DERBY FARMS (PVT) LTD
versus
STEWART MUSONZA CHIRUNGA
and
B. CHIRUNGA

HIGH COURT OF ZIMBABWE
KUDYA J
HARARE, 30 October and 1, 2 and 21 November 2007

Mr. *O. Bvindi*, for the plaintiff
Mr. *O. Matizanadzo*, for the defendants

KUDYA J: The plaintiff company ("lessor") filed summons out of this court on 14 June 2006 seeking the eviction of the defendants ("lessee"), who are husband and wife, from subdivision D of Derbyshire Farm ("the farm"), holding over damages from the date of summons to the date of eviction and costs of suit. The defendants filed their plea and counterclaim on 12 December 2006. In the plea they sought the dismissal of the plaintiff's claim with costs. In the counterclaim they sought an order of specific performance on payment of $400 000.00 (revalued) plus interest thereon at the prescribed rate from 29 November 2005 to the date of payment and in the alternative payment of the current value of the improvements they effected on the farm or an amount ascertained at the time of judgment to be the fair value of the improvements, payment of damages for breach of contract of the option to sale and interest on these amounts at the prescribed rate of interest and costs of suit.

THE EVIDENCE

The plaintiff called the evidence of two witnesses and produced 8 documentary exhibits while the defendants called the evidence of two witnesses and produced 17 documentary exhibits.

Common cause

It was agreed that the plaintiff was called HJ Gripper (Pvt) Ltd until 24 February 2006 when the Registrar of Companies agreed through exhibit 7 to register it under its present name, Derby Farms (Pvt) Ltd.

In 1999 the plaintiff represented by its sole shareholder and managing director Raymond Arthur Gripper ("Gripper") entered into negotiations for the lease of the farm with the defendants. The discussions culminated in a written lease agreement, exhibit 1, which was executed on 12 January 2000. It was to run for 3 years from 1 January 2000 to 31 December 2003 and was subject to renewal for two years at the option of the lessee. The lease was supposed to be the precursor to the purchase of the farm by the defendants. Clause 15 recorded the option to purchase that was granted to the defendants.

In terms of clause 6 the lessee was to use the premises to operate such activities as are ordinarily carried out on a farm. In clause 9.1 the lessee acknowledged that the farm was fit for the purpose for which it was let while in clause 9.2 the lessee were permitted at their own expense to keep and maintain the premises and to make all such improvements as are expected in a farming environment.

At the time of agreement, the farm was being utilized by Grave Concerns, operated by Mr Mbofana, in the production and sale of tombstones. There was no farming activity going on at the farm. There was no sign left of poultry farming that once had graced this 55 acre farm. In exhibit 4, the letter dated 5 August 2005 written to the lessee by Gripper, the farm was described by the plaintiff as a quarry. This was because its title deeds limited its use to farming and quarrying. When the lease was entered into, there were three sheds and an office building attached to one of the sheds.

The defendants moved onto the farm with livestock and farming implements. They grew maize, renovated the sheds into poultry runs and pigsties. They constructed houses for workers and built ablution facilities. The poultry project was superseded by the piggery project, to the extent that by the time the relationship between the parties soured in August 2005 they had 1000 pigs on the farm.

It was clear from the letter written by the first defendant to Gripper on 11 January 2003 exhibit 2, that the parties engaged in discussions on the sale and purchase of the farm. The concern that the defendants raised in that letter were over the desire by Gripper to be paid in foreign currency and the fact that as Government appeared to have an interest in the farm for urban expansion, the defendants looked to either the plaintiff or Government for compensation of the improvements that they had made on it. That these purchase and sale discussions were serious was demonstrated by the grant of a Certificate of No Present Interest, exhibit 15,

which was valid for 12 months from the date of issue. It was sought on 19 February 2003 and according to exhibit 21, was issued on 21 May 2003.

Though there was no written request to exercise the option to renew the lease for a further two years after 31 December 2003, the defendants continued in occupation with the full blessing of Gripper.

A flurry of correspondence between the parties took place between 21 July 2005 and 15 February 2006. Thirteen of the letters were produced as exhibits 3; 4; 5; 6; 8; 9; 10; 11; 12; 13; 14; 22 and 23. They reveal how the negotiations were conducted and why they failed.

Apparently, it started on 8 June 2005. Gripper went to the farm with Mr Dickinson of Kennan Properties. He offered to sell the farm to the defendants for $200 million (old currency). The offer was open until 31 July 2005. It is noteworthy that all the figures that were negotiated were in old currency. He wished to convert it into rands to assist with the medical bills of his two brothers who were ill in South Africa. The first defendant hoped to raise the purchase price from a debtor who owed him $600 million and was not amenable to the idea of disposing his house in Borrowdale Brooke to finance the purchase.

Gripper indicated on 21 July that he would increase the offer exercisable in August 2005 to $250 million.

The two met at a service station in Harare on 3 August 2005. Gripper pitched the asking price to $300 million for that month. He would accept the payment of $200 million in cash with the balance of $100 million payable by the end of September 2005. The first defendant counter offered to pay $200 million failing which they could jointly sell the farm as a going concern but these were rejected by Gripper. The belief the defendant had that the offer of $200 million was open for 3 months to the end of September was also rejected. It seemed that the plaintiff had given him 3 months to vacate the farm if he failed to purchase it. It was in the letter of 5 August that Gripper revealed that he had been to the farm many times before to hold discussions with the first defendant when he saw the pigsties but had not raised the issue with him.

On 23 November 2005, in exhibit 9, the plaintiff advised the defendants that an offer to purchase the property owning company for $400 million had been made by a third party. His offer would only be considered if it at least matched this amount and was made by 30 November 2005. If accepted, the plaintiff would then initiate the application for a certificate of no present interest and make any agreement reached conditional on its issuance. It was clear

from exhibit 9 that the plaintiff expected the offer to come from the defendants. This letter broke the trend that had been exhibited in previous letters where it appeared the plaintiff was the one making the offer to the defendants.

On 28 November the defendants offered to buy the property for $400 million. The response from the plaintiff of 8 December considered the request as an offer. It appeared that on 13 December, the defendants suggested that the letter of 28 November was an acceptance of an offer to sell at $400 million. They were corrected by the plaintiff on 16 December and were advised that their offer had been surpassed by that from an interested suitor who turned out to be Misheck Dudzai Mataranyika, who had raised his offer for the plaintiff and not the farm to $500 million. The defendants were advised to contact Mataranyika to discuss whether he would be willing to accommodate them. The defendants replied on 21 December 2005. They disputed the averment that they were ordinary prospective purchasers but insisted that in terms of the written lease agreement, exhibit 1, they had the right of first option to purchase and lamented that the failure to finalize the negotiations lay with the plaintiff who constantly changed the price of the farm. This letter demonstrated that the defendants appreciated that that they were the ones who were making the offer for they wrote “our client has not received a clear response to his offer”. They also sought clarification on whether or not the plaintiff had concluded a contract with Mataranyika and accused the plaintiff of acting in bad faith. They maintained that they were entitled to compensation for the improvements in the event that the negotiations to buy collapsed.

Again, on 11 January 2006, the plaintiff gave the defendants until 20 January to make an offer surpassing that of Mataranyika and intimated that it would conclude an agreement with Mataranyika in the absence of a better offer. It disputed acting in bad faith and denied that the defendants were entitled to compensation. The next letter from the defendants of 25 January seemed to suggest that the plaintiff was making an offer to sell on certain terms and conditions. The plaintiff had the last word on 15 February 2006. It signaled the end of the negotiations by declaring that it would not sell the farm to the defendants because they had failed to grasp and timeously accept the numerous opportunities it had afforded them to purchase the property. They were to expect communication from Mataranyika to negotiate their continued stay on the farm.

It was common cause that this meeting took place in early March of 2006. Mataranyika suggested that the defendants sign a new lease agreement, exhibit 20. He also requested that

the parties enter into a gentleman's agreement, which deferred the question of compensation to improvements to later discussions. The defendants refused to sign the new lease agreement, firstly because on termination the lessee would not be compensated for improvements and secondly because the plaintiff sought to limit the size of the acreage leased by them. The lessor also raised the rentals from $1 million to $5 million per month.

On 15 March 2006, Mataranyika was issued with a share certificate, exhibit 16, for 7418 fully paid shares which were created in the plaintiff to increase the issued shares to 13 000. He paid $700 million for the shares. He became the majority shareholder in the plaintiff. When the discussion between Mataranyika and first defendant failed to reach a compromise, Mataranyika wrote an undated letter, exhibit 19, advising the defendants of his appointment as the Managing Director of the plaintiff; his intention to proceed with a horticultural project, which would not be affected by the defendants' pig operations and set the new rental effective 1 April 2006 at $5 million per month payable by the 5th of each month to the plaintiff.

The rentals from April to December 2006 at the new rate were paid without prejudice by cheque on 2 November 2006(see exhibit 25) and the rentals for the whole of 2007 were paid by cheque on 19 April 2007 (see exhibit 24).

The parties shared the costs of the preparation of exhibit 17, the valuation report that was compiled by Mrs Rumbidzai Dihwa, a chartered valuation surveyor of 19 years experience of Ebenezer Properties (Pvt) Ltd, an Estate Agent and Valuator, who was appointed by the Estate Agents Council to valuate the cost of improvements and the value of the land on the farm. This meeting of minds of the parties was initiated by the pre trial conference judge on 19 April 2007. Exhibit 17 was prepared on 18 May 2007. The depreciated replacement cost of the improvements, in new currency, were $3 146 079 250.00 while the open market value of the land was $7.5 billion.

It was further agreed that the plaintiff offered to pay the defendants the depreciated replacement value in May 2007 but was turned down. They also refused to have the farm subdivided in such a way that they would remain with 5 to 10 acres were the piggery project was situated. They preferred to be compensated the gross replacement costs or to remain in occupation of the whole farm.

On 11 June 2007, acting on the defendants' instructions, Ebenezer Properties conducted a gross replacement cost evaluation of the improvements, exhibit 17A, only and found them worth $6 262 454 000.00 (new currency).

It also carried out a new valuation on of the improvements and the land, exhibit 18, on 26 October 2007. The gross replacement cost of the improvements, in new currency, were found to be $66 485 615 000.00 while the open market value of the land was placed at $51.6 billion.

Disputed facts

Most of the disputed facts were inconsequential and do not overshadow the agreed ones. These touched on whether the defendants had 6 cattle, as alleged by Gripper, or 22 cattle, as alleged by first defendant when they moved onto the farm.

While the plaintiff stated that the parties agreed that the defendants were to keep poultry only, the defendants averred that they were to carry out any farming activities they deemed fit. I believed the defendants on this score. Gripper visited the farm at least thrice a year. He saw the alterations that the defendants made to the sheds; the buildings that they were constructing, the poultry run and pigsties that they built and raised no objections to their presence until after the contentious meeting of 8 June 2005. In my view, the absence of any complaints from him showed that the defendants were given a wide mandate to farm in its widest sense. After all, the expectation was that they were going to purchase the farm. The dispute on this aspect is decided in favour of the defendants.

The other dispute that arose was that the defendants paid rentals for 7 to 9 months only in a year. This was disputed by the defendants. I agree with first defendant that he paid all the rentals expected of them timeously at least up to March 2006. The payment of rent was not made a cause of action by the plaintiff. No arrear rentals were claimed. Both Gripper and Mataranyika who testified for the plaintiff failed to give any evidence of non-payment of rentals during this period.

The dispute on whether the plaintiff sold the farm to defendants or not and whether the gross replacement value should be used as opposed to the depreciated replacement value are in my view disputes of law rather than fact.

THE ISSUES

At the pre trial conference that was held on 20 June 2007, the parties agreed that a valuation of the improvements be done by an appointee of the Estate Agents Council and that the costs would be shared equally between them. The plaintiff admitted that the lease

authorized the defendants to effect improvements on the farm and that its refusal to compensate for the improvements was based on the fact that they were not necessary in a farming environment.

Five issues were referred to trial. Two of these related to the claim in convention. It was agreed that the onus lay on the plaintiff to prove them. The remaining three were for the counterclaim, for which it was agreed that the onus to prove them lay on the defendant.

The first issue for the claim in convention was whether the plaintiff is entitled to evict the defendants by virtue of the expiration of the lease agreement and the parties' failure to agree on a new rent amount. The second being whether the plaintiff is entitled to holding over damages of $15 000.00 per month.

On the first issue, Mr *Bvindi,* for the plaintiff, contended that the lease expired by the effluxion of time. He submitted that it expired on 31 December 2003. He argued that while clause 3 of the lease gave the lessee the right of option to renew the agreement for an additional period of two years reckoned from 31 December 2003, the defendants failed to exercise that right. He buttressed his argument by contending that they did not communicate their wish to renew to the plaintiff. See *Chibanda v Hewlett* 1991
(2) ZLR 211 (H) at 214 D and 215F.

Mr *Matizanadzo*, for the defendants, declined to respond to these averments for the reason that they were irrelevant to the determination of the issue under consideration. He submitted that the contention that the plaintiff could evict the defendants because they had failed to agree on an amount of rentals after the expiration of the lease was not legally sustainable in the light of the provisions of sub section (2) of section 22 of the Commercial Premises (Rent) Regulations, SI 676/1983 ("SI 676/1983").

It seems to me that by making reference to section 22 (2) of SI 676/1983, Mr *Matizanadzo* acknowledged that the lease had expired. He did not concern himself with the date of expiration of the lease. He viewed the defendants as statutory lessees.

Clause 3 of the lease is worded as follows:

> "The lessee shall have the right of option to renew this agreement for an additional period of two years reckoned from the date of expiry hereof on such terms as may be agreed between the parties."

The evidence led at the trial did not establish that the lease was renewed in the manner contemplated by this clause. The parties did not agree on, let alone discuss, the terms of the

new lease. In any event ROBINSON J, dealt with a clause "to renew the lease for a further 5 year period, at a rental to be mutually agreed upon" in *Film and Video Trust v Mahovo Enterprises (Pvt) Ltd* 1993 (2) ZLR 191 (H). At195D-198G he conducted a survey of cases which dealt with option to renew rentals and option to purchase clauses in South Africa. He held that because such clauses lacked a determined or determinable rental and or purchase price they were notices of invitation (offers) to the option holder (the lessee) to come and negotiate on the terms of a new contract with the option grantor (lessor) who is not obliged to agree to anything. Thus an acceptance of such an offer to negotiate would not result in a contract of lease and would be unenforceable.

I agree with Mr *Bvindi* that the lease was not renewed automatically on 1 January 2004 by virtue of clause 3. That clause did not set out the method of renewal. The defendant did not set out how he renewed the lease. It was clear from the evidence that he remained on the farm. He would remain a lessee under the common law concept of tacit relocation. This concept was dealt with by SANDURA JP, as he then was, in *Chibanda v Hewlett, supra*, at 216C. It is an implied agreement to relet. Its essential requirements are that the lessor permits the lessee to remain in occupation after the termination of the lease and he accepts rent paid by the lessee. He remained on the farm. The plaintiff stated that he did not pay rent during this period. The defendants averred that they paid the rentals that were due. If they did not pay rent, then they were not tacit lessees, but if they paid rent then they were tacit lessees.

Mr *Bvindi* submitted that the onus was on the defendants to show that they paid rentals. He contended that on 5 August 2005, in paragraph 2 of exhibit 4, the plaintiff advised the defendants that they had paid rentals during the first few months of the original lease, which point was not disputed in their response of 7 August 2005, exhibit 5. Further, in their discovery affidavit, the defendants highlighted that they used to have but no longer had receipts issued by plaintiff as acknowledgments of rent paid and proof of deposits into the plaintiff's account. He argued that failure to produce these documents in evidence was fatal to the defendant's position.

It seems to me that the onus lay on the defendants to show that rent was paid. It is impractical to expect the plaintiff to discharge a negative averment. First defendant stated in his testimony that Gripper used to visit the farm thrice a year, yet he averred that he paid most

of the rent to him in cash. The evidential burden to demonstrate that payments were made lay on the defendants.

Notwithstanding their failure to produce evidence of payment, I am satisfied that they paid rentals that were due until 31 March 2006. This is because the plaintiff never raised the issue of arrear rentals with the defendant until August 2005 and even then despite the failure to deny the averment of none payment by the defendants, it did not take any action to enforce its rights in terms of the lease, common law or statutory provisions. Again, its claim seeks holding over damages from the date of services of summons (stated in the appearance to defend as 1 July 2006) and not from the first year of lease when the alleged breach manifested itself. Lastly, in its further particulars of 11 August 2006, the plaintiff averred that the lease expired some time in 2005. This tended to contradict the averment of the non payment of rental other than during the initial few months of the lease period.

I find that under the common law, after 31 December 2003, the defendants became tacit lessees of the plaintiff, at least until 31 March 2006. This finding is, however, irrelevant in the scheme of things by virtue of the statutory provisions of SI 676/1983.

Mr *Matizanadzo* submitted that the defendants became statutory lessees after the renewed lease agreement expired on 31 December 2005. It seems to me that the written lease expired on 31 December 2003 for the reason that it was not renewed. Thus from that date, as long as the defendants paid their rent in advance by the 7th of each month and performed the other conditions of the written lease, they became statutory tenants.

The defendants are in essence raising a defence of statutory tenancy. The evidentiary burden lies on them to show that they are protected from eviction because they are statutory tenants. Though the defendants did not lead any evidence to show that they were paying rentals within 7 days from due date, I hold for the reasons already advanced above on tacit relocation that they paid rentals timeously for the period ending 31 March 2006. Exhibit 25 shows that they only paid without prejudice what they purported were rentals for April to December 2006 on 2 November 2006 and for the period January to December 2007 on 19 April 2007. As these were paid after the service of summons the acceptance of the payments by the plaintiff's legal practitioners could not amount to a waiver of the claim for eviction and holding over damages. It did not in my view signify an acceptance of delayed rent. I accept the

contention of the plaintiff that it accepted the amounts as payment in *lieu* of holding over damages.

I find that, by operation of law, the defendants ceased to be statutory tenants in April 2006 as they did not pay the rent for the months of April to October 2006 within 7 days of due date. They cannot find protection from eviction from the provisions of subsection (2) of section 22 of SI676/1983. Failure to agree on a new rent would not be a lawful ground for eviction. It is not a good and sufficient ground to seek eviction. In the circumstances of this case where the defendants ceased to be statutory tenants, they are liable for eviction on the basis that the written lease that they had with the plaintiff expired by the effluxion of time.

The second issue in the claim in convention relates to whether the plaintiff would be entitled to holding over damages in the sum of $15 000.00 per month from the date of the service of summons to the date of eviction. The summons appear to have been served on 1 July 2006. The money was paid to the plaintiff's legal practitioners for the period to December 2007. I agree with the submission of Mr *Bvindi* that based on the orbiter of Hiemstra J in *Alphedie Investments (Pty) Ltd v Greentops Ltd* 1975 (1) SA 161 (T) at 164H-165A that after the termination of a lease the lessor would be entitled to damages and not rentals.

The defendants tendered the money as rentals at a time that they to their knowledge were no longer regarded by the plaintiff as lessees. I see no reason why the order prayed for should not be given but in the sum of $5000-00 per month, which amount the defendants have been tendering since November 2006 and which the plaintiff accepted.

Whether or not the plaintiff will be granted the order it seeks, however, depends on the resolution of the issues raised in the defendant's counterclaim.

These issues are stated as follows:

1. i) Whether plaintiff breached the option agreement between the parties;

   ii) If so, whether defendants are entitled to damages arising from breach;

   iii) If the defendants are entitled to damages arising from the breach of the option agreement, what is the quantum of their damages

2. Whether the purchase by Misheck Mataranyika of majority shares in plaintiff was wrongful, unlawful and amounted to a deprivation by the plaintiff of defendants' right of first option to purchase the property

3. i) Whether the improvements and buildings made and erected on the farm by the defendants are necessary improvements in a farming environment as contemplated by clause 9.2 as read with clause 6 of the lease agreement

ii) Whether the defendants are entitled to compensation for the improvements they effected on the farm

iii) If so, what is the quantum of the compensation due and payable to the defendants?

I deal with these issues as they were referred.

1. i) whether plaintiff breached the option agreement between the parties;

Clause 15 of the lease agreement is worded thus:

> "During the currency of this lease agreement, it is recorded that the lessee is hereby granted an option to purchase the entire property provided that in the event of the option being exercised within twelve months from the date of commencement of this agreement, the purchase price shall be the Zimbabwe dollar equivalent of US$33 000.00. In the event that the option is exercised at any other time during the currency of this agreement the purchase price shall be negotiable."

Mr *Matizanadzo* contended that clause 15 gave the defendants the right of first refusal. He referred to *Sawyer v Chioza and Ors* 1999 (1) ZLR 203 (H) at 207E-F and *Central African Processed Exports (Pvt) Ltd and Ors v Macdonald & Ors* 2002 (1) ZLR 399 (S) at 403C-G, in which the right of first refusal, also known as the right of pre-emption, was defined. It compels the grantor, once he decides to sell, to offer the property to the grantee, usual at the highest price offered by a third party. Mr *Bvindi*, on the other hand, contended that clause 15 was not a right of pre-emption but an option to purchase clause. He relied on **Christie, The Law of Contract in South Africa, 2nd ed** at page 60 and *Hattingh v Van Rensburg* 1964 (1) SA 578 (T) for the proposition that the validity of an option to purchase as in that of a right of pre-emption depends on whether the price thereof is determined or determinable. He submitted that clause 15 was invalid because it did not set a price after 12 months of the existence of the lease. The same point was also made in *Film & Video Trust* case, *supra.*

It is clear to me that clause 15 did not grant an exclusive offer to the defendants to buy the farm from the plaintiff after 12 months. It invited them to accept the offer to purchase the

farm within 12 months at the Zimbabwean dollar equivalent of US$33 000.00, at the legal rate of exchange. The defendants did not exercise the option during the period of 12 months. It therefore lapsed. By failing to set out the parameters within which the purchase price would be ascertained during the negotiations that would subsequently follow the expiration of the 12 months, the second portion of the option to purchase was invalid. The lease agreement did not therefore provide the defendant with a valid option to purchase at the expiration of the first 12 months.

The meaning of section 23 of the SI 676/1983 was provided in *Chibanda's* case, *supra*. It held that the condition on renewal could not be carried over to a statutory lease because it is an onerous term which would require the express consent of the lessor. Even if that interpretation were wrong, 12 months of the statutory lease lapsed on 31 December 2004.

The plaintiff, through the conduct of Gripper, opened negotiations with the defendants for the sale of the farm after the expiration of the option to purchase period from June 2005 to January 2006. The correspondence exchanged between *Messrs Scanlen and Holderness,* for the plaintiff, and the defendants' present legal practitioners are clear on the nature of these negotiations. The exchange of correspondence between the parties at first gave the impression that Gripper was offering the defendants to purchase the farm at $200 000.00 (new currency) by 31 July 2005. The defendants failed to prove that they accepted the offer within the stipulated period. The defendants also failed to show that they accepted the offer to buy the farm at $300 000.00 in August 2005.

In November 2005, the plaintiff invited offers from the defendants in the region of $400 000.00 for the plaintiff and not the farm. At first the defendants wrongly assumed that they had been offered the plaintiff for that price. By 21 December 2005 the defendants legal practitioners acknowledged that they made an offer of $400 000.00. It was not accepted by the plaintiff. The parties did not therefore execute a contract of sale. The defendants are therefore not entitled to either specific performance or damages for breach of contract.

2. **Whether the purchase by Misheck Mataranyika of majority shares in plaintiff was wrongful, unlawful and amounted to a deprivation by the plaintiff of defendants' right of first option to purchase the property.**

By then Mataranyika had come onto the scene. Mr *Matizanadzo* contended that Mataranyika was a truthful witness while Gripper was not. This was based on the view that Mataranyika admitted that by 16 December 2005 he had become the majority shareholder in the plaintiff while Gripper said he became such in March 2006. It seems to me he was mistaken on that score. There was no difference between Mataranyika and Gripper's evidence. This is confirmed by the defendants' own letter of 25 January 2006, exhibit 8, wherein in paragraph 8 the erstwhile legal practitioners of the defendants stated that a meeting with Mataranyika had revealed that he had not purchased shares in the plaintiff but that he would raise his offer to beyond $500 000.00 if the defendants offered that amount for the purchase of shares in the plaintiff. Mataranyika's version was that he eventually bought the shares for $700 000.00. It was only after that that he wrote exhibit 19 to the defendants seeking to accommodate them at the farm.

It seems to me that the plaintiff did not deceive the defendants on the sale of the shares. It acted above board, and gave the defendant every opportunity to buy firstly the farm and secondly the plaintiff but the defendants failed to seize the opportunities that were proffered.

It also seems to me that Mataranyika did not dispossess the defendant of any rights of first option. The defendants did not have such rights of pre-emption.

The defendants by reference to exhibit 21, a letter from the Secretary of Lands , Land Reform and Resettlement dated 17 May 2007 submitted that the sale of shares to Mataranyika in the plaintiff company was unlawful as it did not obtain a certificate of no present interest before the disposal took place. Its importance lies in providing the date on which exhibit 15 was issued, as 21 May 2003. It erroneously referred to the Land Acquisition (Right of First Refusal for Rural Land) Regulations SI 297/1992, which were repealed by the Land Acquisition (Disposal of Rural Land) Regulations SI 287/1999.

Notwithstanding the clear interpretation errors which refer to all land no matter how small as being subject to the dictates of SI 287/1999, it is apparent that the farm in question falls into the category of rural land. Indeed *Messrs Scanlen and Holderness* seemed to believe in their letter on behalf of the plaintiff which was addressed to the defendant's legal practitioners on 23 November 2005, exhibit 9, that such a certificate was required for the sale of the property – owning company. The difficult I face in the present matter is that it appears to me that the sale

of shares in a land –owning company is governed by section 4 and not section 3 of SI 287/1999. The regulations define a land-owning company as a private company which owns one or more pieces of rural land and whose holding of rural land constitutes the whole or the major part of its assets. In the absence of proof that the farm constitutes the whole or the major part of the plaintiff's assets, I cannot find that it is a land owning company. Thus even if I were to find that the creation of new shares which were allocated to Mataranyika with the effect that he became the controlling shareholder was a significant transfer of shares, in the absence of proof that the plaintiff is a land-owning company, it is not possible to hold that a certificate of no present interest was required before shares were transferred to Mataranyika. In the result am not able to hold that such transfer was void as mandated by section10 of SI 287/1999. Even if it was void, it would not assist the defendants in their counterclaim on this aspect, as the plaintiff would remain as the plaintiff. It is a separate and distinct legal person from its shareholders.

I answer the second issue in the counter claim against the defendants

3. i) whether the improvements and buildings made and erected on the farm by the defendants are necessary improvements in a farming environment as contemplated by clause 9.2 as read with clause 6 of the lease agreement

The improvements that the defendants made on the farm appear in annexure 1 of exhibit 17 and 18. Exhibit 17 was compiled on 18 May 2007. They built four new pig sty blocks, one of which adjoined the first shed. Two of the three sheds that were on the farm were converted to pigsties and a fowl run and goat pen while the other housed an office and storeroom. A new office, kitchen, toilet and shower were built adjoining the shed that was converted into an office and storeroom. They constructed three two roomed houses, a three roomed house, an eight roomed house, guard room, one big storeroom, two livestock loading rumps, water reservoir, four pit latrines, an incomplete fowl run and three incomplete eight roomed houses at foundation box level. Exhibit 18 was compiled on 23 October 2007. The defendants had constructed a water trough, main entrance gate pillars, incomplete storeroom extension and a pig sty still at slab level.

Clause 6 provides that "the lessee shall use the premises to operate such activities ordinarily carried out on a farm", while clause 9.2 states that "the lessee shall at his own

expense keep and maintain the premises and make all such necessary improvements as are expected in a farming environment."

Mr *Matizanadzo* contended that these two clauses gave the defendants a wide discretion in the type of farming to pursue. It could not be given the restrictive meaning sought by the plaintiff. Mr *Bvindi,* however, contended that the two clauses were subject to the reasonable farmer test. He argued that it was not in the contemplation of the parties for the defendants to build tobacco barns or pursue Aquaculture without reference to the plaintiff. It seemed to me that these examples were misplaced. If they fall into the category of activities ordinarily carried out on a farm then the defendants would not need to refer his intentions to the plaintiff. The contract was compiled by the plaintiff. It was up to it to place restrictive clauses on the type of farming it wished the defendant to pursue. If it wished to restrict them to those which were necessary for the protection and preservation of land, it should have stated as much in the lease. Instead by clause14.2 it limited the terms and conditions to those written into the agreement. His reference to *Reza v Nyangani* 2001 (1) ZLR 202 on the meaning of necessary and useful improvements did not assist the plaintiff's case. At page 205G MCNALLY JA, held that "usefulness must therefore be measured in terms of added value" and not on whether the plaintiff would require the structures for its own use. Indeed if it were to sell the land, those structures that were constructed by the defendants would add value to the farm. Exhibit 17 and 18 highlight the improvements that the defendants brought to the quarry. They were all, in my view, necessary improvements that are objectively found in a farming environment.

ii) Whether the defendants are entitled to compensation for the improvements they effected on the farm

The case of *De Beers Consolidated Mines v London & South African Exploration Co*. (1893) 10 SC 359 at 368 by reference to Placaat of the States of Holland and West Friesland of 1658 held that the owner of leased property who has consented to the construction of buildings by a lessee on his property shall be bound to compensate him but such a lessee is not to remain in occupation on the pretext that he has made improvements for his remedy lies in an action for compensation which can only be brought after he has quitted possession.

Reza v Nyangani, supra, is authority for the proposition that an occupier is entitled to necessary and useful improvements while *De Beers Consolidated Mines, supra,* holds amongst others, that a lessee is entitled to compensation for improvements that are made with

the owner's consent. I have found that the plaintiff consented to such improvements in the lease agreement.

Mr *Bvindi* contended that the plaintiff was not entitled to compensate for those improvements that were made after the dispute on whether they were permissible improvements arose. He put that date at 5 August 2005, that is, when exhibit 4 was written. It seems to me that the actual question for resolution is whether the defendants are entitled to compensation for the improvements that were made after they ceased to be statutory tenants. *Lydenburg Properties Ltd v Minister of Community Development* 1963 (1) SA 167 held that a *mala fide* occupier could not be compensated for improvements that he made after he had knowledge of his status. In the present matter the defendants would not be entitled to compensation for the improvements that they made after 7 April 2006. The improvements that would be hit would be the additional constructions that were found on 23 October 2007 as recorded in exhibit 18 and the completion of work in progress which first defendant underscored in his testimony. He did state under cross examination that he completed the water reservoir, which was 95% complete, and roofed the five pigsties, which were 90% complete, in 2007.

I accordingly hold that the defendants are entitled to compensation for the improvements that are listed in annexure 1 of exhibit 17 dated 18 May 2007 with the exception of the water tank and five pigsties, which should be compensated at 95% and 90% of their values respectively. The value of the compensation will shortly be determined in (iii) below.

iii. If so what is the quantum of the compensation due and payable by the plaintiffs to the defendants

Mr *Matizanadzo* submitted that the defendants should be paid the gross replacement value of the improvements while Mr *Bvindi* submitted that the compensation due would be the depreciated replacement value.

The expert, Mrs Rumbidzai Dihwa of Ebenezer Properties, provided the definitions of the two terms. Gross replacement cost is the estimated cost of replacing an item or modern substitute in like kind and like utility prior to any allowance for depreciation. The item or modern substitute should have the same gross external area as that existing at prices current at the relevant date. The total figure may include fees, finance charges appropriate to its production/construction period and other expenses directly related to the creation of the item.

She defined depreciated replacement cost as the estimated current gross replacement (or reproduction) costs of improvements less allowances for physical deterioration and all relevant forms of obsolescence and optimization.

It seems to me that the gross replacement costs cover all the expenses incurred in reproducing a like item while depreciated costs cover the estimated value of the item.

Reza v Nyangani, supra, underscored that compensation for improvements in a hyperinflationary environment must take into account the value by which the item has been enhanced to the beneficiary rather than the expenses incurred by the claimant in producing the item. By so holding the Supreme Court appears to have departed from the position adopted in *Fletcher and Fletcher v Bulawayo Waterworks Co. Ltd* 1915 AD 636 at 648 that "the measure of enhancement would generally be less than the expenditure actually incurred; but if in any instance it proved to be greater, then only the lesser amount was to be awarded as compensation." The manner in which MCNALLY JA arrived at the figure of $60 000.00 in that case is instructive. He estimated the enhanced value and excluded the value of labour. The Supreme Court thus held that our courts should apply the depreciated replacement cost.

It seems to me that this accords with common sense. Compensation is for the buildings or items that are already in existence and not for new buildings. The value can only be an estimate. It is also the only mode of valuation that is defined in SI 676/1983.

In the present matter it was telling that when Mrs Dihwa was asked by the defendants' legal practitioners to evaluate the improvements for the parties, she without any prompting used the depreciated replacement cost. She only used the gross replacement cost method at the special request of the defendants.

The correct basis for compensation in the present matter would be the depreciated replacement cost.

The parties were agreed that the depreciated replacement cost for the improvements in exhibit 17 no longer reflected the enhanced value of those improvements at the date of hearing. Exhibit 18 reflected the wrong value.

Mrs Dihwa did not provide the court with the formula of depreciation used. I am not able to estimate the depreciated replacement cost of the structures as at 23 October 2007. The defendants have therefore failed to prove the amount of compensation that is due to them. In these circumstances the only option open to me is to follow what UCHENA J did in *Shumba v Imbayago and Another* HH 14 /2005 and grant the plaintiff absolution from the instance. To follow the course suggested by counsel for both parties of ordering the compilation of a new valuation report by a valuator on the Master's panel is without legal basis and would be amount to allowing the defendants to open their case through the back door.

Before concluding, I must deal with the submission made by Mr *Bvindi,* which was not opposed by Mr *Matizanadzo.* He submitted that the defendants have no improvement lien over the farm, which would protect them from eviction. This submission is anchored in *Syfrets Participation Bond Managers Ltd v Estate & Co-op Wine Distributors (Pty) Ltd* 1989 (1) SA 106 (T). VAN ZYL J at page 111B stated thus: "it is quite clear from these placaeten that the lessee had the right to claim compensation only after he had evacuated the property. He therefore had no lien or right of retention. These placaeten have been received into South African law and have been applied in our courts." See also *De Beers Consolidated Mines* case, *supra,* at page 368.

I will therefore grant the application for eviction, together with the other consequential relief sought in convection and absolve the plaintiff from the instance in the counterclaim.

DISPOSITION

It is accordingly ordered that:

1. The defendants and all those claiming the right of occupation through them be and are hereby evicted from subdivision D of Derbyshire also known as Derby Farm.

2. The defendants shall pay holding over damages calculated at the rate of $5 000-00 per month from the date of service of summons to the date of eviction, which amount shall be set off against the sum of $105 000.00 paid on 2 November 2006 and 19 April 2007 on a without prejudice basis to the plaintiff's legal practitioners by the defendants.

3. The plaintiff is absolved from the instance in the counterclaim.

4. The defendants shall pay the plaintiff's costs of suit for both the claim in convention and the counter claim, jointly and severally the one paying the other to be absolved.

Messrs Dube, Manikai and Hwacha, plaintiff's legal practitioners
Messrs O. Matizanadzo and Associates, the defendants' legal practitioners