REPORTABLE (80)

TRANSNATIONAL HOLDINGS LIMITED
v
ZB FINANCIAL HOLDINGS LIMITED

SUPREME COURT OF ZIMBABWE
GUVAVA JA, UCHENA JA & KUDYA JA
HARARE: 27 MAY 2022 & 17 AUGUST 2023

T. Nyamakura, for the appellant

T. Mpofu, for the respondent

KUDYA JA:

[1] The appellant appeals against the whole judgment of the High Court (the court *a quo*) that was handed down on 24 July 2019. The court *a quo* dismissed the appellant's counter claim with costs and did not pronounce a substantive order on the main claim. The appellant seeks, firstly, that this Court corrects the failure *a quo* to dispose of the main claim by inserting an order of dismissal with costs. Secondly, the reversal of the adverse order that was granted against it.

THE INTERACTION BETWEEN THE COURT AND COUNSEL

[2] At the commencement of the appeal hearing the court requested counsel to address it on the appropriate cure for the common cause patent failure of the court *a quo* to pronounce a substantive order on the claim in convention. The reason for the failure is provided in the reasons for judgment, at p 437 of the record, which reads as follows:

> "The plaintiff's claim having been fulfilled and the dividends recovered, its claim has been rendered purely academic. The plaintiff's claim has been overtaken by events. No practical purpose will be served by the issuance of an order directing that the dividend be paid back to the plaintiff. It shall not be necessary to formally make any pronouncement over the plaintiff's claim. There is no need for a determination to be rendered on the main claim."

[3] Mr *Nyamakura*, for the appellant, moved the court to correct the substantive judgment of the court *a quo* by inserting a new para 1 dismissing the main claim with costs. Mr *Mpofu*, for the respondent, on the other hand, strongly submitted that the appropriate corrective order ought to be declinatory of jurisdiction for the reason that the claim in convention had become moot. In reply, Mr *Nyamakura* abandoned his initial position in preference to the order moved by Mr *Mpofu*.

[4] Section 22 (1) (a) and (b) (ix) of the Supreme Court Act [*Chapter 7:13*], imbues this Court with the power to vary or amend, the judgment appealed against or give such judgment as the case may require or take any other course which may lead to the just, speedy and inexpensive settlement of the case. See *Mhora v Mhora* SC 89/20 at p. 8. We are satisfied that this is a proper case for us to invoke s 22 powers.

[5] The nature of the corrective order that this Court may issue depends on the facts and circumstances of the case under consideration. It could be a removal from the roll as happened in *Mariyapera v Eddies Pfugari (Pvt) Ltd & Anor* SC 3/14 at p 3 and *Chiangwa & Ors v AFM in Zimbabwe & Ors* SC 67/21 at p 1. It may also be, either a dismissal or an order declining jurisdiction. See *Ndewere v The President of Zimbabwe & Ors* SC 57/22 at paras. [61] and [65], *Khupe and Anor* v *Parliament of Zimbabwe and Ors* CCZ 20/19; *Geldenhuys & Neethling v Beuthin* 1918 AD 426 at 441.

[6] This Court, by consent of the parties, agreed to exercise its expansive s 22 (1) (a) and (b) (ix) powers, to correct the substantive judgment or order of the court *a quo* by inserting a new para. 1 declining jurisdiction for the reason that the claim in convention was moot. This will be reflected in the final and dispositive order that will ensue at the end of this judgment.

[7] The consent order disposed of the appellant's first ground of appeal. The appellant achieved partial success in that while the correction sought was granted, it did not result in the dismissal of the claim in convention but in an order declining jurisdiction.

[8] The further substantial spin off of the consent order was that the appellant's second, third, fourth and fifth grounds, which were ancillary to the first ground of appeal fell away. Mr *Nyamakura* was constrained to motivate any of these grounds of appeal. He properly abandoned them. They are accordingly struck out. The sixth ground of appeal is the only one that remains in contention.

THE FACTS

[9] The appellant is a locally registered public investment company and a shareholder in the respondent. The respondent is also a locally registered public company, which is listed on the Zimbabwe Stock Exchange (ZSE).

[10] In 2004, the Reserve Bank of Zimbabwe (RBZ) advanced a loan to Intermarket Holdings Limited (IHL), then a wholly owned subsidiary of the appellant. The loan was converted to equity in 2006. The RBZ thus became a 50.98 per cent shareholder in IHL. Soon thereafter, the RBZ divested its stake to the respondent without according appellant the pre-emptive rights embodied in IHL's articles of association. The respondent thereafter assessed the appellant's remaining stake in IHL to be equivalent

to 6.21 percent of the respondent's own issued share capital. In March 2007, the respondent offered the appellant a 6.21 percent shareholding in its equity in exchange for the appellant's IHL shares. The stipulated date for accepting the offer was 23 March 2007. The respondent, however, reserved to itself "the right, without prejudice to its other rights, to condone the non-observance by any IHL shareholder of any of the terms of this offer". The appellant did not accept the offer. Instead, it countered the offer by challenging the valuation of its shareholding in IHL and the concomitant size of the stake offered for its shares in the issued share capital of the respondent in Case Nos. HC 1538/07 and HC 1721/08 (appealed to this Court as SC192/08). Sadly, these cases appear to be extant.

[11] In March 2015, the Minister of Finance and Economic Development directed the RBZ to resolve the long-standing dispute between the appellant and the respondent through an out of court settlement. It was envisaged that the settlement would result in the appellant "being offered shareholding" in the respondent and in the withdrawal of all pending court cases. The number of shares that would be allotted to the appellant were to be premised "on the valuation of the entities" that were at the centre of the dispute.

[12] On 31 May 2016, the Government of Zimbabwe (GOZ) and the appellant consummated an agreement for the transfer of the GOZ's shares in the respondent to the appellant. The GOZ was represented by the RBZ while the appellant was represented by Nicholas Mugwagwa Vingirai (Vingirai). The effective date of the agreement was 31 May 2016. The GOZ agreed to transfer 19.79 percent of its stake in the respondent, consisting of 37 557 226 shares to the appellant. It retained a 3.71 percent shareholding, comprising 3 691 575 shares. in the respondent.

[13] Clauses 3.1, 3.2, 3.6 and 4.1 of the agreement stipulate that:

> "3.1 The Transferor (GOZ) shall retain three point seven one percent (3.71%) of its entire shareholding in ZB (the respondent) and transfer the rest of the shares to the transferee (appellant) and as a result of which the transferee shall, post implementation of this agreement, hold 26% shareholding in ZB, the transferee having been offered 10 876 134 shares in ZB representing six point two one percent (6.21%) of the issued share capital.
>
> 3.2 The obligations of the parties (defined in the preamble as GOZ and appellant) to respectively transfer and acquire the shares are conditional upon the fulfilment of conditions or undertakings listed hereunder.
>
> 3.6 The transfer shall not in any way affect any other existing shareholder of ZB.
>
> 4.1 Risk and profit shall pass from the transferor to the transferee on the effective date."

[14] The appellant undertook to withdraw all pending litigation against the respondent including Case No. SC 192/08 (ref Case Nos. HC 1538/07 and HC 1721/07). The GOZ undertook to expeditiously transfer the shares to appellant, grant a general proxy to appellant so that it would attend all shareholders meetings and procure the resignation of all its nominee directors from the respondent's board. The appellant was entitled to nominate 3 non-executive board members to the respondent's board of directors. All disputes between them would be settled by consultations, negotiations or arbitration.

[15] The agreement was dispatched by the RBZ to the respondent on 27 June 2016. The RBZ requested the respondent to do the needful in implementing the agreement. On 30 June 2016, the respondent advised the RBZ that the parties would have to engage stockbrokers and transfer secretaries to perfect their agreement.

[16] On 28 June 2016, the respondent remitted a dividend warrant of US$ 560 009.93 to the GOZ in respect of 41 177 201 shares recorded under its name in the respondent' share

register on 17 June 2016 (the record or closing date for the payment of the dividend). The payment was in respect of a dividend of 1.36 US cents per share on the respondent's issued share capital of 175 557 190 for the year ended 31 December 2015 that had been approved by shareholders at the general meeting held on 27 May 2016. The payment included the 37 557 226, which had not yet been transferred to the appellant. The transfer subsequently occurred on 6 February 2017.

[17] In compliance with r 3.9 and r 11.36 of the ZSE Listing Rules, the respondent published a cautionary statement to the investing public and a similarly worded circular to its shareholders, in the print media, on 21 July 2016. It announced that:

> "The board of directors of ZB Financial Holdings Limited (ZBFHL) advises that the Company's long running case with Transnational Holdings Limited (THL), the former majority shareholder in Intermarket Holdings Limited, has been resolved. **The steps and arrangements necessary to implement the agreement are currently being attended to. Upon conclusion of the necessary processes, THL will end up with a 26 % shareholding in ZBFHL**. THL will nominate three (3) directors to the ZBFHL board. Meanwhile, shareholders are advised to exercise caution when dealing in the Company's shares." (My emphasis).

[18] On 5 August 2016, the appellant's three nominees were appointed to the respondent's board. Thereafter, on 5 October 2016, the appellant successfully requisitioned the resignation of the directors who represented the GOZ on the board. On 8 December 2016, a further two directors were, at the instance of the appellant, appointed to the board.

[19] On 21 December 2016, at an acrimonious board meeting, the directors nominated by the appellant passed a resolution (the board resolution) for the payment of a "duplicate dividend" of US$ 658 699 to the appellant for the financial year ended

31 December 2015. The dividend comprised US$560 009.93, which had been paid to the GOZ and US$98 689.07 purported to be due from the 10 876 134 shares captured in clause 3.1 of the agreement. The resolution further directed the respondent's management to recover the dividend paid to the GOZ of US$560 009.93. The respondent duly paid the requested amount to the appellant on 17 January 2017 and wrote a letter of demand to the GOZ on 23 Janaury 2017.

[20] The board resolution was annulled by the resolution of members (the shareholders resolution) at the subsequent general meeting held on 12 May 2017. The appellant's nominees were all removed from the board at that meeting. The members further approved a dividend payment of US1.26 cents per share on 175 190 642 ordinary shares in issue for the year ended 31 December 2016. The share register would close on 16 June 2017 and payment would be due on 27 June 2017. The shareholders resolution directed management to recover the "duplicate dividend" paid on 23 January 2017.

[21] On a date between 29 June 2017 and 10 July 2017, the respondent *mero motu* withheld the dividends due to the appellant in the sum of US$477 560 and set them off against part of the duplicate dividend.

[22] Notwithstanding the partial set off, the respondent issued summons for the repayment of the duplicate dividend on 28 July 2017. The appellant filed its plea and counterclaim on 14 November 2017. The appellant tendered its stake in IHL in exchange for an allotment or issuance of 6.21 percent shares in the respondent. It also sought payment of the dividend due to it on 27 June 2017 of US$614 407.69, interest and costs, alternatively the ascertainable balance of the difference between the sums awarded in

the main claim and the counter claim. The dividend claim was premised on the putative 6.21 percent stake and the 19.79 percent shareholding. This was in spite of the fact that the only shares registered in the respondent's share register on the record date related to the 19.79 percent stake. The appellant therefore premised its dividend entitlement on a total of 48 433 760 shares, which it purported constituted 26 percent of the respondent's issued share capital. The purported shares actually constitute 27.6 percent of the issued share capital of the respondent. The claimed shares would constitute 26 percent if the respondent's share capital of 175 557 190 was increased by 10 876 134 shares to 186 066 776 shares.

[23] It was common ground that when the pre-trial conference was held on 8 October 2018, the respondent had set off the duplicate dividend in its entirety. It was further common cause that on the date of trial *a quo,* the claim in convention had become moot.

THE PROCEEDINGS BEFORE THE COURT *A QUO*

[24] The respondent called the testimony of its CEO, Mutandangayi, while the appellant relied on the evidence of Vingirai. The evidence of these witnesses was mostly common cause. They disagreed on whether the respondent was bound by the agreement between the GOZ and the appellant, and on the interpretation of the agreement and some of the documents that emanated from the respondent.

[25] Vingirai asserted that the respondent was bound by the agreement because it fully participated in the negotiations leading to the conclusion of the agreement; the agreement inured to its benefit and its conduct reasonably led the appellant to believe that it had accepted the benefits accruing from the agreement. He further asserted that

the respondent unequivocally embraced the agreement through the cautionary statement and circular, published on 21 July 2016, and in its letters written to the RBZ and the GOZ on 23 November 2016 and 23 January 2017, respectively.

[26] The CEO, on the other hand, disputed Vingirai's assertions. He vehemently denied the existence of any privity of contract between the respondent and the parties to the agreement. He asserted that the contents of the cautionary statement could not reasonably be construed as constituting condonation by ratification of the agreement. He explained that the cautionary statement was issued in terms of the mandatory requirements r 3.9 of the ZSE Listing Rules, which require a listed entity, such as the respondent, to expeditiously publish any developments, which may have a material impact on its business and share value. He impugned the probative value of the two letters on the ground that they were written by the respondent's Group Secretary at the behest of the respondent's conflicted board, which was then packed with the appellant's nominees. He accused that board of not only violating the respondent's articles of association but also of breaching their fiduciary duty towards the respondent.

THE CONTENTIONS *A QUO*

[27] In the court *a quo*, Mr *Mbuyisa* for the appellant and Mr *Mpofu* for the respondent conceded that as the main claim had been overtaken by set off, it had become moot. Both counsel, however, insisted that the court *a quo* determine the propriety or validity of the set off. The court *a quo* firmly declined to do so but indicated that it would make *per incuriam* observations on the moot claim.

[28] In view of the fact that both counsel conceded, during the trial *a quo*, that the main claim was moot, it is not necessary for this Court to transverse the very substantial submissions both counsel made *a quo* on the validity of the set off. Suffice it to say, Mr *Mpof*u impugned the duplicate dividend on three grounds. The first was that the board resolution upon which the duplicate dividend was premised, was passed in serious breach of the respondent's articles of association. The second was that the conduct of the directors who passed that resolution violated their fiduciary duty towards the respondent. He contended that the resolution was conceived, debated and passed at the instance and under the undue influence of Vingirai by nominees of the appellant who knowingly flouted articles 7, 16, 17, 92, 99, 100, 104 and 105 of the respondent's articles of association. Vingirai did not declare his "selfish interest" on the first day of debate and only belatedly did so on the second day after he had caused irreversible harm to the respondent. He further contended that these directors deliberately promoted the appellant's interests at the expense of the respondent's interests. The third was that the payment of the dividend of US$98 689.07, having been made on shares that had never been issued was also a nullity. He thus contended that as the three violations were in breach of statute law and common law, the resolution and the subsequent payment were void *ab initio* and had no force or effect. He therefore submitted that, on the authority of *Commissioner of Taxes v First Merchant Bank Ltd* 1997 (1) ZLR 350 (S) at 353C and *Metallon Gold Zimbabwe v Golden Million (Pvt) Ltd* SC 12/15 at p 5, the undue duplicate dividend fell into the ambit of an ascertainable debt that could be properly set off against any future dividends that would be payable to the appellant. He thus moved the court *a quo* to dismiss the appellant's claim for the payment of money.

[29] On the claim for specific performance, which was premised on the tender of the appellant's shares in IHL, he submitted that the tender could not revive an offer which had lapsed on 23 March 2007. He argued that while the respondent could condone the belated acceptance, such condonation had neither been sought by the appellant nor granted by the respondent. He therefore argued that the appellant had no legal basis for seeking the allotment of shares outside the stipulated time for accepting the offer. He also submitted that while the right to sue for specific performance was a cognizable debt under the Prescription Act [*Chapter 8:11*], the right to sue had been afflicted by extinctive prescription some 3 years from 23 March 2007. He further submitted that in the absence of privity of contract, the agreement could not bind the respondent.

[30] Mr *Mbuyisa*, on the other hand, submitted that clause 3.1 of the agreement bound the respondent. He argued that para 3.1 revived the offer that had lapsed on 23 March 2007. He further argued that the appellant's right to accept the offer had not prescribed as any such prescription had been interrupted by the litigation, referenced in clause 3.1 of the agreement. He also argued that the respondent had impliedly ratified the agreement by conduct. The conduct was, in his contention, exemplified by the cautionary statement and circular to shareholders on 21 July 2016, and the contents embodied in the respondent's letters of 23 November 2016 and 23 January 2017. He therefore submitted that the appellant was for that reason entitled to an order for specific performance in regard to the 6.21 percent stake, as tendered in the claim in reconvention.

[31] The upshot of his submissions in respect of the claim for the payment of money was that a valid board resolution could not, in terms of article 92, be overturned by a shareholders' resolution. He contended that the shareholders' resolution that overturned

the board resolution was invalid and could therefore not be used as a basis for setting off dividends that were legally due to the appellant in the subsequent financial year. He submitted that the shareholder's resolution could not therefore shield the respondent from the *ad pecuniam solvendum* order sought by the appellant in reconvention.

THE FINDINGS OF THE COURT *A QUO*

[32] The court *a quo* made the following findings. The main claim was moot and would therefore not detain it. It would only make a determination on the claim in reconvention. It did not believe Vingirai's testimony, wherever it differed with that of the CEO.

[33] In respect of the claim *ad pecuniam solvendum*, the court held that the amount sought had been used to set off a debt, constituted by the duplicate payment, which debt was due to the respondent. The court found that the debt in question had been incurred through an invalid board resolution. The invalidity arose from Vingirai's and all the directors who had been nominated by the appellant's proven breach of their fiduciary duty towards the respondent during the passing of the resolution. Consequently, the court held that, as the dividends that were rightly due to the appellant in respect of the 19.79 percent stake, had been recouped by the respondent under a justifiable *causa*, the counterclaim for their recovery could not succeed. The court *a quo* also held that the balance of the claim for the payment of dividends, which was premised on the unissued 6.21 percent shareholding, was unsustainable. This was on the main basis that the 10 876 134 shares to which this claim related had not been allotted or issued to the appellant.

[34] The court *a quo* dismissed the claim for the allotment of the 6.21 percent stake to the appellant. The main basis for the dismissal was that the appellant failed to establish its entitlement to the shares on a balance of probabilities. The appellant failed to prove that the GOZ, which acted through the agency of the RBZ, had the respondent's mandate, consent or approval to execute the agreement on its behalf or for its benefit. It also found that clause 3.1 did not constitute a reopening of the lapsed offer. It therefore held that the publication of the cautionary statement and the circular to shareholders together with the letters of 23 November 2016 and 23 January 2017 eschewed the suggestion that clause 3.1 of the agreement was ratified and condoned or that an allotment of 10 876 134 shares had been made.

[35] The court *a quo* made two findings in favour of the appellant. The first was that prescription had been interrupted by pending litigation. The second was that the shareholder's resolution could not override a valid board resolution. It nonetheless held that these favourable findings could not assist the appellant as they "did not create any rights to the dividend" for the appellant.

[36] Consequently, the court *a quo*, dismissed the counterclaim in its entirety.

GROUNDS OF APPEAL

[37] Aggrieved by the court *a quo's* decision, the appellant appealed to this Court on six grounds of appeal. At the commencement of this judgment, we highlighted the concessions made by Mr *Nyamakura* in regard to the order that ought to issue from the first ground of appeal. It is not necessary for us to set out the second to fifth grounds of appeal. This is because they were rightly abandoned and consequently struck out.

[38] The first and sixth grounds of appeal state that:

1. The court *a quo* erred both at law and in fact by failing to make a pronouncement on the issue whether or not the respondent's claim should succeed or fail, in circumstances where this issue was live between the parties, evidence was led on the issue by both parties and both counsel addressed the issue in argument.

2. The court *a quo* erred and misdirected itself when it held that the appellant was not entitled to 6.21% of the shares despite evidence that the respondent implemented the agreement between the appellant and the Government of Zimbabwe.

[39] The appellant seeks the success of the appeal and the vacation of the substantive judgment of the court *a quo* in respect of the counterclaim and its substitution by an order granting the appellant the relief initially sought therein. It also seeks an award of costs in respect of the appeal and the substitutory order.

THE SUBMISSIONS BEFORE THIS COURT

[40] Mr *Nyamakura* valiantly submitted that this Court ought to uphold the appellant's appeal in regard to the order *ad pecuniam solvendum* and *ad factum praestandum*. His submissions for the claim for the payment of money was premised on the purported validity of the 21 December 2016 board resolution and the purported invalidity of the 12 May 2017 shareholders' resolution.

[41] In interactions with the court, Mr *Nyamakura* conceded that the claim sounding in money was, on the totality of the evidence adduced *a quo*, unsustainable. In the main, the evidence on record showed that the board resolution passed on 21 December 2016, violated articles 4, 5, 6, 7, 8, 16, 17, 92, 99, 100, 104 and 105 of the respondent's articles of association. These articles conjunctively bestow on the shareholders the sole power to create, issue and allot shares and the singular authority to approve the payment of any dividends. These articles also stipulate that the payment of dividends can only be made to a shareholder whose name is recorded in the share register of the company on the record date. Finally, article 92, on which the appellant nailed its colours, protects valid board resolutions that are consistent with the provisions of the other articles of association. He therefore conceded that the impugned board resolution was void *ab initio* and had no force or effect.

[42] On the claim for specific performance, notwithstanding his concession that the allotment or issuance of shares was the prerogative of shareholders, he strenuously submitted that the conduct of the respondent after the effective date of the agreement showed that the respondent had allotted and issued the 6.21 percent stake to the appellant. He contended that the allotment was evidenced by the cautionary statement and the circular to shareholders, which were published on 21 July 2016 and the letters that emanated from the respondent on 23 November 2016 and 23 January 2017. He therefore submitted that the court *a quo* misdirected itself in dismissing the appellant's claim for specific performance in respect of these shares.

[43] On the only issue that remained in contention, Mr *Mpofu* contended that the parties to the agreement acted under a mistaken belief that an offer could be accepted after it had

lapsed. He relied on the cases of *Orion Investments (Pvt) Ltd v Ujamaa Investments (Pvt) Ltd & Ors* 1988 (1) ZLR 583 (S) at 588A-C, *Parker v W G Kinsey & Co (Pvt) Ltd* 1987 (1) ZLR 188 (S) and Christie: *The Law of Contract in South Africa* at p 65 for the contention that an offer cannot be accepted after the expiration of the time stipulated for its acceptance. He further contended that the corporate facts indubitably demonstrated that the 6.21 percent stake had never been issued. He also argued that, the letter of 23 November 2016 demonstrated that the 6.21 percent stake could not be issued without diluting the shareholdings of the other shareholders. The self-same facts also showed that the appellant had not sought nor been granted condonation for the belated acceptance. He finally contended that the minutes of the shareholders general meeting held on 12 May 2017 clearly showed that the proposal by the appellant for the allotment of these shares had been roundly rejected at that meeting. He therefore submitted that the dismissal of the claim for specific performance was unassailable.

THE ISSUE

[44] The only issue that remains for determination is whether or not the court *a quo* erred in dismissing the appellant's claim for the allotment of 6.21 percent shareholding in the respondent.

ANALYSIS

[45] The determination of the sole issue revolves upon the construction of articles 4, 5, 6 and 24 of the respondent's articles of association. Article 4 requires that all issued shares be fully paid up. Art. 5 provides that the directors should allot or issue shares that are created by members in general meeting under the terms and conditions that are specified at such a general meeting. Art. 6 stipulates that the share capital of the Company shall

be increased by a Special Resolution taken in general meeting which shall give pre-emptive rights to existing shareholders in proportion to the shares that each member holds. Article 24 provides that:

> "The Company may by Special Resolution increase its capital by the creation of new shares of such amount as may be deemed expedient."

A general meeting is defined in art. 2 as:

> "an annual or extraordinary general meeting of the members of the Company except where the context otherwise requires".

[46] The above cited articles clearly demonstrate that the creation, allotment and issuance of the shares in the respondent is the sole prerogative of the shareholders in a general meeting. In casu, the shareholders refused to create, allot and issue shares to the appellant at the annual general meeting held on 12 May 2017. The fact that the appellant proposed the allotment of these shares at that general meeting put paid to its assertion that the letter of 23 November 2016 showed that these same shares had been allotted and issued to it on 18 November 2016.

[47] In context, the letter of 23 November 2016 constituted advice to the RBZ of the impossibility of implementing clause 3.1 of the agreement in the manner contemplated by that agreement. An allotment of 10 876 134 shares to the appellant from the existing issued shares would represent 5.84 percent of the respondent's issued share capital. Further, while an increase of the share capital by these shares would increase appellant's stake to 26 percent, it would, contrary to clause 4.1 of the agreement, result in the dilution of the shareholding of the other shareholders. It is clear to us that the letter of 23 November 2016 shows that the issuance of a 6.21 percent shareholding to the appellant that was contemplated under clause 3.1 of the agreement, was impossible of

performance. In other words, the clause was to that extent, unenforceable. The appellant could not rely on an unenforceable clause to found its cause of action.

[48] In any event, the appellant demonstrably failed to satisfy this Court that the court *a quo's* findings of fact that are recited in para 34 above were, in the circumstances of this case irrational. See *Hama v NRZ* 1996 (1) ZLR 664 (S) at 670C-D.

[49] It is also noteworthy that the two letters relied upon by appellant were written at a time when the appellant's nominee directors were in full control of the board. It is strange that no evidence of such an allotment was produced *a quo*. The fact that the two letters were written under the undue influence of the appellant's nominee directors is apparent from their respective contents, which espoused the appellant's position. These letters could not, in any event supplant the power of shareholders to create, allot and issue the shares craved by the appellant.

[50] The weakness in the claim for specific performance is further exemplified by the approbation and reprobation exhibited by the appellant. In one vein, it claims that the shares had been issued by 18 November 2016 and in another, it prays for a specific order for their allotment and issuance. Its claim for specific performance could therefore not be sustained by these inconsistent positions. See *Hlatshwayo v Mare & Deas* 1912 AD 243 at 259.

[51] In the circumstances, we agree with Mr *Mpofu* that the appellant failed to establish a legal basis upon which the court *a quo* could order the respondent to allot the 6.21 percent stake to it. The dismissal of the claim for specific performance *a quo* is unassailable. The appeal is clearly devoid of merit and ought to be dismissed.

COSTS

[52] There is no reason why costs should not follow the result.

DISPOSITION

[53] The following order will issue.

1. By consent, the order of the court *a quo* is corrected by the insertion of para.1, which reads as follows:

   "1. Jurisdiction in respect of the claim in convention be and is hereby declined for the reason that the matter is moot."

2. Subject to para. 1 above, the appeal be and is hereby dismissed with costs.

GUVAVA JA: I agree

UCHENA JA: I agree

Mtetwa & Nyambirai, the appellant's legal practitioners

Gill, Godlonton & Gerrans, the respondent's legal practitioners