DAVID KAMUZU CONSTANTINE CHIDZERO
and
ANNE-MARIE CHIDZERO
versus
BAYSLIP INVESTMENTS (PRIVATE) LIMITED
and
SKYEAD INVESTMENTS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 3, 4, 5 & 10 July 2024

Ruling on Application for Absolution from the Instance

Mr *S Musapatika,* for the plaintiffs'
Mr *G Madzoka* with *W Diarra*, for the defendant

MUSITHU J: This judgment is rendered pursuant to an application for absolution from the instance made by the defendants at the close of the plaintiffs' case. The plaintiffs' claim is multifaceted, arising from Debt Recovery Joint Venture and Management Agreements (the joint venture agreements) between the plaintiffs and the defendant. The defendants are alleged to have breached that joint venture agreements in numerous ways. The claims can be summarized as follows:

a) an order compelling the defendant to render an account of all the revenue from farming operations, which includes the value of farm retentions and disposals of crops, livestock and insurance claims at two farms, being Wychwood measuring 348,54 hectares and Thursfield measuring 41,13 hectares, which farms are situate in the district of Goromonzi.
b) an order for the debatement of the rendered account and payments of amounts due to the plaintiffs by the defendant.
c) payment of interest on the amounts due to the plaintiffs by the defendants at the rate of 5% per annum from 30 June 2020 to date of full payment.
d) payment of the sum of US$43 620 due to the third plaintiff in respect of the farming operations conducted between 2017 and 2022.

e) payment of the sum of US$33 790 being damages of reasonable compensation of the plaintiffs' barns, electric fence, powerlines and drip irrigation destroyed by the defendant.
f) payment of US$20 160 being damages suffered by the plaintiff for loss of income caused by the defendant's refusal to give vacant possession of the farms upon the expiry of the joint venture agreement.
g) payment of the sum of US$6 650 of the unpaid tobacco incentives due to the defendant.
h) payment of US$4 450 being the tobacco regrowth fine imposed on the first plaintiff pursuant to the defendant's failure and or refusal to destroy plaint regrowth as required by the law.
i) payment of US$3 900 being reasonable costs of land rehabilitation for land that was left unrehabilitated by the defendant at the time that it vacated the farms.
j) payment of US$184 800 due to the third plaintiff under the joint venture agreements.
k) payment of US$120 960 due to the plaintiffs by the defendant for timber harvested by the defendant during land clearance at the two farms.
l) costs of suit.

The brief factual background to the claims is as follows. The first plaintiff is the holder of an offer letter over a farm known as the Remaining Extent of Wychwood situated in the district of Goromonzi measuring 348,54 hectares. The second plaintiff is also the holder of a valid offer letter in respect of a farm known as Thursfield situated in the district of Goromonzi measuring 41,13 hectares. The first and second plaintiffs operated the two farms through the third plaintiff. The plaintiffs concluded joint venture agreements with the defendant in 2015. The plaintiffs claim that the agreements expired in 2020.

After taking over the day-to-day farming operations, the defendant had a duty to undertake farming activities, and was expected to account for the said operations and output at the farms from the time of occupation to the date of termination of the agreement or vacation, whichever occurred first. The plaintiffs allege that the defendant failed, neglected or refused to render an account to the plaintiffs despite several demands to do so from the inception of the joint venture agreements to the date of vacation in 2022.

The account the plaintiffs wanted rendered included receipts in possession of the defendant in support of the statement of income and expenditure. The accounts also included all sources of income of the joint venture operations, the sale prices of farm produce, livestock, capital expenditure, proof of funding or loans and repayments made.

In its plea, the defendant denied that the joint venture agreements expired in 2020 as alleged by the plaintiffs insisting that they were extended to 2025. The defendant was solely responsible for the day-to-day farming activities in terms of the joint venture agreements. Its duty to account to the plaintiffs was to the extent set out in the joint venture agreements. Such duty to account did not extend to the period after its vacation of the farms. The necessary accounts were rendered in terms of the joint venture agreements. The defendant denied owing the plaintiffs any fiduciary duty.

The defendant averred that some of the plaintiffs' claims had long prescribed in terms of the Prescription Act[1]. It denied owing the sum of **US$43 620** for the period 2017 to 31 October 2020, partly because the claims had prescribed and partly because such amount was not due to the plaintiffs anyway.

The defendant also denied vandalizing the plaintiffs' barns, electric fence, powerlines and the drip irrigation system. The claim for **US$33 790** for the damaged equipment was therefore denied. The claim for **US$20 160** based on the defendant's alleged refusal to vacate the farm was contested on the basis that the plaintiffs permitted it to continue in occupation after June 2020. It was further argued that the plaintiffs had claimed a share of the farming operations for the period after June 2020 and were therefore not entitled to damages arising out of the defendant's occupation of the farms after June 2020.

The defendant also denied that the plaintiffs were entitled to any tobacco incentives in terms of the joint venture agreements. The claim for damages arising out of the failure to destroy the tobacco residue was also dismissed on the basis that the plaintiffs forced the defendant to relinquish the farm. The defendant had also been warned not to undertake any farming activities.

The claim for US$184 800 was also dismissed on the basis that it was not specific to the period it related. To the extent that it covered the period before 31 October 2020, the claim was dismissed based on prescription. At any rate, the plaintiffs were allegedly paid all their entitlements in full.

The claim for timber allegedly harvested by the defendant was equally dismissed on the basis that the harvest was done in terms of the parties' agreements.

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[1] [*Chapter 8:11*]

The matter was referred to trial on the following agreed issues:

- whether the plaintiffs' claims in respect of the period prior to 31 October 2020 have prescribed.
- whether the defendant's occupation of the two farms after 30 May 2020 was lawful.
- whether the defendant is indebted to and liable to pay the plaintiffs the sums claimed in the summons or any other amount.
- whether the defendant has an obligation to and should render an account to the plaintiffs for farm operations from 2015 to the date of rendering of vacant possession.
- who is liable to pay the costs of suit and at what scale?

The plaintiffs' case was premised on the evidence of two witnesses, being the first plaintiff herein and Dick Mupambireyi, an expert witness. I shall proceed to summarize the witness evidence relative to the claims hereunder.

David Constantine Kamuzu Chidzero- The First Plaintiff

The witness confirmed that he and his sister, the second plaintiff herein are holders of offer letters in respect of the two farms. The joint venture agreements for the two farms were signed in 2015, for a five-year tenure. They were approved by the relevant Ministry. The agreements expired on 31 May 2020. The plaintiffs made an offer to extend the agreements, but negotiations fell through along the way for various reasons. That caused a breakdown in relations between the parties.

The witness claimed that the agreements entitled the plaintiffs to have access to the farm and equipment. They were entitled to access to information on farming activities. For the duration of the agreements, the third plaintiff was entitled to 8% of the gross sale proceeds on all crops and livestock sales or disposals annually, or the amount of US$20 000, whichever was greater. The first plaintiff was entitled to a monthly stipend of US$800, which was later reduced to US$400.

The nature of the information that the defendant was required to provide to the plaintiffs was regulated by clause 10 of the agreements. That information included records of sales of tobacco and maize, seasonal cropping and livestock plans and planned hectares or livestock units, projected yields and sales to be compared with actual sales. According to the witness, problems started with the 2017 and 2018 maize crop after the defendant failed to discharge its financial

obligations following sales. The defendant refused to pay for the maize crop on the basis that it was recouping for its capital improvements such as fencing, water troughs for cattle and construction of tobacco barns.

Concerning the first claim, the witness stated that there was a partial disclosure of tobacco sales sheets up to the year 2021. The contracted maize sales were disclosed, but the 8% of the gross sale proceeds was not paid. For horticulture produce there was disclosure until around 2017. There was no information on the sale and revenue received on the sale of geraniums. Information on cabbages and onions was last provided in 2017. As regards chia seeds, the witness claimed that he saw the crop on the ground, but no information was provided concerning that product. The information that was not disclosed was for tobacco production and sales for the 2022 selling season. Initially tobacco sales sheets were sent directly to the plaintiffs by Mashonaland Tobacco, but this was stopped in 2021. The sales sheets were only availed on 24 December 2021 long after the sales were completed.

As regards the monetary claims, the witness stated that the figures were arrived at from sales information received for the 2017 and 2018 farming seasons.

Under cross examination, the witness conceded that although the information for 2015 was disclosed, he had made a claim for it on the advice of his legal practitioner. The information for the years 2017-2019 was requested verbally but was never supplied. His explanation for not approaching the courts timeously was that courts were too expensive, and he did not have funds as he relied on the stipend he received from the defendant.

The witness stated under cross examination that the claim for income on tobacco was not based on estimates as reflected in the report prepared by an expert. The figures were based on actual sales sheets. He deferred any comments on the report to the expert witness.

The evidence of Dick Mupambirei

The second witness was Dick Mupambireyi, a member of the Real Estate Institute of Zimbabwe with 23 years of post-qualification experience. He was engaged by the plaintiffs to analyse the joint venture agreement between the parties to assess possible losses, as well as quantify the value of improvements which were the subject of compensation. He was also required to assess the income to be earned by the plaintiffs, being the 8% of the gross sale proceeds on all

crops and livestock sales or disposals annually. He generated a valuation report that was complemented by another bundle of supporting documents.

The witness' evidence was not materially different from that of the first witness, save in those instances where he explained the basis of his computations that yielded the figures for the individual claims.

The Application for Absolution from the Instance

The test to be applied in an application of this nature is a well-worn path. In *MC Plumbing (Pvt) Ltd* v *Hualong Construction (Pvt) Ltd*[2], CHIGUMBA J articulated the position of the law as follows:

> "Absolution from the instance means that the plaintiff has not proved a case against the defendant, and it is to be distinguished from a positive finding that no claim exists against the defendant. Where a defendant has been absolved from the instance, the plaintiff may reinstitute the action provided that it has not prescribed. The rationale behind absolving a defendant from the instance is that, due to the insufficiency of the plaintiff's evidence and failure to establish an essential element of its claim, the defendant should be spared the trouble and the expense of continuing to mount a defence to a hopeless claim."[3]

Further down in the same judgment, the learned judge went further to state as follows:

> "In the case of ***Lourenco* v *Raja Dry Cleaners & Steam Laundry Private Limited*[4], t**he Supreme Court had occasion to discuss the various cases which ought to be relied on in determining an application for absolution from the instance. The first case to be referred to be that of *Mazibuko* v *Santam Insurance Co Ltd and Anor* 1982 (3) SA 125 (AD) at 133, where the court said, at 132H:
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> > "In an application for absolution made by the defendant at the close of the plaintiff's case the question to which the Court must address itself is <u>whether the plaintiff has adduced evidence upon which a court, applying its mind reasonably, could or might find for the plaintiff;</u> in other words whether plaintiff has made out a *prima facie* case".

The next case referred to by the Supreme Court is that of *Gascoyne* v *Paul and Hunter* 1917 TPD 170 where the court said, at 173:

> > "The question therefore is, at the close of the case . . . was there a *prima facie* case against the defendant Hunter; in other words, <u>was there such evidence before the Court upon which a reasonable man might, not should, give judgment against Hunter?</u>". (my underlining for emphasis).

[2] HH 88/15
[3] At pages 6-7 of the judgment
[4] 1984 (2) ZLR 151 (S) @ pp156-158

It must be recalled that at this stage, the court is being asked to effectively close the door on the plaintiff's case without the benefit of the other side of the story. The issue is whether sufficient evidence has been placed before the court to persuade the court to hear the defendant's case. There is no reason why the court should embark on a wild goose chase when the plaintiff, by placing an ill-judged account of events has effectively sealed his own fate.

The plaintiffs' overall claim is founded on diverse causes of action which must be considered independent of each other. I now turn to consider these individually.

Claims for rendering of account and its debatement

The claims pertain to the disclosure of information of farming activities for the period 1 June 2015 to 22 September 2022. The defendant contends that the claim for information for the period 1 June 2015 to 3 November 2020 was not served within the prescription period of three years and had therefore prescribed.

As regards the period after 3 November 2020, it was submitted that the information on tobacco had been disclosed up to 2021 as confirmed by the first plaintiff in his evidence. Absolution from the instance therefore ought to be granted in respect of the disclosure of information for the tobacco crop up to 2021.

It was further submitted on behalf of the defendant that the duty to disclose information arose from the contract. In his evidence in chief, the first plaintiff claimed that the joint venture agreements expired on 31 May 2020. It therefore followed that the obligation to disclose information ended with the expiry of the joint venture agreement on 31 May 2020. It was further submitted that no *prima facie* case was established for an order to compel the disclosure of information for the period after June 2020. Absolution had to be granted for that period as well.

In response, the plaintiffs averred that the plea of prescription was ill conceived. Firstly, it was argued that it was not properly before the court. Rule 42(8) of the High Court Rules, 2021 was not followed. It was further averred that the plea of prescription ought to have been filed and set down in terms of the rules with heads of argument being submitted. Secondly, it was argued that the plea of prescription was not substantiated. The plaintiffs' claim was that the parties agreed that the amounts demanded would go towards capital improvement compensation. The defendant's position therefore needed to be known. Thirdly, it was argued that the account was a running one

to which payments interrupted prescription. There was no evidence of when prescription began to run. The defendant was allegedly not disclosing information and the plaintiffs were unaware of the full facts required for purposes of ascertaining their cause of action.

The question of prescription is central to the resolution of the parties dispute herein and that can only be the reason why it was one of the agreed issues for trial. The issue is therefore properly before the court, and it was properly pleaded. Rule 42 (8) (9) of the High Court rules, 2021 sets out the procedure for raising special pleas among other things. The procedure for the setting down of the special plea is similar to that of opposed applications. Heads of argument must be filed before the hearing of the matter. The procedure advocated for by the plaintiffs is appropriate where there are no factual disputes, and the question of prescription is resolvable on the papers. However, where factual disputes arise concerning the time when the cause of action arose, then *viva voce* evidence would be required to resolve disputes of fact. See *Brooker* v *Mudhanda & Ors*[5]. In the present matter, *viva voce* evidence was required to resolve the question of the time when the cause of action arose.

The plaintiffs' summons was issued on 27 October 2023 and served on 3 November 2023. I agree with the defendant's submission that the claim for the rendering of an account and debatement for the period up to 3 November 2020 is prescribed. Summons was served after the three-year prescription period. The plaintiffs were aware prior to the issuing and service of summons of which information remained outstanding from the defendant. The first plaintiff all but conceded that the major constraint to the institution of proceedings timeously was the unavailability of financial resources to engage counsel to start the process. The plea of prescription must therefore be upheld in respect of claims up to 3 November 2020.

The second leg of the defendant's argument relates to claims for the period after 3 November 2020. In his evidence, the first plaintiff confirmed that there was a partial disclosure of tobacco sales sheets up to the year 2021. The information on tobacco sales was thus availed and it ought not to have been part of the plaintiffs' claims. Absolution must be granted in respect of the claim for the disclosure of tobacco sales for the period up to the year 2021.

[5] SC 5/18 at page 17 of the judgment

The final leg of the defendant's submission pertains to the plaintiffs' admission that the liability for disclosure of information arose *ex contractu*. The plaintiffs' claims were allegedly tied to the joint venture agreements which expired on 31 May 2020. The defendant argued that for that reason the plaintiffs could not claim disclosure of information based on expired contracts. In response, the plaintiffs argued that the defendant was estopped from seeking refuge from agreements that it argued never lapsed but were extended to 2025. On that score, the plaintiffs further argued that the defendant could not be allowed to approbate and reprobate.

There is merit in the plaintiffs' submission. It is not in dispute that the defendant remained in occupation of the farms beyond 31 May 2020, the date when the agreements are alleged to have expired. In paragraphs 11.1 and 11.2 of its plea, the defendant states:

> "11.1 It is denied that the joint venture agreements expired in June 2020. The defendant pleads that having allowed it to continue in occupation after June 2020, Plaintiffs are not entitled to damages in the sum of US$20,160.00 for alleged refusal to vacate the farms.
> 11.2 Having claimed a share of the farming operations for the period after June 2020, Plaintiffs are not entitled to any damages arising out of Defendants occupation of the farms after June 2020".

The question of when exactly the joint venture agreements were terminated must be critically examined in the face of the conflicting positions taken by the parties. The defendant contends that the agreements were never terminated in June 2020. It is on that basis that it denies liability for damages arising from the alleged unlawful occupation beyond June 2020. Surely, the defendant cannot in the same breath argue that the plaintiffs must not rely on the same agreements it claims were extended beyond June 2020. For that reason, the court determines that the plaintiffs have made a case to compel disclosure for the period after 3 November 2020 for other information other than information on tobacco sales.

Claim for US$ 43, 620.00 in respect of farming operations conducted from 2017 to 2022

In terms of the plaintiffs' own claim, the crop produce covered tobacco, maize, silage, chia and sweet potatoes. The defendant contends that part of the claim covered the period after June 2020, a period after the expiry of the contract. The plaintiffs could not claim a contractual right based on a contract that had expired. The plaintiffs were bound by their own pleadings, including

the averment that the contract expired in June 2020. Absolution ought to be granted therefore on the portion of the US$43 620 that related to the period after 2020.

The first portion of the claim was concerned with tobacco for the period 2019 and 2022. The amounts involved are US$4 890 and US$22 580 for 2019 and 2022 respectively. The sum of US$4 890 was based on an invoice prepared by the third plaintiff, (invoice number 062 of 2019). In his evidence, the first plaintiff accepted that the claim was brought outside the three-year prescription period. That claim had prescribed and ought to be dismissed.

Further, under clauses 10.4 and 10.6, of the joint venture agreements, the plaintiffs were entitled to payment of "8 percent of gross sale proceeds on all crops and livestock". The invoice produced by the plaintiff was not evidence of gross sales. The plaintiffs' witnesses had accepted that the said invoice was not evidence of gross sales. It was argued on behalf of the defendant that the invoice and the conclusions founded upon it did not establish a *prima facie* case for the share of the tobacco income for 2019.

The defendant contended that given that the claim for US$43 620, of which US$5 890 is part, was for "farming operations", it was necessary for plaintiff to prove that the basis of that amount was "farming operations". The report by the plaintiffs' expert witness showed that the figures for tobacco were estimates. Under those circumstances, no *prima facie* case was established.

As regards the amount of US$22 580 for 2022, the defendant averred that no *prima facie* case was made because the joint venture agreements had expired. The expired agreement could not have given rise to a right to claim the 8 percent share of the income. Further, the amount of US$22 580 for 2022 was not based on 8 percent of gross sales proceeds on all crops and livestock.

It was further argued that annexure 14 to the expert's report was a screenshot for 2015. The plaintiffs' second witness stated that the document was supplied to him by the first plaintiff, and it had been written on 25 June 2015. Further, the tobacco income schedule for 2019 to 2022 in the plaintiffs' bundle also stated that the year 2022 estimates were to be verified with "MTC or TIMB". No *prima facie* case was therefore established for the claim for US$22 580.

Concerning claims for income on silage, chia, sweet potatoes and sugar beans, it was submitted that absolution ought to be granted because the bulk of the claims had either prescribed

or were based on estimates. Estimates were not a basis for entitlement to the benefits in question in terms of the joint venture agreements.

In their brief response, the plaintiffs submitted that the defendant did not deny farming tobacco for the 2021-2022 farming season, and that it withheld the tobacco figures from the plaintiffs. Further, the screenshot from the Tobacco Industry and Marketing Board (TIMB), showed that the output was 795 bales which sold for US$282 224. The 8 percent of that amount was US$22 577.92. That amount therefore ought to be paid as damages because the actual farming was done, and the plaintiffs would have been entitled to receive that amount. It was further submitted that the 25 June 2015 date appearing on the screenshot was not the date the screenshot was taken, but the date of registration of the defendant as a tobacco grower.

I must state that given the nature of the defendant's submissions under this head and the clarity which with the defendant presented its case, the court expected the plaintiffs to respond in like manner, justifying the claim under this head instead of giving a generalized response which the court found unhelpful.

The components of the claim under this head are summarized in the plaintiffs bundle as follows:

➢ Maize	US$12 100
➢ Tobacco	US$27 470
➢ Silage	US$ 1 200
➢ Chia	US$ 2 560
➢ Sweet Potato	US$ 290
Total	**US$43 620**

In its submissions, the defendant said nothing about the claim for the maize crop. I therefore considered that there were no issues concerning this claim under this head.

The claim for tobacco is made up of two components. There is the sum of US$4 980 for the period 2019. That amount is based on invoice SKY 062 of 2019[6]. The defendant contends that the claim has prescribed as it was brought up after the three-year prescription period. No

[6] See invoice SKY INV062 on page 119 of the plaintiffs' bundle

meaningful submissions were made in rebuttal. The court is satisfied that the claim has indeed prescribed and is therefore improperly before the court.

The next component is made up of the sum of US$22 580. The defendant's first argument was that the claim was based on a joint venture contract that had expired in 2020, as per the plaintiffs' version. No claims could therefore be made based on that agreement. I have already determined that the question of the status of the joint venture agreements is a matter that must be determined after the court has heard the full story in view of the defendant's own plea on that point.

Be that as it may, I would still find in favour of the defendant for different reasons. Clause 10.6 of the joint venture agreement states that for the duration of the agreement, the third plaintiff would receive 8 percent of the gross sales proceeds on all crops and livestock or disposals annually.[7] The plaintiffs' expert witness told the court that the figure US$22 580 was partly based on information that he obtained from the first plaintiff. That information was in the form of a screenshot for Tobacco Returns for 2022. The document is dated 25 June 2015.[8]

Further, the schedule in the expert's report from which the sum of US$22 580 was extrapolated states that the "2022 estimates to be verified with MTC or TIMB". The two acronyms are for Mashonaland Tobacco Company and the Tobacco Research Board. The expert witness admitted under cross examination that he had not verified the latest information on estimates with these key institutions. The screenshot relied on predated the expert's valuation report by almost 8 years. The information relied on neither conformed with clause 10.6 of the joint venture agreement, nor was it based on a reliable source. The claim for absolution is therefore well grounded.

Claim for US$33 790 in respect of damages to property and equipment

The defendant averred that the plaintiffs ought to have established a *prima facie* case of "destruction and damage" of the identified properties to avoid absolution. The defendant averred that the plaintiffs failed to establish a *prima facie* case of the damage to the property by the defendant. This was because the two witnesses made conclusions based on assumptions of what

[7] Page 184 of the plaintiff's bundle
[8] See screenshot on p 117 of the plaintiffs' bundle

could have happened. Neither of the two had seen any representative of the defendant damaging the property or the equipment.

In response, the plaintiffs submitted that the defendants could not escape the cost of vandalizing the plaintiffs' barns, electric fence, and powerlines destroyed. It was also averred that the defendant had an obligation to re-install the uprooted drip irrigation system.

Having analyzed the evidence placed before the court I am persuaded by the defendants' submission that the alleged damage to property and equipment cannot be attributed to the defendant. Under cross examination the first plaintiff conceded that he did not witness the destruction of the property or the equipment because he was not at the farm at the material time.

The second witness' evidence was not helpful either. Under cross examine by the defendant's counsel, he was asked which of the Cockers (defendant's representatives) had vandalized the barns, and his answer was that he assumed both were responsible. The basis of his assumption was that both stayed at the farm at the time of the alleged vandalism.

No independent evidence in the form of persons who witnessed the alleged vandalism by the defendant's representatives was placed before the court to corroborate the claims of vandalism. None of the witnesses stayed at the farms to positively attribute the vandalism to the defendant. The plaintiffs' claim does not state the period within which the vandalism occurred. I must also pause to observe the way the plaintiffs' claim was also pleaded in this regard. Para 17 of the declaration reads:

> "The Defendant vandalized the Plaintiff's barns, electric fence, powerlines and destroyed and uprooted the Plaintiff's drip irrigation system to which the Plaintiffs are entitled to the sum of US$33,790.00 being damages of reasonable compensation required to reinstall and restore the damaged instrument, equipment, and lines damaged by the Defendant."

An act of vandalism denotes a willful or malicious destruction of property and in this case some equipment. The plaintiffs were required to place before the court evidence which pointed to the willful or malicious destruction of their property by the defendant's representatives. Such willful or malicious conduct could only be established through the evidence of eyewitnesses who witnessed the malicious acts. The plaintiffs' case was not pleaded in the alternative to impute the damage to property or equipment to negligence or omissions on the party of the defendant.

For the foregoing reasons, the court determines that the plaintiffs failed to establish a *prima facie* case of vandalism that could be attributed to the defendant.

Damages in the sum of $US20 160 being loss of income caused by the defendant's refusal to vacate the farm upon expiry of the joint venture agreements

The claim was necessitated by the defendant's alleged refusal to give vacant possession of the farms upon the expiry of the joint venture agreements. The third plaintiff had allegedly planned to enter a new joint venture with a new partner starting June 2022, but that joint venture did not materialize. The plaintiff's claim was based on 8 percent of the gross income that would have been realized if that arrangement had been carried out.

According to the defendant, the first plaintiff's evidence in chief was that there was an agreement with a new venture partner to grow tobacco in that particular year, but because of delays they were unable to start farming. The defendant is also alleged to have refused to give its consent for the new partner to start farming operations. The new partner did not want to be involved in the dispute and walked away. The defendant contends that the first plaintiff's evidence was at variance with the second witness' report which was to the effect that the plaintiffs had merely planned to enter into a new joint venture with a new partner beginning June 2022. The defendant further contends that the conflict in the testimony of the two witnesses means that no *prima facie* case was established to sustain the claim.

Further, according to the defendant, the first plaintiff confirmed under cross examination that there was no agreement yet with the new joint venture partner, Remake Investments (Private) Limited. In the absence of such agreement, then the plaintiffs could not claim to have lost a chance to profit from the joint venture. Remake investments allegedly failed to secure funding of the intended joint venture for reasons which the plaintiffs did not rely for its claim.

The defendant argued that in the absence of an agreement between the plaintiffs and Remake Investments, the plaintiffs could not competently allege that thirty hectares of tobacco would have been planted. Similarly, the plaintiff could not assert the yield that would have been achieved from the thirty hectares. Further, without the benefit of an agreement, there was no basis upon which the plaintiffs could seek to convince the court that they were entitled to 8 percent of the gross income. The first plaintiff conceded under cross examination that there were no supporting documents to back up the claims of the new joint venture agreement.

In their response, the plaintiffs averred that there was no evidence to disprove the allegation that the defendant unlawfully refused to vacate the farms that's depriving them an opportunity to

make income. The plaintiffs insisted that the defendant was liable to pay damages in the sum of US$20 160, being income lost because of the defendant's refusal to give up the farms on the expiry of the joint venture agreements.

The plaintiffs claim under this head is set out as follows:

> "The joint venture agreements expired in June 2020 and the Defendant unlawfully refused to vacate the farms to the effect that the Plaintiffs failed to undertake farming activities and was deprived of income. The Defendant is liable to pay the sum of US$20, 160.00 in damages suffered by the Plaintiffs for loss of income necessitated by the Defendant's refusal to vacant the farms upon the expiry of the joint venture agreement."

The plaintiffs claim as pleaded makes no reference to a new joint venture arrangement with any new partner. The claim is based on the alleged loss of income because of the defendant's refusal to give vacant possession of the farms. The evidence placed before the court connects the lost income to the failure of the new joint venture agreement to take off because of the defendant's conduct. There is some disconnect between the case as pleaded and the evidence that was placed before the court. Asked why the new partners identity was never revealed in the papers, the first plaintiff claimed that he did not wish them dragged into litigation. There was no signed agreement with the new partner. The new partner had allegedly prepared the tobacco seed for planting but there was no land available.

Under cross examination, the expert witness said he did not know whether the arrangement between the plaintiffs and the new joint venture partner was binding or not. The plaintiffs ended up planting maize after the arrangement to plant tobacco crop fell through. In his report, the expert witness stated:

> "An assessment of the losses on the maize crop incurred as a result of the of Skyead's actions is pending. Skyead continue to hinder the new JV which is going ahead for the 2023-24 season and may have refused to condone tobacco contractor finance to the new JV partners."[9]

Under cross examination, the expert witness admitted that the fact that the plaintiffs went on to grow the maize crop instead of the tobacco crop meant that they had mitigated their losses. The witness further admitted under cross examination that the yield achieved from the maize crop ought to have been considered in determining the alleged loss suffered.

[9] Page 51 of the plaintiffs bundle

The plaintiffs' evidence suggests to me that their claim is not only convoluted but was also not well thought out. No *prima facie* case was established against the defendant.

Payment of the tobacco incentive in the sum of US$6 650

The incentive is alleged to be for the period 2017 and 2018. The defendant contends that the claim was instituted after the three-year prescription period and must be struck off. Further according to the defendant, the first plaintiff admitted under cross examination that the documents used to prove the claim were not evidence of payment of the incentive. The documents did not speak to the incentive. The second witness also accepted that the documents made no mention of the incentive.

In light of the concessions, the defendant averred that it had made a case for absolution from the instance in respect of the claim for the tobacco incentive.

In response, it was submitted on behalf of the plaintiffs that the defendant owed the said amount. This was because it had not denied having been paid that amount by the Reserve Bank of Zimbabwe. It was further submitted that the payment of incentives was common in the tobacco industry, and it was paid directly to tobacco growers' bank accounts by the Reserve Bank of Zimbabwe. For that reason, it would not reflect on the Mashonaland Tobacco Company sales sheets. The defendant could not demand proof of payment because it withheld its bank statement from the court.

The claim for the payment of the tobacco incentive is pleaded in para 19 of the declaration as follows:

"Defendant is owing the Plaintiff the sum of US$6 650 for unpaid tobacco incentives".

The plaintiffs' claim was not pleaded with sufficient clarity to show what that incentive was for and its origin. The expert valuation report shows that the claim was in respect of tobacco sales for the years 2017 and 2018.[10] The source documents used in the generation of the report are two growers' statements from Mashonaland Tobacco Company in the defendant's name. The first statement is dated 17 August 2017 and the second is dated 1 August 2018. Under cross examination by the defendant's counsel, the first plaintiff admitted that the claim was not instituted within three

[10] Page 51 of the plaintiff's bundle.

years of the above dates. The witnesses also conceded that there was no proof of the incentive having paid by the Reserve Bank of Zimbabwe. The evidence of the second witness was not helpful. He also could not confirm whether the incentive was paid by the Reserve Bank of Zimbabwe.

The question of prescription was not addressed by the plaintiffs in their response to the application for absolution. It is clear from the evidence that the claims for the tobacco incentives ought to have been made at the latest by 1 August 2021. The claim has therefore prescribed. Even if it had not prescribed, no evidence was placed before the court to confirm that the defendant was indeed paid that incentive by the Reserve Bank of Zimbabwe. No *prima facie* case was established against the defendant.

Claim for the tobacco regrowth fine in the sum of US$4 450

In terms of the plaintiffs' declaration, the claim was for the tobacco regrowth fine imposed on the first plaintiff pursuant to the defendant's failure and or refusal to destroy the regrowth as required by the law. In its submissions, the defendant argued that the first plaintiff voluntarily admitted liability for the fine when he signed the acknowledgment of guilty. The first plaintiff conceded that based on the admission of guilty he was liable. The plaintiffs could not pass on to the defendant the consequences of their free admission of guilty.

In response, the plaintiffs submitted that the regrowth fine of US$4 450 was proved and by operation of law, it was the defendant's obligation. It was also the defendant who had planted the tobacco and made away with all the funds realized from the 2021/22 season. The defendant was still on the farm when the plant inspection was done. The admission of guilty issued in the name of the first plaintiff was signed for by an employee not the first plaintiff himself, and this could be verified by comparing the signatures on the admission of guilty and the joint venture agreements.

The admission of guilty shows the amount paid as US$4 000. The first plaintiff claimed that the additional US$450 was for labour costs that the plaintiffs incurred on behalf of the defendant. The regrowth had to be cleared with hoes by labourers on the 40-hectare piece of land.

In the court's view there is a *prima facie* case which warrants further ventilation. In its plea, the defendant argued that the plaintiffs were not entitled to claim this amount because it was forced to relinquish the farm. The defendant also claimed that it had been barred from partaking

in further farming activities at the time that the fine was levied. The circumstances under which the defendant vacated the farm relative to the levying of the fine must be further explored. The defendant's evidence must be heard on this point. For that reason, the defendant's claim for absolution under this head must fail.

Claim for land rehabilitation in the sum of US$3 900

The claim was for costs for land rehabilitation in respect of land that was allegedly left unrehabilitated when the defendant vacated the farms. The defendant argued that the plaintiffs failed to establish a *prima facie* case for damages in the sum of US$3 900. The defendant further argued that no quotation for moving the soils had been placed before the court. The plaintiffs had also not adduced evidence of the extent of the area in need of rehabilitation.

In response the plaintiffs argued that the defendant was liable for the said amount because it left dumps of soil from dam excavation. The plaintiffs argued that the claim was proved as pictures were attached. The quotation and rates for rehabilitation were tendered as evidence.

The plaintiffs' declaration did not set out the type of land rehabilitation that was required. The first part of the quotation attached to the expert's report refers to estimates for civil works in respect of two-night storage dams[11]. The first part is of no relevance to the claim since it was for dam construction. The second part of the quotation pertained to land clearance with particular focus on tree stumping. From the expert witness' report, it appears the plaintiffs' concern was with the soils dumped on pastureland during the construction of overnight holding dams[12]. That allegedly rendered the land unusable.

The cost for the intended land rehabilitation was not established. The quotation supplied pertains to other forms of rehabilitation which the plaintiffs were not concerned about. The quotation was concerned with construction of night storage dams and land clearance with particular focus on tree stumping. Further, the expert witness conceded that he had not determined the extent of the area to be rehabilitated, calling the omission an error on his part. As correctly submitted on behalf of the defendant, the extent of the area to be rehabilitated is a critical factor in the assessment of damages. The attached quotation was therefore irrelevant. The absence of a clear

[11] Page 80 of the plaintiff's bundle.
[12] See report on p 38 of bundle

demarcation of the area in need of rehabilitation made the plaintiffs claim clearly a matter of conjecture. No *prima facie* case for the claim was established.

Claim for US$184 800 being 8 percent share of horticultural proceeds

According to the experts' report, the claim is in respect of onions, cabbages and tomatoes for five seasons from 2017 to 2022. The defendant averred that part of the claim for the period before 3 November 2020 was filed outside three-year prescription period. That portion of the claim ought to be dismissed because of prescription. It was further submitted that to establish a *prima facie* case for the claim to succeed consistent with clause 10.6 of the joint venture agreements, the plaintiffs ought to have led evidence to prove:

- Cultivation of the identified crops during the mentioned seasons;
- The sale of the crops concerned;
- The realization of the amounts forming the basis of the claim as set out in the report.

The amount claimed was based on assumptions, as confirmed by the valuation report and the witness' testimony. The claim was thus not based on proven horticultural activities, but general crops grown in the area and figures obtained from the Agricultural Research Trust. It was further submitted that in the absence of proof of farming activities and actual sales, no *prima facie* case for the payment of US$184 800 had been established.

In response, it was submitted on behalf of the plaintiffs that the sum of US$184 800 was alleged and proved to the court. The 8 percent formula had been adopted from the parties' agreement. It was further submitted that the defendant should disprove its liability through the evidence of actuals of horticultural produce. That included revenues from oil distillation of geraniums and khaki weed not declared. There was also evidence of crops seen on the ground by the valuer and pictures of the oil distiller used for those crops.

The plaintiffs' share is for 8 percent share of the horticultural proceeds. It is not in dispute that the plaintiffs' claim under this head was grounded on clause 10.6 of the joint venture agreements between the parties. As already highlighted in this judgment, clause 10.6 entitled the third plaintiff to receive *"8 percent of the gross sales proceeds on all crops and livestock sales or disposals annually, or the amount of USD 20 000 (twenty thousand US dollars), whichever is greater*." This formula was to be applied for the duration of the agreements.

The defendant's contention is that the joint venture agreements did not provide for payments based on assumptions. I agree with that submission. A reading of clause 10.6 of the joint venture agreement leaves one in no doubt that the 8 percent formula was to be applied to gross sales proceeds of actual sales and was not to be based on assumptions. The duty of the court is to interpret contracts in a manner that accords with the parties declared intentions. In their submissions, the plaintiffs did not deny that this was the intention of the parties. That issue was not addressed at all save for the instance on the provision of actuals by the defendant. The plaintiffs' claim is therefore bereft of any legal foundation as it falls foul of the provisions of the parties' joint venture agreements. The defendant is therefore entitled to absolution.

Claim for US$120 960 for indigenous timber harvested by the defendant during land clearance

The valuation report claims that the timber was used as fuel in the tobacco barns over two seasons, being the 2016/2017 and the 2019/ 2020 seasons[13]. The defendant avers that the claims for the value of the timber was not instituted within the prescription period and had therefore prescribed. The defendants further averred that in terms of clause 6.9 of the agreements, the defendant was entitled to use the farm's timber resources for domestic use, repairs and construction, fencing, and processing of crops on the farm. The defendant argued that the timber was therefore used for the purpose stated in the agreement.

The defendant further averred that even if it were assumed that it was liable for the cost of the timber, what was infact claimed by the plaintiffs was not the cost of timber but that of coal. That was not a contractual benefit and could not be allowed. The amount of US$120 960 represented the value of the coal required to process tobacco for two seasons. That amount was based on unfounded assumptions pertaining to hectarage and tobacco yields for the aforementioned tobacco seasons. The defendant submitted that there was no supporting evidence regarding the yield for two seasons or the cost of coal per unit.

In response, the plaintiffs averred that tobacco curing was done through exotic timber and not indigenous timber as per farming tradition and practice. The plaintiffs therefore assessed the

[13] Page 34 of the plaintiffs' bundle

benefit of the indigenous timber and imputed liability for the amount claimed as the value of the timber harvested by defendant during the land clearance at the two farms. The plaintiffs further averred that the timber covered 38.61 hectares and had been maintained for years. It was submitted that it would be unfair for the defendant, which ought to have acquired curing timber at a cost to have utilized the plaintiffs' timber at no cost. It was argued that in HC 3977/21, the defendant had a claim for land clearing yet in the same breadth the defendant was extracting timber for use in curing tobacco. The clearing costs were far less than the value of the timber benefit, hence the clearing costs ought to be off set against the compensation claims.

In their response, the plaintiffs did not address the critical issue of prescription. They also did not address the critical question of why the report relied on the value of coal as the basis of the claim and not the value of the timber allegedly harvested. Clause 6.9 of the joint venture agreements is instructive. It states that:

> "The Company shall only use the Farm's timber resources for domestic use, repairs & construction, fencing, and processing of crops on the Farm and shall not sell or otherwise dispose of such timber resources."[14]

As already observed, the expert's valuation report claims that the harvested timber was used as fuel in the tobacco barns over the stated period. The use of the timber for the stated purpose was consistent with clause 6.9 of the joint venture agreement and one wonders why that claim was instituted at all. The court determines that there is merit in the defendant's claim for absolution under this head.

COSTS OF SUIT

The defendant submitted that absolution should be granted with costs on the legal practitioner and client scale. That level of costs was justified on the basis that the plaintiffs' claims were frivolous and that they constituted an abuse of court process. The other reason was that the defendant ought to be compensated for being needlessly put out of pocket.

In response, it was submitted on behalf of the plaintiffs that the application for absolution was frivolous and vexatious. The court was urged to dismiss it with costs on the legal practitioner and client scale.

[14] Page 191 of the plaintiff's bundle

In the exercise of its discretion, the court found it befitting to order that the defendant's application for absolution be granted with costs on the ordinary scale. In as much as the court largely found in favour of the defendant, part of the application for absolution was dismissed.

Resultantly it is ordered that:

1. The plaintiffs' claims (a) and (b) for the rendering of an account and its debatement for the period 1 June 2015 to 3 November 2020 are hereby dismissed for having prescribed.
2. The application for absolution from the instance is granted in respect of the claim for the provision of information on tobacco sales for the period 3 November 2020 to December 2021.
3. The application for absolution from the instance is hereby dismissed in respect of the following claims:
    a) The rendering of an account and its debatement for the period 3 November 2020 to 22 September 2022.
    b) Claim (h) for the payment of US$4 450, being the tobacco regrowth fine imposed on the first plaintiff for the defendant's alleged failure to destroy plant regrowth as required by law.
4. The application for absolution is hereby granted in respect of the following plaintiffs' claims:
    a) Claim (d) for payment of US$43 620 in respect of farming operations conducted between 2017 and 2022.
    b) Claim (e) for payment of the sum of US$33 790, being compensation in respect of damages to the plaintiffs' barns, electric fence, powerlines and drip irrigation.
    c) Claim (f) for payment of US$20 160, being damages for loss of income suffered by the plaintiffs because of the defendant's refusal to give vacant possession of the farms upon expiry of the joint venture agreements.
    d) Claim (g) for payment of US$6 650 in respect of unpaid tobacco incentives due to the plaintiffs.
    e) Claim (i) for payment of US$3 900 being reasonable costs of land rehabilitation.
    f) Claim (j) for payment of US$184 800, being income due to the plaintiffs under the joint venture agreements.
    g) Claim (k) for payment of US$120 960 in respect of the plaintiffs' timber harvested by the defendant during land clearance at the two farms.

5. The plaintiffs shall bear the defendant's costs of suit.

Danziger and Partners, plaintiffs' legal practitioners
Coghlan, Welsh & Guest, defendant's legal practitioners