

**REPORTABLE (90)**

GERALD SIBANDA  
v  
LAWRENCE MASANGA

**SUPREME COURT OF ZIMBABWE  
GWAUNZA DCJ, GUVAVA JA & CHIWESHE JA  
HARARE: 23 FEBRUARY 2024 & 30 SEPTEMBER 2024**

*R. G. Zhuwarara*, for the appellant

*F. Mahere*, for the respondent

**GUVAVA JA:**

[1] This is an appeal against part of a judgment of the High Court ('court *a quo*') handed down on 13 December 2021 in HH 702/21, in which the court granted the respondent an order to evict the appellant and all those claiming occupation through him from No. 60 Circular Drive, Burnside, Bulawayo. The court *a quo*, in the same judgment, dismissed the appellant's claim in reconvention seeking a *declaratur* that the purported cancellation of the agreement was invalid, that payment of the purchase price to the conveyancer be declared full performance of the appellant's obligations under the agreement and finally an order that the respondent be compelled to sign all relevant papers in order to pass transfer to him within seven days of the grant of the order.

**FACTUAL BACKGROUND**

[2] The respondent is the registered owner of a certain piece of land situated in the District of Bulawayo being subdivision A of Matsheumhlope also known as No. 60 Circular Drive,

Burnside Bulawayo ('the property'). Sometime in July 2006 the respondent, who was based in South Africa, engaged Business Exchange Estate Agents ('Business Exchange') to sell his immovable property for an asking price of ZWD16 billion. Business Exchange duly placed an advert in The Herald newspaper seeking buyers for the property. The appellant responded to the advert and negotiations culminated in a reduced purchase price of ZWD15 billion.

[3] On 23 August 2006, the appellant and the respondent entered into an agreement of sale and in terms of clause 1 payment was to be effected in the following manner:

- “(a) An initial deposit in the sum of ZWD 1.5 billion shall be paid to Business Exchange (Private) Limited on signature of this Agreement of Sale.
- (b) The balance in the sum of ZWD 13.5 billion to be paid directly to the Conveyancers on registration of transfer.”

Soon after the parties had signed the agreement the Zimbabwean currency was revalued by the Reserve Bank of Zimbabwe by dropping three zeroes through “Operation Sunrise”. The amount of ZWD15 billion was therefore revalued to ZWD15 million. The appellant paid a deposit of ZWD1.5 million on 30 August 2006. The respondent gave the appellant vacant possession of the property. The appellant has been living in the property for the past 18 years.

[4] When the deposit was paid, the conveyancers, being Coghlan, Welsh and Guest Legal Practitioners, proceeded to carry out the transfer process, which process included obtaining Capital Gains Tax (CGT) assessment from the Zimbabwe Revenue Authority ('ZIMRA'). ZIMRA however declined to issue the CGT assessment on the basis that the value of the property in the agreement of sale was too low. In order to assure ZIMRA that the value was indeed a market value, the appellant requested a valuation of the property

from Bulawayo Real Estate. They assessed the value to be ZWD\$18 million. This value was again declined by ZIMRA as being too low.

[5] In an effort to save the agreement the appellant filed an urgent chamber application in the High Court under HC 1183/07 seeking interim relief barring the property from being sold to any other person and compelling ZIMRA to accept the value of the property as had been agreed to by the parties. A provisional order was granted by CHEDA J on 1 June 2007. On 4 May 2011, MATHONSI J (as he then was) discharged the provisional order and dismissed the application for a final order. The dismissal was granted in default as the appellant did not appear on the return date. The appellant did not seek rescission of the default judgment. As at the date of discharge of the provisional order ZIMRA had not issued a CGT assessment for the property.

[6] In the meantime, the respondent requested that the appellant authorize the release of the balance of the purchase price of the property to avoid the effects of hyper-inflation. The appellant wrote back saying this could only be done after the respondent had complied with the ZIMRA obligations. On 19 February 2007 the appellant however finally agreed to release the entire purchase price to the respondent at the same time demanding transfer. The respondent thereafter wrote to the conveyancers advising them to halt the entire process of the sale of the property and refund the purchase price as the process was taking too long due to the unavailability of the CGT assessment and also due to the fact that the value of the money had been severely diminished by hyperinflation. Consequently, the conveyancers returned the full purchase price and transfer costs that had been paid by the appellant into his bank account and returned the title deed of the property to the respondent.

[7] On 27 October 2009 the respondent instituted proceedings in the court *a quo* under HC 5222/09 seeking the eviction of the appellant from the property. It appears nothing significant happened to that process until twelve years later on 15 July 2021 when the respondent amended his summons and declaration to include a claim for holding over damages at the rate of US\$20 (or Zimbabwe dollar equivalent at the current bank rate) per day with effect from 31 August 2018 to date of eviction. In the claim the respondent averred that performance of the agreement of sale had been made impossible by the refusal by ZIMRA to issue a CGT assessment so as to enable transfer. The respondent further averred that due to hyperinflation the purchase price had become negligible. He further alleged that due to changes in currency the Zimbabwean dollar had ceased to be a medium of exchange thus the original agreement could not be implemented. It was on this basis that the respondent averred that the agreement between the parties had terminated and the appellant had to be evicted from the property.

[8] The appellant entered appearance to defend and, in his plea, averred that the respondent had sold his rights, title and interest in the property and had therefore divested himself of ownership rights. The appellant further averred that he had complied with his obligations in terms of the agreement as he had duly paid the initial deposit of ZWD1.5 million and the balance of ZWD13.5 million. He maintained that he had kept to his side of the agreement as he paid the balance directly to the conveyancers before transfer had taken place. He further averred that the duty to obtain a CGT assessment rested squarely upon the respondent as the seller of the property. He pointed out that the balance of the purchase price including transfer fees had been paid between 18 October 2006 and 17 November 2006. He stated that the erosion of the purchase price was not a valid basis to resile from the agreement as the principle of *laesio enormis* was not part of Zimbabwean law. It was

his position that the agreement was still valid and the purported termination by the respondent was of no force and effect as the respondent had not cancelled the agreement in terms of clause 7 which sets out the procedure to be followed in the event of breach of contract. He denied that the respondent was entitled to holding over damages as he had sold the house to him.

[9] The appellant also filed a counterclaim in which he sought a *declaratur* that the purported cancellation of the agreement was invalid, that payment of the purchase price to the conveyancer be declared full performance of the appellant's obligations under the agreement. To enforce the *declaratur* the appellant sought an order that the respondent be compelled to sign all papers necessary to pass transfer of the property to him within seven days of the order being granted, failing which the deputy sheriff would be authorized to sign all the relevant transfer papers in the respondent's place.

[10] The respondent filed a plea to the appellant's counter-claim and averred that the matter was *res judicata* as it had been finalized under case number HC 1183/07 when MATHONSI J (as he then was) had discharged the interim order compelling ZIMRA to accept the purchase price agreed to by the parties for the purpose of assessing CGT. He also denied that the appellant was entitled to transfer of the property as the purchase price had been returned to him and he had accepted it. The parties proceeded to Pre-Trial Conference and agreed on the following issues for determination during trial:

- “1. Whether or not a valid sale of agreement was concluded and performed?
2. Whether or not the plaintiff is entitled to the remedy of eviction in this matter?
3. Whether or not the plaintiff effected valid refund of the purchase price?

4. Whether or not the defendant is liable to the plaintiff for holding over damages in the sum of US\$450-00 per month from 31 August 2018 to date of giving vacant possession?”

[11] On 14 March 2014, DUBE J (as she then was) heard the matter under HC 5222/09. The respondent was in default and the court granted a default judgment in favor of the appellant. On 19 March 2015 the default judgment was rescinded by MAKONI J (as she then was). The judge further directed that the matter be set down for trial.

[12] At the trial the appellant and respondent both led evidence and were the sole witnesses for their respective cases. The court *a quo* in determining the matter held, *inter alia*, that the performance of the agreement had become impossible as ZIMRA declined to accept the purchase price agreed to as between the parties as the true value of the property. It further held that transfer could not be effected based on that agreement of sale and that even if the Commissioner General had determined a value, the parties still had to enter into another agreement or vary the original agreement to reflect the new purchase price. This would have the effect of the Commissioner General imposing an agreement upon the parties which he could not do.

[13] The court *a quo* further held that a refund of the purchase price amounted to repudiation of the contract by the respondent. The court noted that the purchase price was deposited into the appellant’s bank account and it was not returned to the respondent. The court *a quo* thus found that the appellant accepted the repudiation and the respondent remained the owner of the property. It also found that the respondent was entitled to recover the property under *rei vindicatio*. With regards to the respondent’s claim for holding over damages, it found that the respondent failed to prove the amount of US\$450.00 as claimed and dismissed it. On the appellant’s counterclaim, the court *a quo* held that,

having found for the respondent it naturally followed that the counterclaim could not be granted. On this basis, the court *a quo* granted an order for the eviction of the appellant from the property, dismissed the claim for holding over damages and dismissed the appellant's counter claim.

[14] Aggrieved by the decision of the court *a quo*, the appellant appealed to this Court on the following grounds of appeal:

1. The court *a quo* grossly erred at law in dismissing the Appellant's claim in reconvention without deliberating on the *declarateur* sought. The court *a quo* did not relate to the *declarateur* in its determination or give reasons for the dismissal of the claim.
2. The court *a quo* erred at law by failing to apply the correct test relating to supervening impossibility. The court erroneously assessed whether there was a 'meeting of the minds' with regards to impossibility instead of ascertaining whether the contract had been rendered unenforceable on account of impossibility of performance.
3. The Court *a quo* grossly misdirected itself in concluding that impossibility was objective and absolute in the face of evidence establishing that compliance with Capital Gains Tax laws (CGT) could be achieved. Impossibility was never established.
4. The court *a quo* grossly misdirected itself in disregarding that;
  - 4.1. The value paid by the Appellant was ascertained by the respondent.
  - 4.2. The respondent did not ascertain what ZIMRA considered a fair valuation of the property.
  - 4.3. The respondent opposed a petition compelling ZIMRA to calculate CGT and secured a discharge of the provisional order resolving the tax hurdle.

The court *a quo* failed to consider evidence establishing that Respondent was temporarily disabled from performance. The evidence led cannot substantiate a conclusion that impossibility was objective and absolute.

5. The court *a quo* erred in finding that the agreement *inter partes* had terminated on account of supervening impossibility yet the respondent purportedly (and wrongfully) cancelled the agreement on the basis of economic hardship.

[15] From the above grounds, it seems that this appeal turns on three main issues which are:

- (i) Whether or not the court *a quo* erred in holding that the contract could not be performed due to a supervening impossibility.
- (ii) Whether or not the court *a quo* erred in holding that the contract had been properly cancelled; and
- (iii) Whether or not the court *a quo* erred in dismissing the appellant's claim in reconvention without making findings on the declarateur sought.

### **APPELLANTS' SUBMISSIONS ON APPEAL**

[16] Mr *Zhuwarara* for the appellant, submitted that the court *a quo* erred in concluding that the respondent was excused from performing the contract based on a supervening impossibility. It was his argument that the court *a quo* applied the wrong test in determining whether or not there was supervening impossibility as it erroneously focused on the wrong principle. Counsel argued that the test for supervening impossibility did not involve a meeting of the minds but rather that the party alleging the impossibility should prove that there was a supervening impossibility. Counsel argued further that the real reason why the respondent cancelled the agreement was that the purchase price paid by the appellant had been eroded by hyperinflation.

[17] Counsel further submitted that the court *a quo* ignored the fact that the appellant had made an application to compel ZIMRA to accept the value of the property as agreed by



the parties but the respondent had sought the discharge of the provisional order when the appellant failed to attend the court hearing thus creating the impossibility. It was the appellant's argument that the impossibility alleged by the respondent was temporary and could have been overcome if ZIMRA had been compelled to issue the CGT assessment. Counsel argued that the evidence before the court could not sustain a defence of supervening impossibility and, therefore, the purported cancellation of the contract should not stand. It was further submitted that the court *a quo* should have entertained the claim in reconviction and not dismissed it out of hand.

### **RESPONDENT'S SUBMISSIONS ON APPEAL**

[18] On the other hand, Ms *Mahere* for the respondent, submitted that the relief sought by the appellant could not be enforced as it did not address the issue of how the CGT assessment would be calculated considering the agreement of sale was in a currency that was no longer in existence. She further submitted that the evidence proved that the supervening impossibility was absolute. ZIMRA had declined to issue a CGT assessment and thus the property could not be transferred to the appellant. She submitted that the respondent had not contemplated such an eventuality and could not be blamed for the actions of ZIMRA. It was her submission that an application compelling ZIMRA to issue a CGT assessment would in turn have altered the contract between the parties thus creating a new contract for the parties.

[19] Counsel further argued that the respondent returned the purchase price which was accepted by the appellant who placed it in an investment account. Counsel argued that the act of accepting the purchase price by the appellant was a tacit acceptance that the contract was impossible to perform. Counsel further argued that it could not be denied that ZIMRA had refused to accept the contracted value of the property and it had refused

to issue the CGT assessment. Counsel thus maintained that the impossibility was no one's fault as both parties wanted the transfer of the property but ZIMRA made such transfer impossible. Counsel submitted that ZIMRA could not come up with a value for the property as this would have amounted to it rewriting the contract for the parties.

[20] Ms *Mahere* did not agree that the court *a quo* applied the wrong test in finding that it was impossible to perform the contract, She submitted that the test for impossibility had four requirements which had been properly canvassed by the court *a quo* and which led to the correct conclusion that the contract had been rendered impossible to complete. On the issue of whether the contract had been cancelled by the respondent, counsel submitted that the contract had not been cancelled but had been discharged by operation of the law as it was impossible to perform.

### **THE LAW**

[21] At law parties to an agreement of sale of an immovable property or *merx* are bound by the terms of the agreement which they sign. The signing of the agreement signifies a meeting of minds between the parties that they intend to be bound by the agreement. The agreement must set out the following:

- (i) The identity of the property to be sold,
- (ii) The amount of the purchase price and manner in which it is to be paid,
- (iii) The mode of delivery or transfer of the property or thing; and
- (iv) The conditions under which the agreement may be terminated by parties.

It is trite that the obligations stated in the agreement bind the parties and it is only upon execution of such obligations that transfer of the property can take place. From this premise, an agreement of sale will be discharged on the basis of four conditions; firstly, upon the parties satisfying their obligations in the terms of the agreement, secondly, where cancellation has taken place in accordance with the agreement, thirdly, where one

party repudiates the agreement and finally, where the agreement is impossible to perform resulting in its cancellation.

[22] Supervening impossibility otherwise known as *vis major* or *casus fortuitus* relates to an unforeseen situation which arises and renders it impossible for a party to perform in accordance with their obligations. Such act can excuse a party from complying with obligations imposed upon it in a contract. This principle is based on the presumption that parties to an agreement intend to be bound by such agreement. The principle will not apply in the following circumstances:

- (i) where either party causes the occurrence of the event leading to the impossibility to perform, or
- (ii) where there is commercial impossibility, or
- (iii) where the agreement or contract can be performed through multiple modes.

Supervening impossibility does not apply automatically but rather, it is determined upon the circumstances of each given case. It is a principle which can only apply when the intention of both parties cannot be met despite their efforts to comply.

[23] The application of the principle of supervening impossibility has been discussed in a number of judgments in this jurisdiction. In *Standard Chartered Bank Zimbabwe Limited v China Shougang International* 2013 (2) ZLR 385 it was held as follows at 389 D of the judgment:

“It goes without saying that in order for its defence to succeed the appellant must do more than merely allege impossibility. The impossibility must be proved, that is, it must be clear from the evidence that performance is impossible, not merely undesirable or uneconomical.”

In *Watergate (Private) Limited v Commercial Bank of Zimbabwe* 2006 (1) ZLR 9 (S) at 14 C-F the Court, dealing with the same principle, held as follows:

“However, whether or not the general rule applies in a particular case would depend upon the circumstances of the case and the nature of the impossibility.

In this regard, I can do no better than quote what BOSHOFF JP said in *Bischofberger v Van Eyk* 1981 (2) SA 607 (WLD). At 611 B-D the learned JUDGE PRESIDENT said:

‘... when the Court has to decide on the effect of impossibility of performance on a contract, the Court should first have regard to the general rule that impossibility of performance does in general excuse the performance of a contract, but does not do so in all cases, and must then look to the nature of the contract, the relation of the parties, the circumstances of the case and the nature of the impossibility to see whether the general rule ought, in the particular circumstances of the case, to be applied. In this connection regard must be had not only to the nature of the contract, but also to the causes of the impossibility. If the causes were in the contemplation of the parties, they are generally speaking bound by the contract. If, on the contrary, they were such as no human foresight could have foreseen, the obligations under the contract are extinguished.’

I respectfully agree with the principles set out by the HONOURABLE JUDGE PRESIDENT. Those are the principles that ought to be applied once the existence of the impossibility has been established.”

[24] In raising supervening impossibility a party must satisfy four requirements which were aptly stated in *Lungu v Lungu* 2000 (1) ZLR 120 (S) at p 125 C-F where SANDURA JA quoted with approval the learned author RH Christie in *The Law of Contract in South Africa* 3 ed, at pp 101-102 wherein it was stated that:

“The Roman law principle that a contract is a nullity if at the time it was made it was impossible of performance forms part of our law. ‘By the Civil Law a contract is void if at the time of its inception its performance is impossible: *impossibilium nulla obligatio* (D50.17.185).’ But the principle thus stated may easily be misunderstood and requires immediate qualification in four respects. First, the impossibility must be absolute as opposed to probable. The mere likelihood that performance will prove impossible is not sufficient to destroy the contract. Second, the impossibility must be absolute as opposed to relative. If I promise to do something which, in general, can be done, but which I cannot do, I am liable on the contract. Third, the impossibility must not be the fault of either party. A party who has caused the impossibility cannot take advantage of it and so will be liable on the contract. Fourth, the principle must give way to the contrary common intention of the parties. This intention may be expressed, as when a seller expressly represents or promises that the merx exists. If it is found not to have been in existence at the time the contract was made, he will be liable for damages for breach of his promise or for his false representation if fraudulent or negligent. Or the common intention of the parties may be implied, as in the case of the sale or lease of a *res aliena*. The seller or lessor impliedly undertakes to deliver the property or to pay damages if he is unable to do so.”

[25] What can be drawn from the above authorities is that impossibility to perform cannot simply be assumed or stated by a party that is relying on it but must be proved on a balance of probabilities. A party must ensure that the above stated requirements are met. In considering whether there was a supervening impossibility or not, the courts should not be quick to exonerate a party from performing their obligations. The court in assessing whether a supervening impossibility exists must thus take note of the nature of the agreement between the parties, the nature of the relationship between the parties, the facts of the case and the nature of the alleged impossibility. These considerations must be looked at cumulatively and the party which alleges an impossibility must establish such allegation with evidence.

#### **APPLICATION OF THE LAW TO THE FACTS**

##### **Whether or not the court *a quo* erred in finding that the contract could not be performed due to supervening impossibility.**

[26] In order to determine whether or not this is an appropriate case in which to apply the principle of supervening impossibility it is necessary to examine the facts. *In casu* the parties duly entered into an agreement of sale. The terms of the agreement of sale entered into by the appellant and respondent, were clear and unambiguous. In compliance with the terms of the agreement the appellant paid the deposit and upon instruction by the respondent, the conveyancers started the process of obtaining the CGT assessment from ZIMRA. It is common cause that ZIMRA declined to issue the CGT assessment on the basis that the purchase price was too low and did not reflect the true value of the property. It was on the basis of the refusal by ZIMRA to issue the CGT assessment that transfer of the property could not be made to the appellant.

[27] It is without doubt that it is a requirement that a CGT assessment must be issued before transfer of property can occur. This is a mandatory legal step in conveyancing. Capital

gains tax is calculated on the basis of the value of the property. Where the Commissioner General is not satisfied that the purchase price reflects the fair market value of a property, he is empowered to determine a value and base his assessment upon that value. This power is derived from section 14 of the Capital Gains Tax [*Chapter 23:01*] (the ‘Act’).

The section provides as follows:

“Where a person purchases a specified asset from any other person at a price in excess of the fair market price or where he sells a specified asset to any other person at a price less than the **fair market price the Commissioner may**, for the purposes of determining the capital gain or assessed capital loss, as the case may be, of such mentioned person, determine the fair market value price at which such purchase or sale shall be taken into his accounts or returns for assessment.”

[28] In this case the Commissioner found that the value of ZWD15 million which had been agreed between the parties was too low for the property. The Commissioner thus had the power to determine the fair market value of the property. He chose not to do so. It is apparent from that the wording of the section that it gives the Commissioner General a discretion to exercise this power. This is because the Legislature, in its wisdom, used the word ‘may.’ In *Shumba & Anor v ZEC & Anor* 2008 (2) ZLR 65 (S) at p 80E the court discussed the effect of the word “may”. The court stated the following:

“It is generally an accepted rule of interpretation that the use of peremptory words such as “shall” as opposed to “may” is indicative of the legislative’s intention to make the provision peremptory. The use of the word “may” as opposed to “shall” is construed as indicative of the legislative’s intention to make the provision directory.”

[29] The wording of s 14 of the Act is clear and unambiguous and leaves no doubt of the intention of the Legislature. The use of the word ‘may’ in the above enactment clearly establishes the discretionary power of the Commissioner General. It follows that the Commissioner General upon being approached by the conveyancer for a CGT assessment could if he so wished, determine what he perceived as the correct market value of the

property since he was not satisfied with their price. The Commissioner General however did not exercise his discretion in favor of determining a market value for the property. The decision by the Commissioner General obviously had a domino effect on the transfer of the property as the conveyancers failed to effect transfer of the property to the appellant in the absence of the CGT assessment.

[30] It is noteworthy that when transfer of the property could not be effected by the conveyancers, the appellant did not sit on his laurels but caused a valuation to be conducted by a company known as Bulawayo Real Estate, which Estate agency gave the value of the property as ZWD 18 million. This value was also declined by ZIMRA. The appellant went on to file an urgent chamber application to compel ZIMRA to assess the CGT based on the value of ZWD18 million. The provisional order was granted. ZIMRA did not act. However, the appellant did not attend court on the return day and the provisional order was discharged. The discharge of the provisional order was thus not at the behest of the respondent as alleged by the appellant.

[31] The respondent, in an effort to save the agreement, sought payment of the remaining balance of the purchase price. Following considerable delay, the appellant paid the balance of the purchase price and again insisted on the transfer of the property. The respondent returned the balance on the basis that the amount was being eroded by hyperinflation and transfer could still not be carried out due to the failure by the conveyancers to obtain the CGT assessment. The appellant acknowledged that he received the amount and placed it in an investment account in the hope that the transfer would eventually be effected.

[32] The facts of this matter paint a picture in which the parties were both in agreement that the sale should take place. They both did everything they could to ensure that the sale

went through and the property transferred to the appellant. The appellant carried out his obligation by paying the deposit as agreed in the agreement and at a later stage paying the balance of the purchase price. The respondent, likewise, carried out his part by giving the appellant vacant possession of the property and instructed his legal practitioners to transfer the property into the appellant's name. Clearly the failure to implement the agreement arose from the refusal by ZIMRA to issue the CGT assessment which was a mandatory step to be satisfied before the transfer of the property could be done. Thus the appellant's argument that that the defence of impossibility relied on by the respondent was self-created does not hold water.

[33] It was appellant's argument that the court *a quo* did not consider the requirements for a defense of impossibility as set out in the *Lungu* judgment (*supra*). We were not persuaded by this argument. A careful reading of the court *a quo*'s judgment and the facts found proved show that firstly, the impossibility to perform was absolute as opposed to probable as the refusal by ZIMRA to issue the CGT assessment rendered the agreement unenforceable. It is not in dispute that ZIMRA is an independent body which is not under the control of any of the parties. When the CGT assessment could not be availed by ZIMRA the appellant sought to compel ZIMRA to issue the CGT assessment without success. It is important to note that whilst ZIMRA could have determined a value in terms of s14 of the Act. It chose not to do so. The reason for declining to exercise its discretionary power is not apparent from the papers before the court. They thus remain firmly embedded in the mind of ZIMRA. Unfortunately, the result of this action was to stall all the processes in the sale as transfer could not take place.

[34] Secondly, the impossibility was absolute as opposed to relative as the refusal by ZIMRA to issue CGT assessment rendered the agreement impossible to perform. Soon after the



deposit was paid the respondent gave the appellant vacant possession of the property in circumstances where he was not obliged to do so by the agreement. This was clear testimony that he intended to carry out his obligations in terms of the agreement. Thirdly, the impossibility was not the fault of either the appellant or the respondent. It was caused by the failure to obtain the CGT assessment which was mandatory for the transfer of the property to occur. Neither party could have anticipated that ZIMRA would decline to issue a CGT assessment. Finally, the intention of the parties to be bound by the agreement was clear as evidenced by signing the agreement of sale. The deposit was paid by the appellant in terms of the agreement. The respondent's gesture of giving the appellant vacant possession of the property was a clear expression of the desire to be bound by the agreement. It is not in dispute that the issue of evicting the appellant only arose in 2009 when it was apparent that the agreement could not be salvaged. It should also be noted that the appellant has been living on the property for free for a period in excess of 18 years. These are not the actions of persons who were not sincere in entering into the sale agreement.

[35] Taking into account the above facts the court *a quo* was thus correct in finding that the respondent was entitled to be excused from performing the contract due to supervening impossibility.

**Whether the court *a quo* erred in holding that the contract had been cancelled**

[36] Mr *Zhuwarara*, argued that the court *a quo* erred in finding that the contract had been properly cancelled by the respondent. The basis of his argument was that the contract had not been cancelled in accordance with clause 7 of the agreement. We were however, persuaded by Ms *Mahere's* submission that clause 7 of the agreement was not applicable as there was no breach of the agreement by either party. Clearly there was nothing to

cancel because, as already discussed above, the contract could not be implemented due to ZIMRA's failure to assess the CGT and it was thus discharged. The judgment of the court *a quo* was therefore correct. Once it found that ZIMRA declined to accept the purchase price and declined to exercise its discretion (as it was perfectly entitled to do) in accordance with s 14 of the Capital Gains Tax Act, a supervening impossibility was created which resulted in the failure by the parties to fulfil their obligations as stated in the agreement of sale.

[37] Faced with an agreement of sale which could not be implemented, the respondent was left with the only option of returning the purchase price to the appellant before it was eroded by hyperinflation which was rampant at the time. The act of returning the purchase price to the appellant did not amount to cancellation of the agreement, rather it was a discharge of the agreement on the basis of the supervening impossibility. In *MacDuff & Co Ltd v Johannesburg Consolidated Investment Co Ltd* 1924 AD 573 at 600, SOLOMON JA commented as follows:

“Now it is a clear principle of our law that a contract is discharged if it has become impossible of performance after it has been entered into: *Peters Flamman & Co v Kokstad Municipality* (1919 AD 427).”

The mere fact that the respondent, in his letter to the appellant, stated that he was cancelling the contract due to loss of value of the money due to hyperinflation is of no moment as it does not alter the fact that the contract was discharged because it was impossible to perform.

**Whether the court *a quo* failed to determine the counterclaim which was filed by the appellant**

[38] The final complaint by the appellant was that the court *a quo* failed to determine his counter claim. It is not in dispute that before the court *a quo* the appellant sought

declaratory and ancillary relief. The court *a quo* in dealing with the matter before it held that the finding that there was supervening impossibility resulted in the discharge of the agreement and was dispositive of the matter.

[39] The appellant in his first ground of appeal argued that the court *a quo* erred in failing to proffer reasons for its decision to dismiss the counter claim. It is settled that a court must determine all issues placed before it through pleadings and submissions by parties unless the issue that it determines is dispositive of the matter. See *Gwaradzimba N.O v CJ Petron & Co (Pty) Ltd* 2016 (1) ZLR 28 (S)) at 31 G)

[40] The dispute between the parties was disposed of by the finding that the agreement between them was discharged due to a supervening impossibility. Having made such a finding, it was unnecessary for the court to plough through the requirements for a *declarateur* and the question whether or not the agreement had been cancelled in accordance with the contract. The court *a quo*, having found that the respondent remained the owner of the property, correctly evicted the appellant on the basis *rei vindication*. This finding had the effect of disposing of the matter. The appellant's complaint in this regard is therefore without merit.

### **DISPOSITION**

[41] The facts reveal that the appellant and the respondent had the intention to be bound by the agreement. The refusal by ZIMRA to issue a CGT assessment made it impossible for the agreement to come to fruition. This was not the fault of either party. In addition, the return of the purchase price by the respondent and the acceptance of it by the appellant resulted in the discharge of the agreement. Once the court *a quo* found that the contract was impossible to perform it meant that the counterclaim could not be granted. The

respondent thus remained the owner of the property as the agreement of sale was discharged. The respondent was within his rights to vindicate his property from the appellant and to seek his eviction from the same property. The court *a quo* correctly ordered the eviction of the appellant.

[42] The appellant's appeal is devoid of merit and cannot succeed. The respondent has been successful in defending the appeal and is entitled to his costs.

In the result it is ordered as follows:

“The appeal be and is hereby dismissed with costs.”

**GWAUNZA DCJ** : I agree

**CHIWESHE JA** : I agree

*Masiye-Moyo & Associates*, appellant's legal practitioners

*Madotsa & Partners*, respondent's legal practitioners