff did not contract with the defendant for the provision of funding for labour as they took the view that the defendant was at liberty to find other sources of funding for labour, but needed the plaintiff's consent. She never sought such

consent even though she knew that labour was not part of the package offered by the plaintiff which is why she never approached the plaintiff seeking funding for labour.

This witness, who is highly qualified in the field of agriculture, and holds a Diploma in Agriculture, a Bachelor of Agriculture degree and a Masters degree in Agriculture and boasts of more than 12 years experience in the tobacco industry, presented his evidence very well without attempting to exaggerate anything. He readily made concessions where necessary and was generally useful to the court. I accept his evidence as credible.

Ray Thompson Tawanda Dobby also testified on behalf of the plaintiff. He is an agricultural extension officer employed by the plaintiff. He holds a Diploma in Agriculture and a Certificate in Agriculture, and has several years of experience in his field having worked for Agritex for a long time before joining the plaintiff in 2003. He corroborated the evidence of Moga in many respects adding that he is the one who identified farmers on the plaintiff's behalf who qualified to be offered the inputs scheme run by the plaintiff.

Dobby stated that the defendant was selected because she met the criteria set by the plaintiff. She had a very good seed bed, had ploughed her land in readiness for the tobacco season, had good infrastructure for handling tobacco. He competently explained the process of growing tobacco through all stages demonstrating a good grasp of the business.

He visited the defendant's farm on 3 different occasions. On the 1st visit, he was going to assess the defendant for the plaintiff's scheme. The second visit took place about 26 January 2010. He observed that the defendant had just commenced reaping the crop. He was satisfied that the defendant was doing well, was on course for a good harvest, had no complications as would necessitate any further visits on his part. On this second visit he had found the defendant's husband one Mr Mukondo who however quickly left to attend an emergency leaving him to be shown around by their manager. He observed that the defendant had put tobacco on only 11 hectares and diverted some of the inputs provided by the plaintiff to a crop of maize. This did not bother him at all, as, in his estimation, the defendant's tobacco looked so well that he did not expect it to fail and it was enough to easily pay off what was owed to the plaintiff.

Under cross examination Dobby was quick to accept that his 3 visits to the defendant's farm may not have been ideal but stated that this was informed by the fact that there was really no need for him to make further visits as the crop was good and on course. In addition, the defendant had no complaints which required his further attention. The

monitoring they did was meant to see if the farmer had planted the crop in terms of the contract while advisory service related to any problems requiring intervention.

On the budgets relied upon by the defendant in her counter claim and in advancing the argument that the inputs given to her were insufficient, Dobby was of the firm view that those budgets included other activities, like land preparation which fell outside the scheme run by the plaintiff. This explains why the plaintiff's figures are less than those budgets.

Again this was an impressive witness who exudes confidence and shows a deep understanding of tobacco growing. He was truthful and as such I embrace his evidence.

The defendant also gave evidence. She is a former General Manager of Spray Valley (Pvt) Ltd, a position she occupied from 2001 to 2012 when she left to take up farming on a full time basis. So during the tenure of the agreement between the parties she was not a full time farmer as she was employed elsewhere. This coincides with the evidence of the plaintiff's witnesses that she was never found at the farm.

Although she has stopped tobacco farming, she having diversified to other farming activities of interest to her, she says that she was engaged in tobacco farming for essentially 3 seasons namely 2007 to 2008; 2008 to 2009 and 2009 to 2010. She stated that working on her own before contracting the plaintiff, she did extremely well on a 12 hectare field. She then entered into a contract with the plaintiff for the 2009 to 2010 season, in terms of which the plaintiff was required to provide inputs to enable her to grow a 30 hectare field with a minimum yield of 75 000 kgs of tobacco, based on her past experience. She understood that contract to mean that the plaintiff was also required to provide funding for payment of labourers' wages. Thinking that she was covered financially in respect of labour, she put up a tobacco crop on 30 hectares.

If she had not been assured of that funding she would have only planted her usual 12 hectare field. The plaintiff did not provide funding for labour in breach of the agreement. It also provided insufficient inputs which were not enough to cover 30 hectares of crop. She produced a variance report showing what TIMB recommends as standard inputs per hectare, what the plaintiff provided and the variance.

I do not consider it necessary to even go further into that variance because the defendant herself testified that her 30 hectare tobacco crop was very beautiful. It was doing so well right up to the reaping stage meaning that whatever inputs were provided must have been balanced and enough to realise a beautiful crop which was ready for reaping. The defendant stated that the only reason she was unable to achieve a good yield in the end was

that the crop was lost at reaping stage because the plaintiff did not provided funds to hire labour to harvest the crop and "unfortunately I lost my beautiful crop and had to be hospitalised at some stage".

To my mind, the issue turns on the determination of whether the parties contracted for the provision of funding for labour. I shall return to that later.

The defendant testified further that even the list given by the plaintiff as inputs she received, was incorrect because although she signed the warehouse issue voucher signifying receipt of the inputs set out therein, she at times did not receive what she signed for because when she went to the warehouse she would at times find that the items were not in stock. Again this is a general statement not borne by the evidence other than the issue of the 300 kgs of termik listed as having been given to her when in fact she only received 100 kgs, the defendant was unable to demonstrate how the plaintiff's documents showing collected inputs were false.

In fact the entire evidence of the defendant regarding what she received is demonstrably unreliable. This is particularly so considering firstly that she had inputs enough to produce a "beautiful crop" which was ready for reaping. More importantly, in her plea, which she did not even attempt to amend right up to the end of the trial, the defendant was steadfast in her averments that she did not receive anything from the plaintiff. In para 2.3 she stated:

> "Defendant avers that the plaintiff failed to discharge its obligations in terms of the agreement. Defendant denies that she was at any time loaned US $18 914-00 in the form of crop inputs and financial assistance by the plaintiff."

Now it is trite that where the evidence of a party is at variance with that party's pleadings it cannot be relied upon. It must be rejected. I find it strange that the defendant would have succeeded in putting up a beautiful crop on 30hectares, instead of the 20 hectares alleged by the plaintiff, if the inputs that she received were insufficient for the purpose. I therefore find sanctuary in the clearly reliable evidence of the plaintiff that the inputs were enough for 20 hectares, and that the defendant actually planted 11 hectares and not 30 hectares as she claims. It is for that reason that the crop was beautiful. I therefore make a finding that the defendant did not lose 30 hectares of crop.

The defendant also accepted the contents of the letter from her then legal practitioners, Wintertons, dated 14 April 2011 which is part of the exhibits, in which she

admitted receiving inputs worth US$16 884-00 instead of the US$19 962,48 then being claimed by the plaintiff. As to what then informed her plea, one is left to wonder.

Regarding the acknowledgement of debt, and the stop order she allegedly signed as evinced by the letter from TIMB, the defendant denied signing both documents. She however, accepted as I have said, that the acknowledgement of debt was signed by her representative. She denied that it was binding on her because that representative did not have a power of attorney to bind her. On her counter claim of $72 475-00 as loss of income owing to the alleged breach of contract by the plaintiff, the defendant stated that if the plaintiff had supplied her with funding for the labour and inputs in terms of the budgets that she produced she would have produced 75 000kgs of tobacco which she would have sold at the rate of $3,20 per kilogram to yield $240 000. The $3,20 per kilogram is derived from her performance in years before her contract with the plaintiff. This is despite the fact that it is common cause that the national average yield for the relevant period was $2,88. The defendant took the view that after deducting the cost of inputs, she would have remained with roughly$120 000-00 profit although she has opted to claim only $72 475-00.

Asked why she was relying on her own previous performance which was in respect of only 12 hectares instead of the national average to compute her loss, the defendant stated that this was because had she not been disturbed by the plaintiff's contract farming, she would have continued doing well and traded at $3,20 per kilogram, that figure was not static. In fact she agreed that prices fluctuate. More importantly, the price of $3,20 was achieved on a crop of 12 hectares and not 30 hectares. As if that was not enough, her counter claim is based on figures contained in budgets given by institutions like TIMB which, on their own, do not state that they relate to the 2009 to 2010 season. In fact they were produced in 2013 raising the possibility that these may be current prices.

Significantly, the evidentiary value of those budgets is also very low because the authors are unknown. They were not called to come and testify in defence of the estimates and their qualifications are unknown. In my view nothing can be gained from these budgets.

The defendant did not make a good witness. I have already alluded to some of the contradictions in her testimony like her decision to depart from the contents of her plea and her inability to justify her claim that no inputs were received from the plaintiff when she herself as well as her representative signed for them. She could also not explain her departure from an earlier admission made through Wintertons.

I now turn to determine the issues for trail. The question of whether the defendant signed an acknowledgment of debt resolves itself easily from the evidence. The acknowledgement of debt produced by the plaintiff, which was signed by the plaintiff on 14 September 2009, was not signed by the defendant but by her representative who also signed for some of the inputs collected on that date. I accept the evidence led by the plaintiff that a stop order was signed by the defendant and submitted to the Ministry of Agriculture and TIMB. It was on the strength of it that deductions were made from the defendant's sales to pay the plaintiff.

The significance of that stop order however pales when regard is had to the concession made by the plaintiff that it accepts the defendant's admission that she received inputs worth $16 884-00 which figure takes into account the fact that there was under – delivery of termik. The defendant only received 100kgs termik instead of 300kgs claimed.

It was argued on behalf of the plaintiff that although she did not personally sign the acknowledgement of debt, produced by the plaintiff, she is still bound by its terms because it was signed by her representative who had authority to bind her. For that reason its terms bind the parties. In making the point that the defendant's representative had apparent authority to bind the defendant, Ms *Mabhande* who made the closing submissions relied on the authority of *Malinga & Anor v Dziva Anor* HB 29/08 (unreported) where NDOU J stated at p 3 of the cyclostyled judgement that:

> "The only issue left for me to determine is whether there is apparent authority. It is trite law that a person who, intending or apparently intending that the representation is to be acted upon, represents, or permits it to be represented to a third party that he has given authority to another, becomes bound to a third person if the third person, induced by the representation, enters into a transaction reasonably believing that the other person has the authority which he has been represented to have – *Monzali* v *Smith* 1929 AD 382 at 385; *Stirling & Ors* v *Federated Insurance Co Ltd* 1983 (1) SA 897(W); *Maytham* v *Logan* 1917 SR 801 at 85; *Seniors Services (Pvt) Ltd* v *Nyoni* 1986(2) ZLR 293(S) at 299 and *Tank* v *Jacobs* (1881) 1SC 289 at 290"

In this case no evidence whatsoever was led to even begin to suggest that the unnamed agent had authority. Nothing was said to point to the grant of apparent authority in the signing of the document, other than to refer to a document signed by the same person to acknowledge receipt of inputs.

The acknowledgment of debt itself does not state that it was signed by a representative of the defendant on the defendant's behalf. Quite to the contrary, it is a glaring misrepresentation as it purports to have been signed by the defendant when it was not. In my

view, there is no way the signature of the defendant's representative on the Farmer Input Distribution Record, acknowledging receipt of inputs, could be interpreted as apparent authority to bind the defendant in the acknowledgment of debt. I conclude therefore that not only did the defendant not sign the document, it is certainly not binding on her and its terms cannot be imputed into the agreement of the parties.

The question of the defendant's indebtedness to the plaintiff should not detain us at all. Although the defendant pleaded that she did not receive any inputs, the evidence before me shows that she did. She made an admission through her lawyers that she did receive inputs worth $16 884-00 and I have rejected her *viva voce* evidence to the contrary as being unreliable. The plaintiff has conceded that indeed only inputs worth $16 884-00 were delivered to the defendant. I therefore make a finding that the defendant is indebted to the plaintiff in the sum of $16 884-00 and not $18 914-00.

The issue of whether the plaintiff failed to discharge its obligations under the agreement involves an interpretation of the said agreement. Two issues arise here, namely the variation of the agreement and the provision of labour. In advancing the argument that the plaintiff did not perform his part of the contract and therefore is not entitled to enforce the contract, Mr *Masara* for the defendant cited the case of *Blumo Trading (Pvt) Ltd* v *Nelmah Milling Co. (Pvt) Ltd & Anor* 2011(1) ZLR 196(H) where PATEL J (as he then was) stated at 201 F-G that:-

> "It is a fundamental premise of every contract that both parties will duly carry out their respective obligations. See *Green* v *Lutz* 1966 RLR 633; *ESE Financial Services (Pty) Ltd* v *Cramer* 1975 (2) SA 805 (C) at 808-809. As explained by Christe; Business Law in Zimbabwe at pp 106 and 119;
>
> > 'There is a presumption that in every bilateral or synallagmatic contract, i.e. one in which each party undertakes obligations towards the other, the common intention is that neither should be entitled to enforce the contract unless he has performed or is ready to perform his own obligations ….
> > Conversely, a party who has caused the other to commit a breach cannot found a claim on the breach …'"

It is ironic that while the defendant seeks to rely on that argument in defeating the plaintiff's claim on what she alleges to be a breach on the part of the plaintiff she herself is seeking to enforce the contract by claiming damages on the basis of that alleged breach when she has not performed her part. She has not paid for the inputs she received.

The intention of the parties can be found in the Preamble to the contract of the parties which reads:

"It is the desire of GDI and the contractor that:

1. Flue-cured Virginia tobacco be grown by the Contractor in accordance with the standard and quality recommendations of the Tobacco Research Board (TRB), TIMB and GDI.

2. GDI provides finances or inputs in their material form to the contractor in the form of an input loan to enable the Contractor to produce flue-cured tobacco to be sold exclusively to GDI.

3. GDI provides technical extension support to ensure that the agreed tobacco is produced.

4. Upon delivery of tobacco to GDI selling points, and after the price has been determined by GDI tobacco buyers in accordance with TIMB regulations or any price matrix agreed hereof and annexed to this agreement, deductions on sales revenue shall be made until the total value of inputs received by the contractor plus interest are recovered" (The underlining is mine).

Clearly therefore the parties understood the contract to be one for provision of "finances or inputs". A simple grammatical meaning of that phrase is that the plaintiff would provide finances or inputs and not finances and inputs. That intention was carried on to clause 3.1 of the contract which should also be understood in that context. It reads:

> "GDI shall provide flue cured tobacco field production input support in material form and/or finances".

In my view in interpreting a contractual provision the court should be guided by the same rules as apply to statutory interpretation. The point is made in *S* v *Nottingham Estates (Pvt) Ltd* 1995(1) ZLR 253(S) at 256E that:-

> "The primary rule of interpretation is, of course, to endeavour to ascertain the intention of the lawmaker from an examination of the provision under consideration placed in proper context. A court will commence its enquiry by giving the word its grammatical signification, unless it is clear that the literal sense, when so applied, defeats the legislative intendment. In such event a deviation from the ordinary meaning, is justified, provided always that the word is sufficiently flexible to admit of another meaning by which such intention be better effected".

In interpreting the phrase "finances or inputs" in the preamble I have given it its grammatical signification, which is that the plaintiff was required to provide either finances or inputs. It is in that context that the phrase "material form and/or finances" in clause 3.1 should be understood. I therefore make a finding accordingly which also puts to bed the

defendant's submission that she was entitled to funding for labour. There was simply no such provision in the contract of the parties.

Which then brings me to the issue of the provision of inputs for 20 hectares instead of what was in the contract, namely 30 hectares. The defendant took the view that by reason of this, the plaintiff breached the contract and is therefore not entitled to be paid while she is entitled to damages.

That there was a variation of that provision is pretty obvious and the plaintiff accepts that it did not comply with clause 6 of the agreement owing to challenges. I agree with Ms *Mabhande*'s submission that when the defendant became aware of the variation of that term of the contract she was required by law to repudiate the contract. She did not. Instead she fully participated in that contract for the entire cropping season of 8 to 9 months. The test for determining whether a contract has been repudiated by way of anticipatory breach is not the repudiating party's state of mind, but on what someone in the position of the innocent party would think he intended to do. It is not a matter of intention but perception: *Blumo Trading (Pvt) Ltd* v *Nelmah Milling Co. (Pvt) Ltd & Anor (supra); Datacolor International (Pty) Ltd* v *Intamarket (Pty) Ltd* 2001(1) SA 581(A) at 591: *Muza* v *Agribank Zimbabwe Ltd* SC 70/03 (unreported).

It is therefore disingenuous for the defendant to argue that she did not repudiate because, right up to the end of the contract, she was hopeful that the plaintiff would supply the inputs sufficient to cover 30 hectares. That argument is lopsided as it ignores the other side, which is that most of the inputs were required from the very commencement of cropping. The inevitable conclusion is that the contract was varied by the parties who were of the same mind. The defendant can therefore not succeed in disowning the contract at the time of paying.

That finding also puts the defendant's claim for damages to the sword. She has not proved any entitlement to such damages. The issue of interest is provided for in clause 7 of the contract and have accepted evidence that it is 17% per annum.

It remains for me to deal with the question of costs. The plaintiff seeks costs on a legal practitioner and client scale on the basis of the acknowledgment of debt which provides for them. I have already made a finding that the terms of that document did not come into effect. However the costs are the discretion of the court. I have accepted evidence that the defendant may be guilty of side marketing given the poor quality and size of the product that she delivered to the auction floors.

Therefore what we have is a party who benefited from inputs which yielded what was admittedly "a beautiful crop". Out of greed she diverted the crop and benefitted without paying for what she got. As if that was not enough she even sought to make more money from the plaintiff in her counter claim for damages which had no merit at all. And then fought tooth and nail to the bitter end. There can be no better candidate for costs on a higher scale.

In the result, it is ordered that;

1. Judgment with costs on the scale of legal practitioner and client be and is hereby entered against the defendant and in favour of the plaintiff in the sum of $16 884-00.
2. Interest on the sum of $16 884-00 at the rate of 17% per annum from 31 August 2010 to date of payment.
3. The defendant's counter claim is hereby dismissed with costs on a legal practitioner and client scale.

Gill, Godlonton & Gerrans, plaintiff's legal practitioners
V.S. Nyangulu & Associates, defendant's legal practitioners