<u>REPORTABLE (112)</u>

[1]

(1) EDWARD BUWU (2) FANI LESLEY BUWU
v
(1) VILLAGE INN (PRIVATE) LIMITED (2) SHEPHERD T. CHIMUTANDA (3) TATIPANO PROPERTIES (PRIVATE) LIMITED (4) CHIEF REGISTRAR OF DEEDS

[2]
(1) EDWARD BUWU (2) FANI LESLEY BUWU
v
(1) FOLAY INVESTMENTS (PRIVATE) LIMITED (2) SHEPHERD T CHIMUTANDA (3) PARADISE ROAD (PRIVATE) LIMITED (4) THE CHIEF REGISTRAR OF DEEDS

SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, MATHONSI JA & CHITAKUNYE JA
HARARE, 17 JANUARY 2023 & 23 OCTOBER 2023

E. Mubaiwa, for the appellants

B Chipupuri, for the first and second respondents

T Gombiro, for the third respondent in case No 1 (Tatipano Properties (Pvt) Ltd)

K Hanyani-Mlambo, for the third respondent in case No 2 (Paradise Road (Pvt) Ltd)

No appearance for the fourth respondent

CHITAKUNYE JA: This is an appeal against the whole judgment of the High Court handed down on 13 January 2021 under judgment No. HH 25-21. The court *a quo* dismissed the appellants' claims in HC 7760/18 and HC 7843/18, which had been consolidated, upon finding that the appellants had no *locus standi in judicio* to seek the cancellation of two agreements of sale *viz*; one between Village Inn (Pvt) Ltd and Tatipano Properties (Pvt) Ltd and the other between Folay Investments (Pvt)Ltd and Paradise Road (Pvt) Ltd.

FACTS

At the centre of this appeal are the affairs of two companies, namely, Village Inn (Pvt) Ltd and Folay Investments (Pvt) Ltd (first respondents). The two companies together with four other associate companies were under judicial management.

The appellants are the shareholders in the companies in question. In both matters HC 7760/18 and HC 7843/18, the appellants were the plaintiffs.

In 2017 the final judicial manager (Cecil Madondo) called for a meeting of directors, shareholders and creditors to consider and approve a scheme of arrangement in terms of s 191 (1) of the Companies Act [*Chapter 24:03*] (the Act). The scheme of arrangement (The Scheme) was duly approved. The second respondent in both matters, Shephard T Chimutanda, was appointed the Scheme Manager in terms of clause 3 of the Scheme of arrangement.

The scheme provided, *inter alia*, for the sale of some assets belonging to the two companies by the scheme manager.

The conditions precedent to the implementation of the scheme by the manager included, *inter alia*, the scheme being approved by three quarters of both secured and unsecured creditors; the scheme being sanctioned by the High Court in terms of s 191 (2) of the Act, certified copies of the court order sanctioning the scheme being registered with the Registrar of Companies in terms of s 191 (3) of the Act; and the obtaining of all necessary approvals including the registration of Atrax Holdings Limited as the Holding company with the Registrar of Companies.

On 17 January 2018 the aforesaid scheme was sanctioned by the High Court in HC5869/17 in terms of s 191 (2) of the Act. The second respondent, Shepherd T Chimutanda, was appointed as the scheme manager. In implementing the scheme, the scheme manager sold some assets of the two companies to Tatipano Properties (Pvt) Ltd (third respondent in case No 1) and Paradise Road (Pvt) Ltd (third respondent in case No 2) on 6 June 2018 and 25 July 2018 respectively.

In August 2018 the appellants issued summons against the respondents under HC 7760/18 and HC 7843/18. The matters were subsequently consolidated since the plaintiffs (that is the appellants herein) were the same in both matters. The appellants were seeking the cancellation of the agreements of sale entered into and concluded between Village Inn (Pvt) Ltd represented by Shepherd T Chimutanda and Tatipano (Pvt) Ltd and also that between Folay Investments (Pvt) Ltd represented by Shepherd T Chimutanda and Paradise Road (Pvt) Ltd. They also sought an order that the fourth respondent be restrained from effecting transfer of the properties sold in terms of the agreements of sale.

In their declaration before the court *a quo,* the appellants alleged that the scheme manager, on the strength of the court order in HC 5869/17, pre-maturely set into motion the scheme prior to the registration of the scheme, and his appointment, with the Chief Registrar of Companies in order for him to become operative according to the law. The appellants averred that on 6 June

2018 and 25 July 2018, the scheme manager, without the legal capacity to do so, proceeded to execute the impugned agreements of sale with the third respondents.

The third respondents in both matters contended that the appellants were aware that the property was being sold at all times but took no steps to stop the sale. They further stated that they were *bona fide* purchasers. They also challenged the *locus standi* of the appellants to challenge an agreement of sale between the first and the second respondents on one hand and the third respondents on the other hand. Their argument was, *inter alia*, that due to the principle of privity of contract the appellants cannot seek the cancellation of an agreement which they were not a party to.

SUBMISSIONS IN THE COURT *A QUO*

At the commencement of the trial of the two matters counsel for the respondents, except the 4th respondent, applied for the issue of *locus standi* captured in the Parties' Pre-Trial Conference Minute to be dealt with first, it being a point of law capable of disposing of the two matters.

During the hearing, counsel for the respondents submitted that the appellants were only shareholders of a company under a scheme of arrangement and had no capacity to challenge a contract between the company and a third party. Counsel for the first respondents submitted that the appellants sought to attack the procedure that led to the court order in HC 5869/17 when they are not directors of the company. He further submitted that a scheme of arrangement is between creditors and a company.

Per contra, counsel for the appellants submitted that the test for *locus standi* is sufficient interest. He submitted that the appellants, as shareholders in the two companies, Village Inn (Pvt) Ltd and Folay Investments (Pvt) Ltd, have interests in the companies they invested in. He further disputed that a scheme is between creditors and a company. He also submitted that the second respondent had no lawful authority to transact in the properties in issue.

DETERMINATION BY THE COURT *A QUO*

Having heard submissions, the court *a quo* held that the only issue for determination at that point was whether or not the appellants had *locus standi*. The court *a quo* noted that it was common cause that the two appellants were shareholders in the two companies central to this dispute. It was further common cause that the agreements of sale that the appellants wanted cancelled were entered into by the scheme manager representing the companies and the purchasers, namely, Tatipano Properties (Pvt) Ltd and Paradise Road (Pvt) Ltd. The court further held that the appellants were not parties to the agreements of sale. The court observed that the appellants, as shareholders, have rights in a company where they hold shares, that right does not, however, extend to having *locus standi* to challenge agreements entered into by the company with third parties. In the circumstances, the court *a quo* concluded that the appellants being shareholders had no right to challenge the agreements of sale entered into by the companies. The court *a quo* consequently dismissed the actions in HC 7760/18 and HC 7843/18 for lack of *locus standi in judicio*.

Dissatisfied by the decision of the court *a quo* the appellants lodged the present appeal on the following grounds of appeal.

GROUNDS OF APPEAL

1. The court *a quo* erred in determining the merits of the matter when it had heard arguments on a point in *limine* and further erred in deciding a disputed issue of fact in the absence of any evidence.
2. Having found that appellants had no *locus standi* and therefore not before it, the court *a quo* erred in dismissing the matter as opposed to striking it off the roll.
3. The court *a quo* erred in not finding that, regard being had to allegations made in their declaration and relief sought, appellants had established their *locus standi* to challenge the agreements of sale based on the shareholders' derivative action.
4. The court *a quo* erred in concluding that appellants, as shareholders, do not have *locus standi* to challenge the validity of a sale of the sole assets belonging to companies in which they own the entire shareholding.
5. The court *a quo* erred at any rate in concluding that appellants required to have privity of contract in order to challenge and not enforce the agreements of sale.
6. The court *a quo* grossly misdirected itself in ordering appellants to pay costs on a punitive scale in the absence of a finding of abuse of process or any reasons justifying such order.

The appellants thus sought the setting aside of the court *a quo's* judgment upon finding that the appellants had *locus standi* to challenge the agreements of sale and for the matter to be remitted to the court a *quo* for continuation of trial before a different judge**.**

SUBMISSIONS BEFORE THIS COURT

At the commencement of proceedings Mr *E. Mubaiwa*, for the appellants, abandoned ground 2 of the grounds of appeal when it was pointed out by the first to the third respondents' counsel that ground 2 was irregularly included in the notice of appeal as it had not been in the initial notice of appeal upon which the appellants had been granted leave to appeal out of time. As no amendment of the initial notice of appeal had been sought or granted it followed that appellants could only proceed on the initial grounds of appeal. Ground 2 was thus expunged from the notice of appeal. This therefore left 5 grounds of appeal for motivation and consideration.

In motivating the appeal, counsel for the appellants submitted that the court *a quo* erred and misdirected itself when it made a determination on the legality of the agreements of sale, which was an issue for the main trial, when it was called upon to only determine a preliminary issue on whether or not the appellants had *locus standi*. He submitted that the court *a quo* failed to appreciate that the appellants, as shareholders in the first respondent in each case, had an interest in the affairs of those companies. He further submitted that although the assets of the first respondents were disposed of pursuant to a scheme of arrangement sanctioned by the court, the scheme manager had however, sold the assets before the sanctioned scheme was registered with the Registrar of Companies as is required by law. It is this conduct by the scheme manager that he said provided appellants with *locus standi* in the matter. Counsel also submitted that the appellants brought that action as derivative action.

Counsel further submitted that the court *a quo* also misdirected itself when it awarded costs on a higher scale against the appellants without providing justification for such costs.

Counsel for the first respondents (Village Inn (Pvt)Ltd and Folay Investments (Pvt) Ltd) and the second respondent (Shepherd T Chimutanda), Mr *Chipupuri*, submitted that the court *a quo* did not make a determination on the merits. He contended that the alleged finding on the legality of the agreements of sale was *obiter* hence the appellants cannot appeal against such remarks. He maintained that the *ratio decidendi* was on the *locus standi* of the appellants. He further submitted that the court *a quo's* finding was that the appellants had no *locus standi* to challenge or seek the cancellation of the agreements of sale to which they were not privy. He also submitted that the disposal of the assets in question was not only done in terms of the sanctioned scheme but also after it had been registered with the Registrar of Companies in terms of s 191 (3) of the Act.

On the level of costs imposed by the court *a quo*, counsel conceded that the court *a quo* erred and misdirected itself in imposing costs at a higher scale without justifying such decision.

Mr *T. Gombiro*, for the third respondent in the first case, Tatipano (Pvt) Ltd, submitted that the assets disposed of by the second respondent, were so disposed after the sanctioned scheme had been registered with the Registrar of Companies. He associated himself with submissions made by counsel for the first and second respondents in this regard. In his submissions Counsel referred to copies of the sanctioned scheme which had the Registrar of Companies' date stamp of 9 May 2018. He averred that in terms of s 191 (3) of the Act, registration with the registrar is done by delivery of the sanctioned scheme of arrangement documents to the Registrar and this was done on 9 May 2018 as evidenced by the Registrar's date stamp. He further submitted that once registration was done the second respondent was mandated to sell the properties in question as per clauses 7.3 and 7.4 of the scheme. Further, counsel submitted that the scheme also clearly stated how the proceeds of the sale were to be utilized by the second respondent and this is what the second respondent did. He also highlighted that the scheme did not provide for consent to be obtained from shareholders before the properties could be sold. The only consent required was from a secured creditor, CBZ, in respect of property belonging to Folay Investments (Pvt) Ltd.

Counsel thus contended that in the circumstances the appellants had no *locus standi* to seek to have the agreements of sale cancelled when the second respondent had merely implemented the scheme of arrangements as demanded of him by the order sanctioning the scheme.

On the argument that the court *a quo* had decided the matter on the merits in its pronouncement on the validity of the agreements of sale, counsel agreed with submissions by counsel for the other respondents before him that such was *obiter* and not the *ratio decidendi*.

On costs counsel conceded that the court *a quo* had erred in awarding costs at a higher scale without giving reasons for such an award.

Counsel for the third respondent, Paradise Road (Pvt) Ltd in the second matter, Ms *K. Hanyani-Mlambo,* associated herself with the submissions by counsel for the other respondents who had made submissions before her. She highlighted that at the time the assets of Village Inn (Pvt) Ltd and Folay Investments (Pvt) Ltd were sold by the second respondent, the sanctioned scheme had been registered with the Registrar of Companies as evident from copies of the sanctioned scheme filed of record. The second respondent having entered into the agreements of sale on behalf of the two companies, with third parties, the appellants had no *locus standi* to seek to have those agreements of sale cancelled.

It is pertinent to note that counsel for all the respondents contended that the submission by the appellants' counsel that the appellants brought a derivative action was an afterthought as the appellants had never pleaded such a cause at all. The facts that they relied upon did not constitute derivative action at all. All they alleged was that the second respondent had sold the properties without first registering the sanctioned scheme of arrangement with the Registrar of companies. The issue of derivative action was just being raised on appeal without any justification. Counsel thus submitted that in light of this it cannot, therefore, be said that the court *a quo* erred in not finding that the appellants had established *locus standi* based on shareholders' derivative action when such was not argued before it.

ISSUES FOR DETERMINATION

Upon a consideration of the grounds of appeal and submissions made, only three issues arise, namely:

1. Whether the court *a quo* made a determination on the merits.
2. Whether or not the court *a quo* erred in finding that the appellants did not have *locus standi* to institute proceedings in question.
3. Whether or not the court *a quo* erred when it ordered the appellants to pay costs at a punitive scale.

APPLICATION OF THE LAW TO THE FACTS

1. Whether the court *a quo* made a determination on the merits.

The appellants' contention that the court *a quo* determined the merits of the matter when it commented that the two agreements were entered into legally is without merit. In its judgment the court *a quo* stated that: "In my view the two agreements the applicants want dissolved were legally entered into and are binding between the two contracting parties." This was in its discussion of the principle of privity of contract. The court was simply stating the position that a contract is binding between the contracting parties. It is common cause that the dispositive issue before the court *a quo* was on the *locus standi* of the appellants to sue for the cancellation of agreements of sale entered into by the first respondents represented by the second respondent and third parties. It was that hurdle the appellants had to overcome before the merits of their application could be argued. The respondents' counsel properly submitted that the above comments by the court *a quo* were simply *obiter dictum* as it was not the basis upon which the court *a quo* decided the preliminary point. It is trite that a statement made as *obiter dictum* is not binding and cannot be appealed against. See *Muza v Saruchera & Ors* SC 45/18.

The *ratio decidendi* was clearly spelt out by the court *a quo* in these terms:

> "I therefore agree with the defendants that these actions must be dismissed on the basis that the plaintiffs have no *locus standi* to bring the actions, especially where they seek to challenge agreements where they are not parties. For these reasons the actions are dismissed at this stage….."

Clearly, therefore, the appellants' cases were dismissed for lack of *locus standi* and not because the court *a quo* made a finding that the agreements were valid.

2. **Whether or not the court *a quo* erred in finding that the appellants did not have *locus standi* to institute proceedings**.

It is pertinent to firstly understand the import of a scheme of arrangement or compromise under the Act. A scheme of arrangement is an arrangement between the company, its creditors and its members. It is a form of reorganization or restructuring of the company. It is taken as a financial and corporate restructuring including sale of assets or the company itself or amalgamation with another company. It is a position of the law that a scheme once sanctioned by court has statutory force and has greater sanctity than a mere agreement between parties affected by it. Once a scheme is approved by statutory majority, it binds all parties thereto including the dissenting minority. The company, its contributories and also the liquidator, in case the company is being wound up, are also bound by the terms of the scheme. Once the scheme is sanctioned by the court, it binds the company and all its members, including those who may have voted against the scheme. The parties thereto will invariably have compromised on their rights in a bid to achieve a common objective. Such objective may include the revival of the company. When that scheme is sanctioned by the court it means the parties thereto are bound by its terms and conditions and the scheme manager is authorized to implement it.

In *Parker v W.G Kinsey & Co (Pvt) Ltd* 1987 (1) ZLR 188 (S) at 194A-C GUBBAY JA (as he then was) affirmed the proposition that a sanctioned scheme of arrangement or compromise creates a contract binding on the parties in these words:

> "To my mind, it is of fundamental importance to have regard to the effect of the sanctioning of a compromise or arrangement, subject of course, to registration of the order pursuant to *s* 167(3) of the Act. I comprehend it to be this: that sanction is not an order of court *ad factum praestandum*, a contravention of which is punishable by contempt of court. It merely gives to the compromise or arrangement contractual force as between those bound by it, deriving such force, not from their actual consent, but by operation of law. The rights and obligations of the parties bound are determined by the terms of the compromise or arrangement, express or implied. They are not to be sought outside the confines sanctioned by the court. Questions relating to validity and interpretation follow normal contractual principles, for the act of sanction does not convert the compromise or

> arrangement into an order of court. The court has no greater power over it than in any other sort of contract. It cannot judicially condone a default in performance, nor can it relieve a party bound by it from the consequences of its operation."

See also *Temisa Holdings (Pvt) Ltd & Ors v Registrar, Pensions and Provident Funds & Ors* 1999 (2) ZLR 101(H).

It is therefore clear that upon the grant of an order sanctioning it by the High Court, the scheme became binding on all parties to it. The appellants as shareholders had participated in the process leading to its approval. The sanctioned scheme provided in clauses 7.3 and 7.4 for the disposal of assets belonging to the two companies and how proceeds therefrom were to be utilized.

Clause 3 of the order sanctioning the scheme directed the scheme manager to implement the scheme. The scheme manager in implementing the scheme, as directed, proceeded to dispose of two assets belonging to the said companies. The sellers are the respective companies as represented by the scheme manager. It is in this light that the appellants' *locus standi* to sue for the cancellation of the agreements of sale entered into in furtherance of a sanctioned scheme to third parties was challenged. The issue of *locus standi* must therefore be viewed in that light.

In *Allied Bank Ltd v Dengu & Anor* 2016 (2) ZLR 373(S) at 376G-H MALABA DCJ (as he then was) aptly stated that:

> "The principle of *locus standi* is concerned with the relationship between the cause of action and the relief sought. Once a party establishes that there is a cause of action and that he is entitled to the relief sought, he or she has *locus standi*. The plaintiff or applicant only has to show that he or she has a direct and substantial interest in the right which is the subject matter of the cause of action."

In *Makarudze & Anor v Bungu & Ors* 2015 (1) ZLR 15 (H) the Court held, *inter alia*, that *locus standi in judicio* refers to one's right, ability or capacity to bring legal proceedings in a court of law. *Locus standi* may also refer to a legal interest in the subject matter of the action which could be prejudicially affected by the judgment of the court.

It is trite that a company operates as a legal entity having a distinct legal personality. It has capacity to enter into agreements with other parties without the consent or participation of its shareholders. When wronged, the company has the right to sue in its own name.

This Court in *Minister of Mines & Ors v Grandwell Holdings (Pvt) Ltd & Ors* 2018 (1) ZLR 660(S) at 665D-F held that:

> "It is a trite principle of company law that a company should itself enforce its rights when it is wronged. This was considered as the rule in *Foss v Harbottle* [1843] 2 Hare 461, 67 ER 189. The rule in *Foss v Harbottle* is that, the proper plaintiff in an action in respect of a wrong alleged to be done against a company is *prima facie* the company itself. Thus, as a general rule, where the company is wronged, the proper plaintiff to institute an action to remedy the wrong is the company itself. No other person has the right to institute an action on behalf of the company if the company is able to vindicate its rights. However, the rule as explained in *Foss v Harbottle* is not inflexible and can be relaxed where necessary in the interest of justice."

Hoexter JA gave the following exposition in *Francis George Hill Family Trust v South African Reserve Bank & Ors* 1992 (3) SA 91 (A), at 97B-G:

> "It is trite that a company with limited liability is an independent legal person and separate from its shareholders or directors. In general, therefore, when a wrong is alleged to have been done to a company the proper plaintiff to sue the wrongdoer is the company itself. In English law a derivative action constitutes an exception to that general rule. The exception is recognised when (1) <u>the wrong complained of involves conduct which is either fraudulent or *ultra vires* and (2) the wrong has been perpetrated by directors or shareholders who are in the majority and so control the company</u>. See, for example: *Burland and Others v Earle and Others* [1902] AC 83 (PC); *Edwards and Another v Halliwell and Others* [1950] 2 All ER 1064 (CA) at 1066-7; *Prudential Assurance* Co *Ltd v Newman Industries*

Ltd and Others (No 2) [1982] 1 All ER 354 (CA). The principle underlying the exception to the general rule is expounded thus by Lord Denning MR in *Wallersteiner v Moir (No 2); Moir v Wallersteiner and Others (No 2*) [1975] 1 All ER 849 (CA) at 857d-f:"

> 'If it is defrauded by a wrongdoer, the company itself is the one person to sue for the damage. Such is the rule in *Foss v Harbottle*. The rule is easy enough to apply when the company is defrauded by outsiders. The company itself is the only person who can sue. Likewise, when it is defrauded by insiders of a minor kind, once again the company is the only person who can sue. But suppose it is defrauded by insiders who control its affairs - by directors who hold a majority of shares - who can then sue for damages? Those directors are themselves the wrongdoers. If a board meeting is held, they will not authorise proceedings to be taken by the company against themselves. If a general meeting is called, they will vote down any suggestion that the company should sue them themselves. Yet the company is the one person who is damnified. In one way or another some means must be found for the company to sue. Otherwise the law would fail in its purpose. Injustice would be done without redress.'" (my underlining)
>
> See also *L Piras and Sons (Pvt) Ltd & Anor(intervening) v Piras* 1993 (2) ZLR 245 (SC).

In *casu*, it is common cause that the first respondents being artificial persons entered into contracts with the third respondents. The first respondents were represented by the second respondent, the duly appointed scheme manager. It is these contracts that the appellants seek to have nullified. The contracts were entered into in furtherance of the sanctioned scheme. The issue before this Court is whether the appellants have *locus standi* to institute such claims as they are only shareholders in the companies which were under judicial management and are now being administered under the scheme. The appellants were never part of the agreements of sale.

The appellants were no longer in control of the company as it was under judicial management. It was the final judicial manager who, in an effort to resuscitate the floundering companies, proposed the scheme. The scheme was duly approved by those affected. The scheme had the effect of taking away some rights that shareholders would in normal circumstances have in the affairs of their companies. The first respondents still had the capacity, through the scheme manager, to take action against anyone who wronged them.

Though the appellants' counsel submitted that the appellants had brought a derivative action, when faced with the fact that in their declaration appellants had clearly stated that they were bringing the suit in their personal capacities as shareholders and had not asserted that they were doing so on behalf of the companies, counsel conceded that derivative action was only being brought up as an alternative in this appeal. It is our view that, even as an alternative, derivative action is not available. The facts alleged in the declaration do not meet the requirements of a derivative action.

As noted in the above authorities for the exception of derivative action to be available certain requirements must be averred and established. These include that: the one bringing the action must be doing so on behalf of the company; there must be a wrong doer who is in control of the company and is preventing the company from instituting action in its own name; and it must be alleged and proved that the wrong doer has refused to institute the action and has prevented the company from instituting the action. None of the above requirements were established. If one is simply implementing a sanctioned scheme in terms of the law, he or she cannot be said to be a wrong doer.

In *casu*, the only 'wrong doing' alleged against the scheme manager was that he had sold the assets without registering the sanctioned scheme with the Registrar of Companies and without seeking the shareholders' consent. When it was pointed out to counsel for the appellants that the copies of the sanctioned scheme filed of record showed clearly that the sanctioned scheme was registered with the Registrar of Companies prior to the disposal of the assets and that the sanctioned scheme had no requirement for the shareholders' consent before or in the sale, counsel found himself hamstrung. He conceded that the sanctioned scheme was registered as per s 191 (3) of the Act. This therefore left appellants with no legal basis or *causa* to institute the action.

It was clear that the appellants sought to base their cause of action on their own false assertion that the scheme was not registered and it needed their consent to be implemented. One cannot seek to clothe oneself with *locus standi* premised on their own creation of non-existent facts. It was incumbent upon the appellants to realize that they had no right, let alone *locus standi*, to seek the cancellation of Agreements of sale entered between the first respondents, represented by the second respondent, and the third respondents in terms of the sanctioned scheme. The appellants seemed unwilling to accept that the scheme took away some of the rights of the company and even their own rights in favour of the terms and conditions of the scheme.

In *casu*, it is common cause that the scheme was intended to ensure that the companies are brought to solvency hence the need to dispose of some of the assets and distribute the proceeds therefrom in a defined manner. The scheme manager was appointed to implement the scheme and the disposal of the assets was sanctioned by the scheme. The appellants, as shareholders, had no *locus standi* to interfere with the disposal of assets in terms of the scheme. They cannot seek cancellation of the agreements of sale when the scheme manager was simply implementing the sanctioned scheme in terms of the law. The agreements of sale were between the first respondent companies as represented by the scheme manager and the third respondents. The appellants are thus strangers to the agreements of sale.

This Court in *TBIC (Pvt) Ltd & Anor v Mangenje & Ors* 2018(1) ZLR137(S) at 144C-E held that:

> "That conclusion of law renders both appellants strangers to the contract between the acquiring authority and the respondent. This brings us to the doctrine of privity of contract. That doctrine restricts the enforcement of contractual rights and remedies to the contracting parties, to the exclusion of third parties. Innocent Maja The *Law of Contract in Zimbabwe* at p 27 para 1.5.3 graphically explains the doctrine as follows:
>
>> 'The doctrine of privity of contract provides that contractual remedies are enforceable only by or against parties to a contract, and not third parties, since contracts only create personal rights. According to Lilienthal, privity of contract is the general proposition that an agreement between A and B cannot be sued upon by C even though C would be benefited by its performance. Lilienthal further posts that privity of contract is premised upon the principle that rights founded on contract belong to the person who has stipulated them and that even the most express agreement of contracting parties would not confer any right of action on the contract upon one who is not a party to it.'"

The court *a quo* cannot be faulted for holding that the appellants had no *locus standi* in the circumstances of the case. The court *a quo* aptly held that:

> "Whilst it may be correct that shareholders have rights in a company where they hold shares that right cannot extend to them having *locus standi* to challenge the agreements entered into by a company in terms of a sanctioned scheme of arrangement."

In light of the above, the appeal on the question of *locus standi* is without merit and ought to fail.

3. Whether or not the court *a quo* erred when it ordered the appellants to pay costs at a punitive scale.

Though the award of costs and level thereof is at the discretion of court, such discretion must be judiciously exercised. It is trite that an award of costs is usually awarded to a successful litigant to indemnify him/her from the expense which he/she would have incurred in defending the action. Such costs are normally on the ordinary scale.

Where costs are awarded on a higher scale reasons thereof must invariably be stated. The purpose of punitive costs includes deterring frivolous litigation, encouraging parties to settle wherever possible and discouraging the institution and continuation of hopeless cases and defences. An award of punitive costs is usually granted in exceptional circumstances. This Court in *Dongo v Naik & Ors* SC 52-20 held that:

> "It is settled law that costs are at the discretion of the court. The award can only be set aside where the discretion was not exercised judiciously. It is also settled that costs on a higher scale are granted in exceptional circumstances. The grounds upon which the court would be justified to make an award for costs on a legal practitioner and client scale include <u>dishonest or malicious conduct, and vexatious, reckless or frivolous proceedings</u> by and on the part of the litigant concerned." (my emphasis)

See also *Wattle Company Limited v Samuel Mukubvu &Tanaka Venturas (Pvt) Ltd* HH 840-19.

In *casu*, the court *a quo* awarded costs on the higher scale but did not provide reasons justifying such costs. It erred in this regard and the appeal ought to partially succeed.

<u>DISPOSITION</u>

The court *a quo* cannot be faulted for finding that the appellants did not have *locus standi* to seek the setting aside of agreements of sale to which they are not privy and which had been entered into by the first respondents with third parties in terms of the sanctioned scheme of arrangement.

However, the court *a quo* erred when it awarded costs on a higher scale without justifying its decision. The appeal ought to partially succeed.

Though there is partial success on costs, it is clear that the respondents never contested this issue. The main appeal related to the finding of lack of *locus standi* and in our view the respondents deserve their costs.

Accordingly, it is ordered that:

1. The appeal partially succeeds with appellants to pay costs.
2. The appeal against the finding of lack of *locus standi* be and in hereby dismissed.
3. Paragraph 3 of the order of the court *a quo* on costs be and is hereby set aside and is substituted with:

> "The plaintiffs shall pay costs on the ordinary scale jointly and severally, the one paying the other to be absolved."

GWAUNZA DCJ : I agree

MATHONSI JA : I agree

Gutu & Chikowero, 1st & 2nd appellants' legal practitioners.

Thompson Stevenson & Associates, 1st & 2nd respondents' legal practitioners.

Chimwamurombe Legal Practice, 3rd respondent's legal practitioners. (Tatipano Properties (Pvt) Ltd.)

Hogwe Nyengedza, 3rd respondent's legal practitioners. (Paradise Road (Pvt) Ltd)