WALTER NYAUNGWA
versus
JEFFM AUCTIONS (PVT) LTD
and
FORESTRY COMMISSION

HIGH COURT OF ZIMBABWE
CHITAPI J
MUTARE; 16 November 2023 & 8 April 2024

Civil Trial Denovo Hearing

Plaintiff in person
Mr *D Tandiri,* for the 1st defendant
Mr *B Majamanda,* for the 2nd defendant

CHITAPI J:

This matter is a denovo hearing by order of the Supreme dated 15 May 2013 following an appeal against the judgment of MUZENDA J which the court rendered on the same case on 30 September, 2023 after trial. The judgment of MUZENDA J decided the case in favour of the plaintiff and the defendant noted an appeal. The Supreme Court disposed of the appeal by its order which was worded as follows"

"IT IS ORDERED THAT

1. By consent:
   (a) The appeal be and is hereby allowed with each party paying its own costs.
   (b) The judgment of the court *a quo* be and is hereby set aside.
2. By virtue of the power vested in this court by s 25 of the Supreme Court Act, [*Chapter 7:13*], the proceedings before the court *a quo* are hereby set aside.
3. The matter be and is hereby remitted to the court a quo for a trial denovo before a different judge"

The background to the hearing de-novo is therefore explained.

INTRODUCTION AND BACKGROUND

2. The plaintiff is a self-acting party and a businessman in Mutare. The first and second defendants are body corporates duly incorporated and registered under the laws of Zimbabwe. The first defendant is said to be domiciled in Mutare and the second defendant in Harare. Significantly, the second defendant carries out the business of auctioneer. At all material times the second defendant was engaged as auctioneer by the first defendant to dispose by public auction various of its movable property in various cities. In Mutare where the plaintiff participated and purchased certain goods some of which involve the dispute on trial, the auction was held on 24 July 2021.

3. In this action the plaintiff claimed that he purchased at the auction certain property as detailed later in this judgment. When he sought to take delivery of the goods which he had purchased and left in the custody and control of the first defendant, he found that the goods had been tempered, vandalized or neglected with the result that their condition was no longer the same as they had been upon purchase at the auction. The plaintiff claimed that he ended up having to effect repairs to three of the purchased items of goods at a cost of a total of US$74 807.00.

4. The plaintiff claimed from the first and second defendants as set out in para 10 of the declaration as follows:

> "10. As a result of first and second defendants, negligence neglect or deliberate vandalization of the goods purchased by the plaintiff from first defendant, the plaintiff suffered damages in the sum of US$74 807.00 which amount despite demand the first and second defendant faded (sic) refused and/or neglected to pay."

5.The plaintiff pleaded alternative relief. Again, I find it convenient for purposes of this judgment to outlay the alternative claim and relief in the words of the plaintiff as set out in para(s) 11-12. It is stated:

> "**11 Alternatively**
>
> On or about the 24 of July 2021 plaintiff and first and second defendant entered into an agreement of sale at a public auction in terms of which plaintiff purchased from first defendant the following items:
>
> (a) Hot press system at US$7500.00
> (b) Sanding machine at US$1500.00
> (c) Glue Spreader at US$1500.00

12.Upon taking delivery of the items purchased from first defendant aforesaid, it was discovered that the goods were not fit for purpose (sic) and that they needed repairs as follows:

(a) Hot press system US$59 807.00

(b) Sanding machine US$7500.00

(c) Glue spreader US$7500.00

Making a total of US$74 807.00

WHEREFORE plaintiff claims against the first and second defendant jointly and severally the one paying the other being absolved."

DEFENDANTS PLEAS

13. The first and second defendants filed their pleas. Both defendants denied liability on the plaintiff's claim. The first defendant pleaded that the sale of the goods to the plaintiff was a voetstoots sale. The first defendant averred that once the sale had been concluded all risk associated with destruction, damage or loss passed to the plaintiff as the buyer. The first defendant pleaded that the issue of who had custody of the goods was immaterial as upon the conclusion of the sale, risk passed to the plaintiff. The first defendant however, then also pleaded a denial that the goods were damaged. The first defendant also pleaded that it made no undertakings on the quality of the goods or otherwise.

14. The second defendant averred that the plaintiff only made the payment out of time and more than a month after the sale. It pleaded that risk passed to the plaintiff from the date of auction or sale in terms of the sale conditions. The second defendant further pleaded that the plaintiff could not collect or have access to the purchased goods because he had not made payment and that on making payment access to the goods was granted to the plaintiff. The second defendant also pleaded that the sale was a voetstoots sale of used goods which were dilapidated. Lastly, the second defendant pleaded that the plaintiff was aware of the voetstoots nature of the sale and that the plaintiff was duly advised of that fact.

PRE-TRIAL CONFERENCE AND AGREED ISSUES FOR DETERMINATION

15. The parties held their pre-trial conference before CHAREWA J on 14 July 2022. Settlement failed and the matter that to be referred for trial. The agreed issues as per the joint pre-trial.

"1. ISSUES

(a) Whether or not the plaintiff was prevented from collecting his goods after the conclusion of the sale?
(b) If indeed the plaintiff was prevented from collecting his goods, whether or not the defendants owed a duty of care to make sure that the goods did not degenerate or deteriorate while in their custody?
(c) Whether or not the goods degenerate or deteriorate while in the custody of the defendants after the sale.
(d) If so, what is the quantum of the loss or damage suffered by the plaintiff as a result of the deterioration or damage of the goods.
(e) Who is liable to pay costs of suit."

The task of the court is to determine whether on the balance of probabilities the plaintiff has succeed in his claim regard being had to proof of the agreed issues.

EVIDENCE OF THE PLAINTIFF

16. He confirmed on oath the common cause fact that he participated in the auction sale conducted by the second defendant on behalf of the first defendant on 24 July 2021. He purchased the following items on acceptance of his bids by the second defendant, namely sanding machine for US$1500.00; hot press system for US$7500.00 and glue spreader for US$100.00. He testified that he paid the purchase price in three payments on 24 July 2021; on 6 August 2021 and on 7 August 2021. Invoice 398 generated by the second defendant dated 24 July 2022 detailed the purchase detailed as:

"Lot 15 sanding machine	$127 500.00
Lot 16 Hot press system	$637 500.00
Lot 18 Glue Spreader	$85 000.00
The total was	$850 000.00

With add ons the total amount of the invoice was $1265 225.00 reflected as having been paid by several amounts the last payment of which was $665 225.00 stated to have been paid on 7 August 2021.

17. The plaintiff also produced invoice reference number 367 dated 24 July 2021 showing the purchased items however denominated in $USD in the sum of an invoice total for the goods as

$10 000.00 and grand total of USD $14885.00 When converted to RTGS the equivalent was $1265 225.00

18. The plaintiff testified that the second defendant denied him the right to take delivery of the purchased goods albeit he had made full payment on the invoiced amount with the last payment made on 7 August 2021. He testified that he was only able to collect the goods after filing an urgent applicant under case No. HC 159/21 to compel the second defendant to release the purchased goods to him and not to re offer the goods for resale as the second defendant had sought to advertise the same goods for re auction.

CASE NO. HC 159/21

19. I consider it convenient to relate to case No. HC 159/21 and revert to the plaintiff's evidence thereafter. Case No. HC 159/21 was an urgent application filed by the plaintiff against the defendants herein for an order to interdict the resale of the auctioned goods in dispute herein pending confirmation of the sale of the goods to the plaintiff. The provisional was granted under judgment No HMT 50/21 dated 30 August 2021. Upon its return for finalisation, parties entered a deed of settlement which culminated in a court order by consent being issued by the court dated 6 October 2021. The order read as follows:

> "BY CONSENT IT IS HEREBY ORDERED THAT:
>
> 1. The applicant shall collect the following items from the second respondent Lot 15 a sanding machine, Lot 16 hot press machine and Lot 18 glue spreader.
> 2. The first and second respondents hereby confirms receipts of a total of RTGS 126 225.00 equivalent to USD (sic) 14 885.00 as full price of Lots 15, 16 and 18 mentioned herein able in "davise 1" (sic). The applicant is not required to pay other amounts
> 3. Each party to bear its own costs of suit."

Payment of the goods was therefore confirmed by the court as having been effected in full. The plaintiff was granted the right to collect the goods as at 6 October 2021 being the date of the order.

20. The plaintiffs' further evidence was that he made payment of the RTGS 1265 225.00 as follows as set out in his founding affidavit in case No HC 159/21 which he incorporated by refence:

24/07/2021	RTGS	300 000.00
06/08/2021	RTGS	300 000.00 (paid to Manica Post)

07/08/2021	RTGS	665 225.00
Total	RTGS	1 265 225.00

21. The plaintiff averred that he was denied access to the goods nor to take possession of the same with the second defendant representatives Mr Mubayiwa demanding further payment on the basis that the plaintiff had not made full payment. On this issue it must be recorded the effect of the consent order in case 159/21 was to declare that the plaintiff in fact paid for the goods in the full amount invoiced. To have denied the plaintiff possession and taking delivery of the goods for reason of non-payment would have been without unlawful justification.

22. The plaintiff testified that upon collecting the purchased goods consequent on the court order authorising him to take delivery of the same, he discovered that the purchased goods had been tempered with and or vandalized. The plaintiff did not in his evidence in chief detail the nature and extent of the tempering the plaintiff.

23. Under cross-examination by the first defendants counsel, the plaintiff agreed that the goods sold on auctions were sold on an as is condition. He stated that he was denied authority to collect the goods despite having made payment. The plaintiff averred that he inspected the goods before placing his bids and making the purchases. He also stated that it was the auctioneers duty to safeguard the goods sold. When asked if he inspected the glue spreader, he averred that he did so and that on collecting it, the distribution box and electric motor were missing. When asked whether he could describe the distribution box/ the plaintiff answered that an engineer would best describe it as he could not do so with clarity although he was not a stranger to it. The plaintiff testified that he engaged engineers to supply missing components and ensure that the machinery was working.
24. In relation to the sanding machine the plaintiff when asked whether it had a control box stated that the machine had a distribution box. In relation to the hot plate the plaintiff testified that the distribution box was missing. He said that the reference to a control box was an error. In relation to the hot press, when asked what was missing the plaintiff responded that it was the "system" which consists of piping to connect to other machines. The plaintiff put the price of repairing the hot press at USD$59 807 to include the control box. When asked to reconcile the fact that he paid the equivalent of USD$7500.00 for the hot press but now claimed $59 807.00. the plaintiff responded that new parts had to be supplied because they were the only ones available. The

plaintiff admitted that he was also claiming USD$7500.00 in relation to the standing machine which he bought for USD$1500.00 and a similar amount of USD$7500 for a glue spreader which he bought for USD$1000.00. When it was pointed out to the plaintiff that in para 9 of his declaration he claimed reasonable costs of repairs as opposed to purchasing new items the plaintiff responded that the counsel was free to advise him where he could get older parts.

25. Counsel put it to the plaintiff that the purchase items were non-functional to which the plaintiff responded that they were only switched off. When it was put to him that the factory which housed the machinery in issue was struck by lighting resulting in a fire that rendered the machinery non-functional, the plaintiff responded that he knew the engineer of the first defendant who gave him information that only the drier was affected by the lightning blast. The plaintiff admitted that he did not test the machinery but stated that the fact he did not test them did not mean that they were not working. The plaintiff also agreed that the roof of the factory which housed the machinery collapsed when it was struck by lightning.

26. The plaintiff was cross examined by the second defendants' counsel. He agreed that the three machines used electricity to power them. When it was put to him that the machines were not connected to electricity power, the plaintiff responded that they were connected. When it was put to him that the machines were auctioned because they were disfunctional, the plaintiff responded that "maybe they wanted new machinery." When further put to him whether he tested the machines, the plaintiff repeated his response to earlier cross-examination that the machines were switched off whilst in working order. When it was put to him again that the machines were not working, the plaintiff who appeared visibly upset responded as follows to counsel, "The fact it they were working or not is not your business."

27. The plaintiff in continued cross-examination admitted that he was claiming payment of USD$74 807.00 being USD$59 807.00 for the hot press which he had bought for US$7550.00 for the sanding machine which he had bought for $1500.00 and US$7500.00 for the glue spreader which he had bought for USD$1000.00. In relation to the liability of the second defendant as auctioneer the plaintiff averred that it was the duty of the second defendant to keep the goods and that the second defendant claimed the goods to be his. The plaintiff admitted that although he should have paid for the goods upon the conclusion of the sale, there was agreement between him and the second defendant those payments be made as directed by the second defendant.

28. The plaintiff agreed that the auction sale was on a voetstoots basis. When it was put to him that the machinery in issue was dilapidated and not functioning, the plaintiff responded that the machines were not functioning but were intact. When asked whether he saw the second defendant removing any components from the machinery, the plaintiff responded that the second defendants counsel was going criminal." When it was put to him that the risk and profit in the purchased items passed to him upon his being declared the winner, the plaintiff responded that he was denied the right to collect the machinery.

29. The plaintiff was significantly asked to justify his claim for payment of US$74 807.00 when he had paid $14 500.00 in local currency. In response the plaintiff averred that the quotation on which he relied to claim US$74 807.00 was before the court. When asked whether he wanted to repair the machinery the plaintiff responded that he wanted to replace the components. When asked to justify making a claim against the second defendant, the plaintiff responded that it was the second defendant who refused him permission to collect the purchased machinery. When asked why he did not leave the machinery after noticing that components were removed, the plaintiff responded that he first reported the fact of missing components to the police before collection. The plaintiff also referred to case No HC 159/21 and stated that the second defendant did not oppose it and was therefore bound by it.

30. In regard to the plaintiffs' demeanour, he was assertive and showed signs of annoyance and impatience with the defendants' legal practitioners. This did not take away the gist of his complaint which he articulated in a manner which was easy to follow. The success or failure of his claim cannot be based upon an unimpressive demeanour. Annoyance and impatience by self-actors are common occurrences because they invariably see legal practitioners as stumbling blocks who stand in what they conceive to be clear cases on their part. The court must be careful to judge their credibility negatively on account of these reactions only. The plaintiff's evidence was satisfactory given and it shall be treated as clear evidence regarding the articulation of the cause of complaint.

31. The plaintiff called a witness one, Brendon Chafa. The witness gave evidence on the quotation for new components to be filled on the purchased machinery. The witness stated that he worked for a company called Mace On the Map Engineering and that his job was to prepare quotations. The witness referred to quotation number 005 dated 5 November 2021. It was prepared at the

request of the plaintiff. The quotation was headed "fabrication of Linner power." The details of the quotation were as follows"

"hot press distribution and control box	$59 807.00
Sanding machine control panel distribution box	$ 7500.00
Glue spreader electric motor control box	$ 7500.00
Sub-total	$740807.00

The witness indicated that in relation to the glue spreader, he mistakenly wrote control box instead of distribution box.

32. Under cross-examination by the first defendant's counsel, the witness stated that he works where necessary with an engineer to clarify parts required for a job and then he sources for them. The witness stated that in relation to the quotation in issue he was shown the missing parts from machinery which he was supposed to quote for. The witness stated that he would source the parts and consult the client one if he found the parts. He admitted the he had no knowledge of the intricacies of the parts he was going to quote for nor its workings. The cross-examination of the witness by the second defendants counsel did not yield anything different from what had been raised by the first defendants' counsel's cross-examination emerged. A narration of the cross-examination will amount to a repeat of what has been stated in regard to the cross-examination by the first defendants counsel.

33. The cross-examination of the witness was nothing to write home about because the witness stuck to his simple narration of facts relating to the quotation which the witness prepared and produced. Significantly, the witness stated that he could not say whether the machinery was used or not when he saw it. He did not know what a distribution box looked like. The witness could not speak to actual values of the components he quoted for save that he prepared his quotation after sourcing from undisclosed suppliers.

34. In relation to the demeanour of the witness, he spoke truthfully and maintained his testimony in cross-examination. The witness professed his ignorance of the details of the items which he quoted for. He was honest to state that the quotation which he prepared had errors of description. The witness also fairly conceded his want of knowledge on the engineering side of the machinery and replacement components and stated that an engineer in the company whom he called Alfonso

inspected the machinery and told the witness what to source for. The witness was also clear that the company which he worked for and on his letter head the witness prepared the quotation was in the business of metal fabrication and not manufacture of the components which the plaintiff claims on. The court found the witness whose professed knowledge in the purchase and supply management field credible and truthful. The value of his evidence however is something different from credibility and demeanour and will be dealt with in the analysis of the whole case. The plaintiff closed his case after the evidence of this witness.

35. The first defendant gave evidence through its security Sergeant Joseph Kanduru who stated that he was assigned to oversee the auction held on 24 July 2021 at the instance of the first defendant the auctioneer being the second defendant. The witness confirmed the auction purchase of the machinery in issue in this matter by the plaintiff. The witness disputed that there were any individual distribution boxes for the machinery and averred that there was a single distribution board from which at least twelve machines which included the machinery in issue used it as the power source from which distribution was made. The witness averred that each machine however had its own individual control box. The control box according to the witness is the gadget which can be switched on and off and is devoted for use on the particular machine.

36. In regard to the hot plate press the witness testified that it had an infeed and outfeed system. The hot presser was used to compress bolts. The witness testified that the hot presser used a pipe system which however was part of Lot 24 and not Lot 16 which the plaintiff purchased. In relation to the glue spreaders, the witness testified that its motor was stolen in 2019 before the auction and that the theft was reported to the police and investigated under case reference CR87/09/19. The witness testified that when the plaintiff bought the spreader at the auction it had no electric motor. The witness testified that the goods were auctioned following a roof collapse of the factory in which the machinery was installed and in use. The machinery was then flooded in water and became disfunctional. The witness stated that the auction was conducted *in situ* and on as you find it basis. He denied that any components were removed from the sold machinery and averred that he was in charge of security and stated that the goods were properly guarded and nothing which was part of the auctioned machinery was removed from the purchased machinery.

37. The witness was cross-examined by the plaintiff. When asked how far the distribution box was mounted from where the sanding and hot press machines were positioned, the witness

indicated an estimated distance of three and twelve metres respectively. The witness also stated that he was the person who ensured collection of machinery sold because the second defendant's mandate was to sell and receipt payment. If a buyer produced a receipt to the security section, the goods invoiced and paid for would be released.

38. The witness was asked by the plaintiff to explain the fact that on the invoice No 398 issued to the plaintiff by the second defendant the hot press was described as a hot press system and was similarly described under Lot 16 as "hot press and system." The witness responded that indeed the plaintiff had collected both the hot press and system but that the plaintiff had sold a piece of the system to one Makuvapasi. The witness in response to the question whether there was in existence a distribution box at on site stated that it was there and that it distributed power to the trimming machines, glue spreaders, sanding machine, core compressor, zigzag machine, bundling machine, two glue mixers, guillotine and cross cut saw. The witness stated that the distribution box had however been removed from where it had been mounted and further stated that it was not part of any of the lots sold nor was it part of goods put up for auction.

39. The witness was asked to explain what had been at the place where cables had been cut off in relation to lot 18 (glue spreader) He responded that there was a distribution box for a roller dryer and not for the glue spreader or any of the other machines which the plaintiff purchased. The witness also stated that lot 16, the hot press did not have a distribution box. The witness was referred to photograph of lot 15 (sanding machine); lot 16 (hot press) and lot 18 glue spreader and asked to indicate where the distribution boxes were. In relation to all the three machines photographs showed that there were armored cables for electricity supply which the witness indicated as being supply lines to control boxes for each machine so that each machine can be individually switched on. When it was put to the witness that each of the machines had its own individual distribution box, the witness responded that there was a manual for the machinery and it shows that there is only one distribution box. The manual was not produced but the witness assertion was not denied either. The second defendant had no cross examination of the first defendant.

40. In re – examination, the witness clarified that what was sold to Makuvapasi by the plaintiff was the infeed for the hot press. The witness stated in this regard that the infeed was sold by the plaintiff to Makuvapasi when the machinery was still within the plant. The witness was also asked

to explain the electrical supply system within the factory when the machinery was in use. The witness clarified that electricity supply feeds into a substation, From the substation, the electricity is fed into the transformers then from the transformers into the distribution box then to panel regulators and then to individual control boxes or panels for each machine.

41. The applicant asked for leave to cross examine the witness on the issue of the alleged sale of the infeed to Makuvapasi. Leave was granted. The plaintiff then asked the witness to explain the basis on which the witness alleged that the plaintiff had sold the infeed to Makuvapasi. The witness responded that the information was from Makuvapasi who advised of the sale and further advised that he would cut the machinery for scrap metal. The evidence of the sale was in the nature of hearsay. However, the plaintiff then put to the witness that he, "the plaintiff" had dismantled the machinery and moved it as pieces."

42. In relation to credibility and demeanor the witness gave his evidence dispartionately and clearly too. The crux of his evidence so far as it is relevant to the case in issue was his testimony that the machines bought by the plaintiff did not have individual distribution boxes as there existed only one distribution box from which electricity was fed into the switch regulators and fed further to individual control boxes which would then house switches to allow or cut off power to the individual machines. The witness was emphatic that there were no distribution boxes for the lots which the plaintiff purchased. The evidence of the witness being clear was accepted. Its impact on the determination of the case is a matter for analysis of all evidence led in the case. The first defendant closed its case after the cross examination and re – examination of the witness.

43. The second defendant led evidence from Jeff Mubayiwa, its director. He testified that the second defendant was an auction company and that he had been an auctioneer for twenty-five years. He stated that he was the auctioneer who conducted the auction in issue on 24 July 2021. The auction was for obsolete equipment to be sold as scrap. The equipment was no longer in use by the first defendant. The witness testified that a bidder who was declared the successful purchaser was required to settle payment at the conclusion of the auction. The witness produced a catalogue on which the conditions of the auction were detailed. He stated that the plaintiff successfully bid for the machinery in issue herein. The witness stated that risk in the property would be assumed by the purchaser upon payment of the purchase price.

44. When asked to comment on the plaintiff's claim, the witness accused the plaintiff of having an agenda as he now chose to pass the sold goods as not having been sold as scrap. He accused the plaintiff of seeking to raise money by making the claim so that he rebuilds scrap. He averred that at auction the machinery had been decommissioned and there was water on the floor where the machinery was sitting. He stated that he feared to walk in the workshop because of the wet floor. The witness admitted that the plaintiff was not permitted to collect the purchased goods because he had not made payment for them. He also accused the plaintiff of having used forex to convert it to RTGS dollars and made payment.

45. The witness was cross examined by the defendants' counsel before being cross examined by the plaintiff. In answer to questions by the first defendant's counsel, the witness denied that distribution boxes were part of the sale. The witness stated that the boxes were not dismantled and that it was the duty of the buyer to dismantle them. He denied that there was an electric motor on any of the machinery sold. He also stated that system pipes were sold separately to avoid arguments among buyers who had also bought machines which used the system.

46. Under cross examination by the plaintiff, very little came out. The plaintiff took issue with the two invoices numbers 361 and 398 which the witness prepared for payment. The witness stated that the invoice given for payment was 398 for RTGS. The witness averred that the plaintiff did not make full payment and was therefore denied permission to collect the purchased machinery. The plaintiff then cross – examined the witness on how payment was effected which are non-issues in the light of the court's order granted in case no HC 159/21. When it was put to the witness that the plaintiff did not have control of the goods, the witness answered that the plaintiff had not made full payment. When the plaintiff referred to the hot press and system to having been catalogued for sale under one lot 16, the witness stated that the items were not sold like that because that would have created noise and the system was sold separately. No other questions of note were asked of the witness. The second defendant closed its case.

47. In relation to the demeanor and credibility of the witness, the court noted that the witness was hostile to the plaintiff's questioning and looked upon the plaintiff as a gold digger or cancer who intended to make money which was not due to enable him to build something from scratch. As a result of the negative attitude of the witness, he did not answer some questions directly. Unfortunately for the plaintiff, he then fell into the trap of the witness' belligerent attitude and

became emotional and aggressive in his questions which however dealt with immaterial issues of how payment was effected and questioning the description of him as a chancer who wanted money. Resultantly questions asked did not crisply address the pertinent issues which determine the matter. The court will be more circumspect in considering the evidence of the second defendants' witness because of his hostility against the plaintiff. Its value and or relevance are a matter of analysis taking account of all evidence led in the matter.

48. The parties filed written submissions. I have had regard to them. In considering the issues put forward for determination it must be noted that the plaintiff accessed and collected the purchased goods consequent upon a judgment by consent issued by the court in case no. HC 159/21. In essence the parties agreed that the plaintiff had in fact paid the purchase price of RTGS$ 1 265 225.00 being equivalent to USD$ 14 885.00 as invoiced by the second defendant. There was no dispute on the plaintiff's evidence that he paid the full purchase price in three payments, the last of which was made on 7 August 2021 in the sum of RTGS$ 665 225.10. As at that date, the plaintiff was entitled to collect the purchased machinery. He was denied that right by the defendants. It follows on the basis of the determination in case no. HC 159/21 that the respondent's refusal to allow the plaintiff to collect the machinery was wrongful and unlawful. Risk in the machinery could not on account of the wrongful denial of the plaintiff access to the machinery parts to the plaintiff. The plaintiff did not therefore assume risk to the machinery on payment but on release of the machinery to him following the court order granted in Case No. HC 159/21.

49. The second issue argued by the parties was, whether or not if the plaintiff was denied the right to collect the goods, a duty of care was owed to him by the defendants to ensure that goods did not degenerate whilst in the custody of the defendants. The problem with resolving the issue is that an answer to it is academic. This is so because the claim of the plaintiff is not based on the allegation that the purchased machinery degenerated in its condition between the date of the payment and its collection. The plaintiff's claim was set out in the declaration in paragraph 9 wherein it is stated:

> "9. When plaintiff took delivery of the goods from first defendant's premises upon inspection, the goods were found to have been tempered with or vandalized or neglected to a point where they were no longer in the same condition as they had been at the time of the sale. In particular the items were damaged, vandalized and or neglected to the extent that they needed repairs and the reasonable cost of such repairs to restore them was as follows;
>
> (a) Hot press system cost of repairs US$ 59 807.50
> (b) Sanding machine cost of repairs US$ 7 500.00 and

(c) Glue spreader cost of repairs US$ 7 500.00
Making a total of US$ 74 807.00"

Thus, the plaintiff's claim was not based on the degeneration of the machinery and no evidence was led by either the plaintiff or the defendant to establish a degeneration of the condition of the machinery nor the extent of the degeneration. This issue should not have been placed before the court for trial when issues were settled at the pre-trial conference because it did not arise from the pleadings. Even if it be said that l should still answer the issue notwithstanding that it arises from the air, then my answer is that there was no evidence of deterioration led by either party thus rendering the issues not proved.

50. The third issue is intrinsically connected to the second one. The same reasoning, I extrapolated in regard to the second issue applies squarely to the third issue. This *lis* from the summons and declaration was not founded upon the allegation that the machinery sold degenerated or deteriorated while in the custody of the defendants after the sale. The words degenerate or deteriorate, for good measure, did not feature during trial in evidence or otherwise. The trial was concerned with parts allegedly missing between the date of sale and the collection dates. The parts were listed as distribution and control box for hot press, control panel and distribution box for sanding machine and electric motor and control box for the glue spreader. The evidence led by the plaintiff was that those parts should be replaced by the defendants. Therefore, the third issue having been stated as "whether or not the goods degenerated or deteriorated while in the custody of the defendants after the sale" was manufactured in the minds of the parties because their pleadings being the summons declaration and the plea did not found an action and answer that based upon an alleged deterioration of the purchased machinery. Thus, even if it be held that l must answer the issue, the fact is that the issue was not proved or established in evidence.

51. The last issues as stated by the parties was for the court to answer the question whether if it is found that the machinery deteriorated or was damaged, what is the quantum of damages suffered by the plaintiff thereby. Deterioration or damage is not the basis for the claim of the plaintiff on both the pleadings and the evidence. Neither the plaintiff nor the defendant based their positions upon a deterioration or degeneration of the state of the machinery. No evidence of the damages suffered for degeneration or deterioration of the machinery was led by the parties. Under the circumstances the court cannot asses damages not established let alone speak to quantum.

It is trite that parties are bound to their pleadings in a court suit. It is impermissible for a party to raise a different case to the one pleaded unless the party raising a different case or defence has made an application to amend the pleadings to incorporate the different case and the court has granted such application and necessary amendments in term of the order of the court have been made. The following quote from the book Jacob and Goldrein *Pleading – Principles and Practice*, 1st ed p8 – 9:

> "As the parties are adversaries, it is left to each of them to formulate his case in his own way subject to the basic rules of pleadings. For sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise or the trial.
>
> The court itself is as much bound by the pleadings of the parties as they are themselves. It is not the function of the court to enter upon any enquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves raised by their pleadings. Indeed the court would be acting contrary to its own character and nature if it were to pronounce upon any claim or reference not made by the parties. To do so would be to enter the realms of speculation_ _ _ The court does not provide its own terms of reference or conduct its own enquiry into the merits of the case but accepts and acts upon the terms of reference which the parties have listed. In the adversary system of litigation, therefore it is the parties themselves who set the agenda for trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda there is no room for an item called 'any other business' in the sense that points other than these specified in the pleadings may be raised without notice."

The above quotation was referred to with approval by the Supreme Court in the case *Benson Makarichi and 7 others* vs *Evangelical Church of Zimbabwe* SC 103/22 at p10 – 11 of the cyclostyled judgment.

53. The importance of pleadings in civil litigation was again stressed by the Supreme Court in the case *of Veronica Nyoni* v *Bernadette Eva Ndoro N.O* SC 79/22 (a must-read case) wherein the learned judge MATHONSI JA reiterated the law governing pleadings and referred to several judgments of the Supreme Court in that regard and also warned litigants that they must carefully plead their cases. Significantly, the learned judge cited the case of *Mashonaland Tobacco Company (Pvt) Ltd* v *Mahem Farms (Pvt) & Anor* SC 152/20 at p9 where the Supreme Court stated:

> " As a general rule, judgment cannot be granted on a cause of action that is not pleaded. The pleading must clearly set out the precise parameters of the issues contested between the parties.

> Thus in the Namibian case of *Courtney Clark* vs *Bassingthwaighte* 1991 (1) SA 684 (Nm) at 698, it was explained that:
> _ _ _there is no precedent or principle allowing a court to give judgment in favour of a party on a cause of action never pleaded, alternatively there is no authority for ignoring the pleadings _ _ and giving judgment in favour of a plaintiff on a cause of action never pleaded... In such a case the least a party can do if he requires a substitution of or amendment of his cause of action, is to apply for an amendment."

The law itself is in my view very fair in relation to giving leeway to parties to amend pleadings. Rule 41 (10) of the High Court Rules 2021 provides that:

> "(16) The court or a judge may notwithstanding anything to the contrary in this rule, at any stage of the proceedings before judgement, allow either party to alter or amend any pleading or document, in such manner and on such terms as may be just and all such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties."

This rule is inserted to ensure that the interests of justice are effectively served in that the parties are permitted to shift positions in their pleadings however, subject to applying for amendment. The plaintiff did not seek to apply to amend his pleadings or issues to pace a case which the evidence otherwise revealed. The pleadings and issues were in conflict and were vice versa.

54. Even if the court were to disregard the issues as set out in the pre-conference minute and interrogated the case on the basis of the complaint made in paragraph 9 of the declaration that on collection, goods had been damaged, vandalized and or neglected, the plaintiff did not lead sufficient evidence to establish the state of the machines and their components at time of purchase and at time of collection for comparison. Further the not so assistive evidence of the plaintiff's witness showed nothing other than that the repairs referred to were not in fact repairs but provision or set up of the electrical system to power the machines because the quotation produced was for the supply of distribution and control boxes which are to do with power supply as opposed to the actual operation of the machines. The plaintiff would still on this line of analysis fail in proving his claim on a balance of probabilities.

55. I did comment that generally witnesses gave their evidence well. I however indicated that the relevance of their evidence would be a matter of analysis. For the reason that a different case was presented to the court and their evidence related to the same unpleaded case, their evidence did not assist to resolve the case. Had the pleadings been settled properly, their evidence would have been

of great assistance. In this case, the pre-trial conference proceedings and settling of issues for trial was a wasted process because it has resulted in a confused trial. It is important that issues for trial be framed to attune to the pleadings. I also felt that the applicant who otherwise had a *prima facie* case to make a dilectual claim after the court had ruled in case no. HC 159/21 that he had been unlawfully denied access to and removal of the auctioned goods after purchase could have done better with legal representation so that the niceties of pleading and proving a case could have been advised of him. In relation to the determination of the claim on the merits, I make the finding that the plaintiff failed to prove his claim on a balance of probabilities.

56. The outstanding issue after noting that the plaintiff's claim cannot succeed is to decide the incidence of costs. The general rule that costs follow the event is subject to the rider that costs are in the discretion of the court. In this case the defendants have not succeeded on the merits but through a technicality and are equally to blame as much as the plaintiff for not settling pleadings and pre-trial conference issues clearly. In such a case the most equitable order to grant is one in which each party bears its own costs.

Accordingly, the plaintiff's claim is dismissed with each party to bear its own costs.

CHITAPI J:…….

Plaintiff – self actor
Dube, Manikai & Hwacha, defendants' legal practitioners