CAPITAL ENERGY (PRIVATE) LIMITED
t/a AGRO CONTRACTORS & PROCESSORS
versus
ALBERT GARIKAYI MNANGAGWA

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE: 10 June 2024 & 24 January 2025

Civil Trial- Specific performance and damages

Mr *T Tandi*, for the plaintiff
Mr *F Nyamayaro,* for the defendant

MUSITHU J: The plaintiff's claim is for an order directing the defendant to deliver 435.82 tonnes of soya beans to the plaintiff, or alternatively the payment of the market value of 435.82 tonnes of soya beans. The plaintiff's claim arose from a Contract Grower Agreement (the agreement) signed by the parties that the defendant is alleged to have breached. The plaintiff also claimed costs of suit on the legal practitioner and client scale in the event of its claim succeeding.

BACKGROUND TO THE PLAINTIFF'S CLAIM

The plaintiff's claim is set out in the pleadings as follows. The plaintiff is in the business of agro-contracting and processing of crops, while the defendant is a farmer. The plaintiff and the defendant entered into a written grower agreement for the 2017/18 farming season commencing on 31 October 2017 and ending on 30 September 2018. In terms of that agreement, the plaintiff undertook to provide the defendant with various agricultural inputs and/or finances to enable the defendant to grow the soya beans crop. Further, the defendant undertook to plant 290 hectares, as well as deliver 870 tonnes of soya beans within the said period. The arrangement was that the defendant would payback for the cost of the inputs advanced to him by the plaintiff through the delivery of the agreed tonnage of soya beans to be farmed and harvested.

Consistent with the terms of the agreement, the plaintiff advanced finances and/or farming inputs to the defendant valued at US$265, 850.68. The defendant accepted the farming

inputs advanced to him and used them to farm the soya beans crop. The defendant was required to deliver soya beans to offset the inputs advanced, and additionally the soya beans that he would have harvested on or before 30 September 2018. As of 1 October 2018, the defendant had, in breach of the agreement between the parties, failed to deliver the soya beans crop to the plaintiff. In terms of the agreement, the defendant was still obliged to deliver 435.82 tonnes of soya beans that would have covered the cost of inputs as of 1 October 2018. The defendant had failed and/or neglected to deliver the said tonnes of soya beans.

It was on that basis that the plaintiff claimed delivery of 435. 82 tonnes of soya beans or alternatively the market value of the same tonnage. According to the plaintiff, the price of soya beans was set and/or determined or gazetted by either the Agricultural Marketing Authority or the Grain Marketing Board.

The defendant's plea

The defendant denied that there was ever an agreement for him to plant 290 hectares of soya beans and in turn supply 870 tonnes of the crop to the plaintiff. The arrangement was that the plaintiff would supply inputs to the defendant for the planting of soya beans. At harvest time, the defendant was expected to sell all the produce to the plaintiff who would then recover the value of the inputs with 10% interest, and then pay back the remainder if any, to the defendant.

The defendant averred that the value of the inputs supplied was denominated in Zimbabwean dollars and not United States dollars. While admitting that the inputs were valued at ZWL265, 850.68 at the time they were made available, the defendant further averred that he did not draw down all the inputs as they were only made available very late into the season. The remaining inputs that were not utilised were repossessed by the plaintiff before an evaluation of their value was done.

According to the defendant, he never realised any value from the plaintiff's inputs that he received and utilised. Not only were the inputs delivered late, but the seed itself was substandard, and the crop did not reach the standard height making it impossible to use a combined harvester for harvesting the crop. Manual harvesting could not be done either as the plaintiff stopped the defendant from doing so until its insurers had assessed the crop. The insurers took long to come, and the crop was lost on the ground. Nothing was salvaged for delivery to the plaintiff because of its conduct of stopping the manual harvest.

It was further averred that the plaintiff never demanded delivery of the soya beans. Instead, the plaintiff only demanded payment of the sum of ZWL$265, 850.68 plus interest,

being the value of the inputs allegedly delivered to the defendant. In any case, the plaintiff was not entitled to such delivery.

THE ISSUES

The trial issues were set out in the joint pre-trial conference minute signed by the parties as follows:

a) What were the specific terms of the contract between the parties?
b) Whether or not the defendant breached the contract?
c) If so, what are the remedies and relief that the plaintiff is entitled to?

The Plaintiff's Case

Maxwell Tendayi gave evidence on behalf of the plaintiff in his capacity as its agronomist. His duties included the disbursement of farming inputs to growers, recording such inputs and visiting the growers' farms to assess the crops and giving advice where necessary. According to the witness, the defendant was given inputs for crop production at Mutsike and Manhombo Farms in the Beatrice area. That arrangement was consummated in terms of the agreement that was signed between the plaintiff and the defendant on 28 November 2017. The inputs included soya beans seed, fertilisers, herbicides, fungicides, cash and tillage services that were paid for by the contractor. The inputs were intended for the 2017-2018 farming season.

In terms of the agreement, the defendant was required to deliver the harvested soya beans crop to the plaintiff. The defendant as grower, was to receive payment less the cost of disbursements. On its part, the plaintiff was required to avail to the defendant the requisite inputs and/or finances to enable the defendant to produce the soya beans crop. In terms of the agreement, the plaintiff was obliged to buy all the soya beans produced under the contract.

According to the witness, the total hectarage for Manhombo Farm was 200 hectares, and out of those 160 hectares of land was prepared. There was no expected yield of the crop because the defendant did not grow anything even though the land was prepared. The plaintiff had disbursed US$16, 000.00 for the 160 hectares prepared, as well as the soya beans blend fertiliser. The total amount of inputs disbursed in respect of Manhombo Farm was US$127, 344.35. The 10% interest component on that amount was US$12, 734.44, leaving the total debt sitting at US$140, 078.80. The witness claimed that the figures which were recorded in a Disbursement Form/Statement, were in United States dollars. Had the defendant planted the

soya beans, a yield of 480 tonnes would have been realised, and this would have been sufficient to offset the said debt.

The contracted hectarage for Mutsike Farm was 90 hectares, and the expected soya beans yield was 3 tonnes. The plaintiff paid for the land preparation and provided the seed, herbicides and fertilisers. It also provided cash for diesel, irrigation repairs, hiring of irrigation pipes, wages and transport amongst other things. The Disbursement Form/Statement for Mutsike Farm also showed some credits which represented inputs that were collected but not utilised. These inputs were retrieved from the defendant and were credited to the defendant's account to offset the debt. The amount owing in respect of Mutsike Farm was US$125, 771. 88.

According to the witness, the market price for soya beans as per the Grain Marketing Board producer price list was set at US$680,00 per tonne as of 1 April 2023. The total soya beans tonnage that would offset the defendant's debt was 435,82 tonnes, which translated to US$265, 850.68 in respect of the two farms.

The witness denied that the inputs supplied were substandard, asserting that these were coming from reputable manufacturers and had undergone the necessary quality checks. The witness also denied that the inputs were supplied late, insisting that these were delivered timeously. The defendant never informed the plaintiff that the yields were affected by the late delivery of the inputs.

The plaintiff was concerned with the delivery of the soya beans crop for it to get real value from the inputs disbursed to the defendant. If the delivery of the soya beans crop was no longer possible, then the plaintiff was content in being paid the equivalent of the value of the soya beans crop as at the date payment was going to be made.

Under cross examination, the witness admitted that the defendant's obligation to deliver the 435 tonnes of soya beans was not recorded anywhere in the agreement. He however insisted that the agreement had to be read together with the schedules attached to the agreement in terms of clause 11 of the said agreement. The witness further conceded that the schedules did not refer to the obligation to deliver 435 tonnes of soya beans. The witness also conceded that in the absence of a specific agreement to deliver the 435 tonnes of soya beans, then there would not have been any contractual breach.

The witness admitted under cross examination that although the plaintiff's claim was denominated in the United States dollar currency, there was no specific mention of that currency in the agreement. He averred that the practice was that values of inputs would be

denominated in the United States dollar currency. He also alleged that the invoices that the defendant signed confirming the receipt of the inputs also referred to United States dollar values. The said invoices were however not part of the plaintiff's bundles before the court. In the plaintiff's letter of demand, which emanated from its legal practitioners and dated 21 August 2019, the plaintiff demanded payment of the sum of ZWL$265, 850.68 in local currency.

The witness also conceded that although the plaintiff's claim stated that the defendant was required to plant 290 hectares of soya beans at the two farms, the agreement did not refer to such an arrangement. Further, while the agreement referred to the plaintiff as the contractor, the identity of the grower, being the other party to the contract was left in blank.

The witness stated that the agreement covered the farming season from 31 October 2017 to 30 September 2018. The inputs were supplied around 18 January 2018. The witness reckoned that it was not too late to supply the inputs at that stage for purposes of planting the crop. According to the witness, the best time to plant the soya would be the period between mid-November to early January of each year. The witness denied that it would be risky to plant soya beans at the end of the planting season asserting that farming by its nature was a risky business from start to finish. What was important was to mitigate the risks involved. Further, the inputs were not supplied at the time of the signing of the agreement because they were not available.

As regards cash disbursements, the witness stated that some of the disbursements were made in the form of wages paid on behalf of the grower, as well as funds paid to the contractor who was preparing the land.

The Defendant's Case

The defendant's evidence was as follows. He and the plaintiff entered into a written grower agreement sometime in 2017. In terms of the agreement, the plaintiff was to supply the defendant with inputs, tillage and any other assistance in line with the production of soya beans. The defendant was required to grow soya beans, and after harvesting, to deliver the produce to the plaintiff. The agreement did not specify the hectarage to be planted, and neither did it specify the tonnage of the soya beans that he was required to produce. The defendant was only required to deliver everything that he would have produced from the inputs supplied.

According to the defendant, the parties agreed that the inputs would be denominated in the Zimbabwean dollar currency. In any case, at the time that the agreement was signed, the local currency was also legal tender. The defendant denied breaching the agreement alleging

that the hectares to be planted and the tonnage to be delivered were not specified in the signed agreement. The defendant also averred that the sum of US$265, 850. 68 was not specified in the agreement.

The defendant denied that clause 4.1 of the agreement as read with the Schedule A to the agreement obliged him to plant 290 hectares of soya beans. Instead, Schedule A required him to grow 954 hectares of soya beans for Zimgold in respect of Alendale Farm. Schedule A referred to by the plaintiff was therefore misleading because it had nothing to do with the two farms that were the subject of the present proceedings.

The defendant admitted getting inputs for Mutsike and Manhombo Farms starting from around 18 January 2018. He however averred that soya beans were a summer crop and so the best time to plant was from late September into November. Planting in December would be rather late and risky. The defendant also stated that from the time he received the inputs, it was no longer possible to get the maximum yield anticipated as it was rather too late.

On why the inputs were delivered late, the defendant told the court that he was informed that the inputs were not available at the material time. When the inputs were subsequently availed, the defendant only managed to utilise them on 90 hectares of land, which gave a yield of 2,3 tonnes of the soya beans crop. The 2.3 tonnes yield that was harvested from Mutsike farm was delivered to the plaintiff. A much bigger harvest would have been realised had it not been for the plaintiff's agronomist who stopped the defendant from harvesting the crop in terms of clause 6.5 of the agreement. This was done on the basis that the plaintiff wanted to assess the crop. The defendant claims to have highlighted to the agronomist the risk of not harvesting early. The defendant also claimed that the inputs received in respect of Manhombo Farm were not utilised but saved for use during the next season.

The defendant also averred that the Disbursement Forms/Statements which the plaintiff's witness referred to as annexures to the agreement were not annexures *per se*, but reconciliation statements prepared after the season. The plaintiff could not refer to them as having been annexures because they were not part of the agreement between the parties. The defendant further averred that he signed these schedules as an acknowledgment of receipt of the documents, and not an acknowledgment of his indebtedness to the plaintiff.

The defendant also contended that the plaintiff did not comply with clause 8 of the agreement which required the plaintiff to give him notice to remedy the alleged breach. Under cross examination, the defendant however conceded that the letter of demand from the

plaintiff's legal practitioners dated 21 August 2019, served as a notice as required by clause 8 of the agreement.

The defendant also admitted under cross examination that he received inputs worth ZWL$265, 850.68. On that amount, the plaintiff was obliged to add 10% interest to fully recover the value of the inputs. The total amount was therefore $292, 435.66. That amount was then divided by $780.00, which was the value per tonne, to give the 374, 91 tonnes of soya beans needed.

The defendant also conceded under cross examination that in terms of clause 6.10 of the agreement, he had a duty to advise the plaintiff of any potential loss in the expected yield to be harvested. He had not advised the plaintiff of that anticipated loss. The defendant also conceded that he had not notified the plaintiff in writing that the crop was ready for harvest in line with clause 13 of the agreement. Further, in terms of clause 5.3 of the agreement, it was the duty of the defendant as the grower to satisfy himself about the quality of the inputs.

ANALYSIS OF THE ISSUES AND THE EVIDENCE

What were the specific terms of the contract between the parties?

The plaintiff's claim was based on agreement signed by the parties. The signed agreement was produced as an exhibit by consent. The agreement was for the 31 October 2017 to 30 September 2018 soya beans farming season. Clause 4 of that agreement dealt with undertakings made by the defendant as the grower. In terms of that clause, the grower was required to make an undertaking regarding the total hectarage that was supposed to be covered by the crop at the contracted farm. The hectarage was left blank. Also left blank was the quantity of the soya beans that the defendant was required to grow and deliver to the plaintiff. Further in terms of that clause, the defendant was supposed to produce and sell the soya beans produce to no other person or entity other than the plaintiff.

Clause 4 referred to Schedule A which was supposed to provide the minute details of the arrangement between the parties. The plaintiff's case was that the inputs supplied to the defendant were in respect of Manhombo and Mutsike Farms, where the soya beans was supposed to be produced. Schedule A was supposed to record the particulars for the growing of the soya beans for the said season, the bank details and the grower's details. The schedule recorded the farm size as 954 hectares. The total area under irrigation was also recorded as 954 hectares. The area under irrigation for the growing of soya beans for Zimgold was also stated as 954 hectares. The farm name was however stated as Alendale Farm.

In terms of clause 5.1 of the agreement, the plaintiff undertook to provide and make available to the grower, the inputs and/or finances set out in Schedule B. That schedule listed the inputs to be provided which included fertilisers, planting seed, seed dresser, inoculant, herbicides, insecticides and fungicides. In terms of clause 5.4, the plaintiff as the contractor was obliged to purchase all soya beans produced by the grower at the agreed price and in the manner set out in Schedule C. In terms of clause 6.3, the grower was required to provide names and identification details of individuals who could sign on any inputs or money advanced to them in the form set out in Schedule E.

In its submissions, the plaintiff relied on the provisions of the agreement which it contended clearly spelt out the parties' obligations. It also pointed to the inconsistencies in the defendant's testimony, and his admission that he breached the agreement by failing to comply with his obligation to deliver soya beans that was required to offset the debt to the plaintiff. The plaintiff also submitted that it had fulfilled its obligations in terms of the agreement and was therefore entitled to claim specific performance from the defendant. If specific performance was impracticable, the plaintiff was entitled to be awarded damages assessed at the current market value of soya beans which was US$580. 00, per tonne.

In response, the defendant in its submissions averred that there was no evidence that the defendant was required to plant 290 hectares of soya beans to produce 870 tonnes of soya beans. This was because the relevant portions of the agreement were left blank. Further, the defendant averred that there was no evidence in the agreement that the defendant was required to deliver 435.82 tonnes of soya beans. Schedule A to the agreement, which was supposed to complement the signed agreement, showed that it was in respect of a farm known as Alendale and not Manhombo or Mutsike farms, which according to the plaintiff were the farms for which inputs had been availed.

The defendant further submitted that the signed agreement did not state the names and quantities of the inputs that were to be advanced to the defendant as well as their values. Schedule B only mentioned some of the inputs by name, but it did not go further to show the quantities and their values. Further, Schedules C and D did not mention the quantities and the values. The averments in the plaintiff's summons and declaration were therefore not supported by the written agreement. The plaintiff could not therefore be suing in terms of a written agreement which was incomplete. The plaintiff could also not enforce terms that were not in the in the signed agreement.

The defendant also submitted that in terms of clause 11.3 of the agreement any changes to the agreement were to be reduced to writing for them to be effective. Anything done outside the agreement was therefore of no significance to the parties.

The plaintiff's claim as already observed is based on the signed agreement between the parties. I have highlighted above what I considered to be the key terms of the agreement. I have also in the same breath related to the parties' closing submissions regarding what they considered to be the terms and conditions that governed their agreement. A written agreement is essentially a record which captures the parties' agreed positions. It reflects what the parties desired to be the basis of legally enforceable terms and conditions that they set out for themselves. In legal discourse, there is a long-standing adage that where a contractual dispute arises, courts must simply interpret the contract to give effect to the intention of the parties as decoded from their written memorandum. In keeping with that adage, courts must steer clear of the temptation to make or amend a contract on behalf of the parties.

From a reading of the agreement between the parties and having considered the evidence placed before the court and the closing submissions, the agreement was deficient in several material respects. One gets the impression that everything was rushed for reasons better known to the parties. A lot of elementary mistakes were made with blanks being left open where critical information, which ought to have captured the intention of the parties, was never provided. The very essence of reducing an agreement to writing seemed to have been lost to the parties. The purpose of creating a written agreement is simply to provide clarity on what the parties would have agreed, leaving nothing to speculation or conjecture. It helps the parties to resolve their dispute at the very first instance without resorting to litigation, especially where the terms and conditions are clear.

The written agreement is a constant reminder to the parties of what needs to be done, at what stage and the consequences of non-compliance with one's obligations. These are matters that parties agree to freely and voluntarily in the comfort of their boardrooms without any external influence. So, where omissions of critical information are made, then it is the parties who must take the blame themselves.

It is critical to recite clause 11 in its entirety. It states as follows:

> "11. WHOLE AGREEMENT
> The parties agree that this Agreement, together with annexed Schedules, constitutes the entire contract between them and –
> 11.1 No warranty or representation or promise or undertaking has been given or made by either party to the other, except those recorded in the Agreement;

11.2 There are no conditions precedent suspending the operation of this Agreement, save as may be stated aforesaid;
11.3 No variation of this Agreement shall be valid unless reduced to writing and signed on or behalf of both parties"

The terms and conditions of the agreement, and by extension the obligations of the parties under that agreement must be considered in the context of the above clause. As already observed, the agreement between the parties did not specify the hectarage that the defendant was required to plant the soya beans crop. Similarly, the quantity of the soya beans that was supposed to be produced was not stated. The relevant portions were left blank in clause 4.1 of the agreement. In terms of the same clause, that information was supposed to be further captured in Schedule A to the agreement. In terms of Schedule A, the farm size and the area under irrigation was stated as 954 hectares.

However, Schedule A captured the farm name as Alendale. There were a lot of blank spaces that were also left uncompleted in Schedule A. That anomaly was not explained or clarified by the plaintiff in its evidence and in closing submissions. The defendant capitalised on that omission by denying that he was under any obligation to deliver the said quantities of soya beans in respect of Manhombo and Mutsike farms. The document that was at the heart of the plaintiff's claim did not support its case, yet it had been placed before the court for that specific purpose.

The remaining schedules that were to be read with the agreement were not helpful either. Schedule B was concerned with "Inputs to be provided (as necessary)". While the inputs were listed, they did not specify the monetary values. Schedule C was concerned with the price and manner of payment. It simply referred to a fixed floor price equivalent to the Grain Marketing Board price for soya beans. Schedule D was concerned with the required quality of soya beans and the standard buying specifications. Schedule E was a mandate form. In that form, the grower was required to confirm the individual authorised to sign for and accept inputs from the contractor. The schedules did not offer much in providing clarity on the omissions that have already been alluded to.

The defendant indeed admitted under cross examination that some inputs were delivered to him. The delivery of the inputs is indeed confirmed by the Input Disbursement Vouchers in respect of both Manhombo and Mutsike Farms. In his closing submissions, the defendant acknowledged receiving some inputs, but averred that there was some other arrangement which was not covered by the written agreement. The defendant submitted that the plaintiff was at liberty to act against the defendant for those inputs that were delivered to

the defendant. The plaintiff could however not purport that the delivered inputs were in terms of the written agreement.

The defendant further averred that in respect of those inputs that were delivered, it was the parties' agreement that after planting and harvesting, the defendant was required to sell all the produce to the plaintiff. The plaintiff would in turn deduct the value of the inputs against the deliveries. These inputs were allegedly delivered late, which affected the yield realised from the farming season. The defendant further argued that the plaintiff had no claim against the defendant in terms of the written agreement.

There is some merit in the defendant's submissions. Clause 11.3 of the agreement was clear that no variation of the agreement would be valid unless reduced to writing and signed by the parties. In interpreting the contract, as well as determining the specific terms of the contract, the court was required to look no further than the signed agreement that was placed before it, as read together with schedules and any other material that was specifically referred to in the signed agreement. After all, the nub of the plaintiff's case was the signed agreement. If the parties reckoned that there were some unexpressed intentions or omissions that were made in their written agreement, then they ought to have incorporated those in terms of clause 11.3 of the signed agreement.

The parties could not seek to amend their agreement through the back door. In other words, the parties could not seek to introduce new contractual terms through their evidence before the court, when these terms ought to have been captured in their signed agreement. In fact, the terms and conditions of the agreement constitute the foundation of the signed agreement because they define the parties' rights and obligations. This is why clause 11.3 was inserted in that signed agreement. That clause completely negates any third-party interference with the signed agreement, beyond what is recorded in that document. The will of the parties must be respected in keeping with the hallowed principles of freedom to contract and sanctity of contracts.

The court therefore determines that the parties did not conclusively record the terms of their agreement because of the several blank spaces that were left uncompleted in both the main agreement and the schedules. The signed agreement did not record the hectarage for the planting of the soya beans, or the expected yield for purposes of offsetting what was owed to the plaintiff by the defendant. The parties cannot leave it to the court to decode what the terms of that signed agreement ought to have been from their unexpressed intentions. Doing so would be tantamount to asking the court to amend the signed agreement on behalf of the parties.

Whether the defendant breached the agreement

The plaintiff submitted that the defendant admitted that he breached the contract by failing to deliver the 374.81 tonnes of soya beans. The delivery was required to offset the debt owed to the plaintiff. Further, the defendant also accepted the late delivery of the inputs, and for that reason, he could not use the late delivery as a basis for failing to comply with the agreement.

In his submissions, the defendant argued that the agreement did not state the hectares that he was required to grow. It did not state the produce that the defendant was required to deliver, as well as the inputs that were advanced and their values. For that reason, the defendant could not have been in breach of obligations that were never imposed upon him under the agreement.

The defendant further argued that the plaintiff did not comply with clause 8 of the agreement which required it to give him seven days' notice to remedy his breach. The defendant further submitted that the plaintiff's letter of 21 August 2019, which the plaintiff sought to rely on did not demand that the defendant purge his breach. Instead, the letter was a demand for the defendant to pay for the value of the inputs in local currency. The plaintiff could not therefore claim delivery of soya beans when it never gave the defendant the opportunity to purge its breach by the delivery of the soya beans.

Clause 8 of the agreement contained the breach clause. It reads as follows:

> "In the event of THE GROWER committing a breach of any of the terms and conditions of this agreement and remaining in the default for a period of seven (7) days after written notice from THE CONTRACTOR requiring such breach to be remedied or …….should circumstances arise which in the sole discretion of THE CONTRACTOR may place the recovery of THE GROWER'S debt at risk, THE CONTRACTOR shall be entitled without notice to cancel this agreement and to claim immediate payment of THE GROWER'S debt with interest, in addition to and without prejudice to any rights which THE CONTRACTOR may have against THE GROWER. In the event of such cancellation, THE CONTRACTOR and its authorised representatives, shall be entitled immediately to enter upon the farm and improvements and to take full control of the crop and to complete the growing, harvesting and delivery thereof, without any interference whatsoever from THE GROWER."

The parties conflicting positions on the question of breach puts into perspective the implications of the plaintiff's letter of 21 August 2019 to the defendant. Clause 8 above required the plaintiff to give the defendant seven days' notice to remedy any breach that would have been brought to the defendant's attention. The letter of 21 August 2019 was referenced "NOTICE TO REMEDY BREACH & FINAL DEMAND FOR PAYMENT OF ZWL$265

850.68 PLUS INTEREST AND COLLECTION COMMISSION." The nature of the breach was set out in para 4 of the letter as follows:

> "We are advised that, you are in breach of the agreement because despite being availed with funds in terms of the Agreement, you have failed and/or refused to pay the sum ZWL$265 850.68 due to our Client."

The letter went on to state that the defendant was being given seven days' notice to remedy the breach, consistent with clause 8 of the agreement. The letter further reiterated that the breach must be remedied by payment of the sum of ZWL$265 850.68, into the plaintiff's bank account before 30 August 2019. The plaintiff's claim as recorded in the declaration is for:

> "An order directing Defendant to deliver 432.82 tonnes of soya beans to the Plaintiff's premises within five days of this order/judgment failing which Defendant to pay Plaintiff the market value of 435.82 tonnes of soya beans determinable at the time of judgment or order."

There is clearly a disconnect between the notice to remedy the breach purportedly issued in terms of clause 8 of the agreement, and the claim before the court. The notice to remedy the breach was clearly for the payment of the sum of ZWL$265 850.68, which were funds allegedly advanced to the defendant for purposes of growing soya beans. There was no mention of any inputs having been delivered to the defendant. There was also no mention of the delivery of the 432.82 tonnes of soya beans to the plaintiff.

If the notice to remedy any breach in terms of clause 8 of the agreement was a condition precedent to the institution of legal proceedings, then the defendant could not be held to have been in breach of the agreement before he was properly issued with a notice in terms of that clause of the agreement. The agreement required the plaintiff to give the defendant notice to purge his breach. While the plaintiff has alleged that the letter of 21 August 2019, served as the requisite notice, I am however persuaded by the defendant's submission that the notice did not require the delivery of soya beans. It alleged that the defendant was in breach because of his failure to pay the sum of ZW$265 850.68. There is therefore merit in the defendant's submission that the plaintiff did not comply with clause 8 of the agreement.

There is no evidence of a breach of the contract in the absence of a properly issued notice to remedy the breach in terms of clause 8 of the agreement. The plaintiff cannot competently claim an order for the delivery of 435.82 tonnes of soya beans, in terms of a notice supposedly issued in terms of clause 8 of the agreement, when the alleged notice makes no reference to the delivery of 435.82 tonnes of soya beans. The plaintiff's claim was therefore prematurely made in the absence of a compliance with clause 8 of the agreement.

The Remedies Available to the Defendant

In view of the conclusions reached by the court on the first two issues, it becomes unnecessary for the court to interrogate this last issue. The plaintiff's claim was not only prematurely instituted, but it was also not supported by the provisions of the same agreement in terms of which it was launched. The court determines that the claim is devoid of merit, and it ought to be dismissed.

COSTS

The general rule is that a successful party is entitled to costs of suit at a scale determined by the way litigation was conducted amongst other factors. In the exercise of its discretion, and having considered the circumstances of the case, the court is satisfied that this a befitting case to order that each party bears its own costs of suit.

Resultantly, it is ordered that:

1. The plaintiff's claim is dismissed.
2. Each party shall bear its own costs.

MUSITHU J: ……

Kantor & Immerman, legal practitioners for the plaintiff
Farai Nyamayaro Law Chambers, legal practitioners for the defendant