MACHINE TOOL MAINTENANCE (PVT) LTD
versus
PILESTONE ENGINEERING (PVT) LTD

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 20, 28 & 30 January 2014 and 12 March 2014

Civil trial

Mr V. Mukwachari, for the plaintiff
Mr J. Samukange, for the defendant

MAFUSIRE J: In this matter litigation started in earnest sometime in 2001. The actual trial before me finally got off in January 2014, a lapse of more than 13 years. Not unexpectedly lots of things had changed. Some issues had got muddled up along the way. Some potential witnesses had died. One had become too old and too sick. Others had relocated. The plaintiff, a company, had changed hands. The defendant claimed *confusio* in both the literal and legal sense. It claimed it had bought the plaintiff's business and the plaintiff's tools, equipment and machinery and that it had earned the right to trade under the plaintiff's name and style. In deed some letters by the defendant at some stage had been written on the plaintiff's letter-head. The parties had also changed their original lawyers. Zimbabwe had changed its currency from the Zimbabwean dollar to a multi-currency system. It seems the only constants that remained were the defendant's major shareholder and the central player in all this, one Ben de Beer and some heavy duty machinery, tools and equipment that are the subject of this trial. Consequently, it has taken some bit of straightening up in order to bring out a coherent story.

In the beginning it was a simple landlord and tenant relationship between the parties. The intention was eventually to convert that relationship into one of seller and buyer. The plaintiff had been the landlord-cum-seller and the defendant the tenant-cum-buyer. The rented properties were twin factories-cum-workshops (hereafter referred to as "**the premises**"). The rented property also included the aforesaid heavy duty machinery, tools and equipment inside those premises (hereafter referred to as "**the machinery**"). In other words,

the defendant would initially rent not only the twin premises but also the machinery inside. The defendant would then buy the premises and the machinery.

The premises were situate Stand 110 Prospect, Waterfalls, Harare. One was 12 New Davies Way and the other 14 New Davies Way. There had been four lease agreements: two in respect of the twin premises and the other two in respect of the machinery inside them. The lease agreements in respect of the premises were dated 1 February 1999. Those in respect of the machinery were dated 10 June 1999. Both sets of leases had an option to sell or to buy. In substance the wording of the option clause had been common in all the four agreements. In the option the defendant had been granted the right to buy the premises and the machinery.

That was the background. Now the dispute.

The defendant had defaulted on the rent payments. The plaintiff had shut it out from the premises and in the process had barred it access to the machinery as well. In May 2002 the plaintiff sought an eviction order under HC 4817/02. It was granted in default on 17 February 2003. In September 2003 the defendant was evicted from the premises by the deputy sheriff following a writ of ejectment. The machinery had remained locked up in the premises.

Apparently soon after the start of the relationship the defendant had brought its own tools, machinery and equipment into the premises (hereafter referred to as "**the defendant's equipment**"). The problem was: on eviction the defendant's equipment had also got locked up together with the machinery.

Some of the defendant's equipment locked up in the premises included tools, machinery and equipment for its own customers. They had been up for repairs. The customers brought pressure to bear upon the defendant. Without the equipment the defendant was out of production. Fearing bankruptcy the defendant brought an urgent chamber application under HC 8827/03. Both the final and interim relief sought access to the defendant's equipment.

The plaintiff opposed the application. Under HC 89015/03 it made a counter-claim. Among other things, it claimed a lien or the landlord's hypothec over the defendant's equipment for the outstanding rentals. But the plaintiff had been prepared to let go so much of the equipment as had been said to belong to the defendant or its customers.

On 16 October 2003 CHINHENGO J issued a provisional order in respect of both the defendant's urgent chamber application under HC 8827/03 and the plaintiff's counter-application under HC 8915/03. The provisional order was a hybrid. It gave both parties some

relief. The defendant would gain access to the premises and remove so much of the equipment as was identified to belong to it or its customers. But out of that equipment the defendant would leave in place one item, a steel welding shed, as security for any rental found to be outstanding and due by it to the plaintiff. Within 24 hours of the order the parties' representatives would converge on the premises and identify the property to be taken out and the property to remain behind.

Apart from the steel welding shed the property to remain behind in terms of the provisional order aforesaid would comprise the machinery, i.e. the property that had been the subject of the leases and the options. Defendant claimed it had exercised the options and had bought it. The plaintiff disputed that. It claimed the defendant had breached all the leases by failing to pay the rentals and that it had failed to exercise the options, let alone to buy the premises or the machinery. Thus there remained a real dispute as to the ownership and the fate of the machinery. In paragraph (e) the provisional order by CHINHENGO J resolved that particular dispute this way:

> "(e) With regard to [the machinery], it is ordered that these shall not be used by either party or any other person pending the determination of HC 8916/03, unless the parties agree otherwise, and will be kept in the custody and care of the Respondent on the premises."

Since that time the parties' rights and obligations in relation to the machinery had remained frozen until this trial before me in HC 8916/03. The plaintiff's summons had been issued on 10 October 2003, i.e. 6 days before the provisional order. The summons claimed, in Zimbabwean dollars - the only functional currency at the time - outstanding rentals for the premises for the period February 2003 to September 2003. The summons also claimed an order declaring executable so much of the defendant's equipment as would still be at the premises. Finally, the summons claimed an order confirming the cancellation of the sale of the machinery.

The defendant contested the plaintiff's claims. Among other things, it claimed that by the time of its eviction in September 3003, it had paid in excess of the rental. Defendant also claimed that it had exercised the options in respect of the machinery; that the rent payments in respect of the premises had included the payments for the machinery on a rent-to-buy basis and that the plaintiff was estopped from cancelling the agreements because it had at one time acknowledged the defendant's payments or tender of payments. The defendant pleaded in the

alternative that the plaintiff was estopped from claiming any more than what it claimed was due to it.

The defendant also counter-claimed. The counter-claim was somewhat complex. But in substance the counter-claim was that by retaining and locking up the machinery and the steel tool shed the plaintiff had effectively breached the lease agreements. Consequently the defendant sought an order to recover the machinery and the steel tool shed. It also claimed damages for past loss of business or profits and damages for future loss of profits. In the alternative the defendant sought reimbursement of all the labour costs that it had incurred in respect of certain personnel that had been employed in some aspects of the business being undertaken in the premises. The alternative claim also included an order directing the plaintiff to take over all such personnel.

It was HC 8916/03 that was eventually set down for trial before me on 20 January 2014. In the joint pre-trial conference minute the issues had been streamlined to 2. They had been stated as follows:

(i) whether or not the defendant had paid in full the purchase price for the machinery,

(ii) if not, whether the sale agreement was deemed to have been cancelled.

At the commencement of the trial, and without any prior warning, Mr *Samukange*, for the defendant, took an objection *in limine*. In the plaintiff's synopses of evidence one Herman Matanda had been listed as its representative and main witness. He would do so in his capacity as the current director for the plaintiff. It was common cause that Mr Matanda had quite recently purchased the controlling shareholding in the plaintiff. He had not been on the scene when the contentious agreements had been executed, compromised or consummated. The agreements had been between Mr de Beer representing the defendant, and one Shirley Valerie Trelc ("**Mrs Trelc**") representing the plaintiff. By the time of the trial Mrs Trelc had since died.

Mr *Samukange's* objection *in limine* was that Mr Matanda was disqualified from representing the plaintiff company because he knew nothing about the agreements or their consummation; that all he would say would amount to hearsay evidence and that in fact he represented no one because the defendant company had bought the plaintiff company.

After seeking a postponement to get further instructions on the objection *in limine,* which request I granted, Mr *Mukwachari*, for the plaintiff, opposed the objection, essentially on the basis that the plaintiff was a juristic person and as such it was entitled to be represented at the trial by any authorised representative of its choice. He also argued that Mr Matanda could place all such company records as had become available to him as first-hand hearsay evidence in terms of s 27 of the Civil Evidence Act, [*Cap 8:01*].

I dismissed the point *in limine* for lack of merit. A company is a legal *persona.* With "***… no body to kick and no soul to damn …***"[1] a company, as a juristic person, can only act through natural persons in transactions or legal proceedings. Mr Matanda was the current director of the plaintiff. His authority to represent the plaintiff could not be impugned on the basis that he had not been at the helm when the agreements in question had been executed and subsequently performed or breached. Much less, he could not be prevented from giving evidence as the plaintiff's witness on the basis that such evidence would be hearsay. If his evidence was hearsay it would be up to the court to assess its admissibility or the weight to ascribe to it. Furthermore, the content of the objection *in limine* was largely on the very issues to be canvassed and ventilated during the trial. Those were my reasons for dismissing the objection *in limine*.

The trial commenced. There was an argument as to who the onus rested on and who had the duty to begin. Mr *Mukwachari* submitted that the breach of contract had been admitted and that if the defendant claimed that it had paid in terms of the agreement then the onus would shift to it to prove that payment. Consequently, he said, the defendant had the duty to begin.

Mr *Samukange* argued that the breach was not admitted and that it was the plaintiff which claimed a breach of the agreements and a failure by the defendant to exercise the options to buy and a failure to pay for the machinery. Therefore, he submitted, the onus had never shifted and the defendant had the duty to begin.

As argument progressed on that preliminary point, and as I sought clarity on a number of points, it soon emerged that none of the parties' counsel, particularly Mr *Mukwachari* for the plaintiff, had fully grasped their own cases, let alone those of their opponent which each of them would have to meet. For example, *Mr Mukwachari* had seemed to think that the defendant had conceded the breach of contract alleged by the plaintiff. But the defendant had

[1] See *CIR v Richmond Estates (Pty) Ltd* 1956 (1) SA 602 @ 606G

not. He had also seemed to think that the defendant had abandoned its counter-claim in its entirety. But again that had not been the case. He had also assumed that both the court and the defence had become aware that the plaintiff had itself dropped all its claims sounding in money i.e. those relating to arrear rentals, and that all it now sought was a confirmation of the cancellation of the agreements of sale in relation to the machinery. But at no stage had this been brought up.

On the other hand Mr *Samukange* denied that the defendant had dropped its claims in their entirety but advised that the claim for loss of past earnings and the alternative claims relating to reimbursements for labour costs and the taking over of certain labour force had indeed been dropped. What remained of the defendant's counter-claims was essentially the claim for the right to take over the machinery; a declaration that from September 2003 the plaintiff had wrongfully prevented the defendant from accessing the machinery for use in its own business and, finally, a claim for damages for a breach by the plaintiff of the rent-to-buy agreements in respect of the machinery.

The old joint pre-trial conference minute seemed to have been superseded by developments. The issues for trial had to be re-defined. That was done. I ruled that plaintiff carried the onus on its claims. The defendant carried it on its own claims. The plaintiff would begin first.

Mr Matanda gave evidence for the plaintiff. In summary his evidence was that he had got hold of a file of papers from a Mr JC Dowson which he wished to produce. On the death of Mrs Trelc this Mr Dawson had been appointed the executor to the estate. At one time he had effectively controlled and run the plaintiff. From the documents in the file, Mr Dowson seems to have generated considerable correspondence in relation to the alleged breach of the agreements by the defendant and the amounts said to be due by it to the plaintiff. Mr Matanda said Mr Dowson could not himself come to court to testify as he had become too old and too sick.

Apart from the correspondence involving Mr Dowson, the plaintiff's bundle of documents also included various computations of amounts said to be due by the defendant to the plaintiff which had been done at various stages by various individuals and entities. The bundle also contained communication by and between these individuals and entities. Some of the individuals and entities included the plaintiff's erstwhile lawyers, and its erstwhile bookkeepers. Asked why the authors of those documents would not themselves come to

testify, Mr Matanda said that some of them could no longer be traced. However, others could easily be traced and be called to come and testify if it was felt necessary to do so.

Mr Matanda relied entirely on the documents in Mr Dowson's file to assert a breach of the agreements by the defendant and the several amounts said not to have been paid.

After Mr Matanda, the plaintiff closed its case. Mr *Samukange* immediately applied for absolution from the instance. He charged that there was no credible evidence that had been laid before the court on which it might find for the plaintiff on any aspect of the matter. He argued that none of Mr Matanda's evidence could be classified as the first-hand hearsay evidence contemplated by s 27 of the Civil Evidence Act. He submitted that whilst he had consented to the production of the plaintiff's bundle of documents which contained copies of documents allegedly from Mr Dowson's file, he nonetheless objected to the admissibility of such documents.

With regards to the documents or statements alleged to have been compiled by the bookkeepers in particular, Mr *Samukange* submitted that there was no telling in what category they could possibly be classified because in reality someone from the plaintiff company would first have had to give information to the bookkeepers who would then have had to make some computations of their own and then have passed such computations to Mr Dowson who in turn would have remitted such information back to the plaintiff. Mr *Samukange* also noted that Mr Matanda had conceded that some of the relevant potential witnesses for the plaintiff had still been around but that a conscious decision had been taken not to call them.

Mr *Mukwachari* maintained that s 27 of the Civil Evidence Act covered the plaintiff's situation and that Mr Matanda could perfectly place before the court the documents from Mr Dowson's file as evidence of what they said. He argued that such documents constituted the plaintiff's business records.

I had reserved judgment on the defendant's application for absolution form the instance. This now is the judgment.

When a defendant seeks to be absolved from the instance at the close of the plaintiff's case, he is in fact saying that the plaintiff has not established the facts that support his cause[2]. He is saying the plaintiff has adduced no such evidence as to warrant him taking the witness' stand to rebut the plaintiff's case or to put across his own.

[2] *Corbridge v Welch* (1892) 9 SC 277, per DE VILLIERS CJ, at p 279

To be absolved from the instance is not to be absolved from the action. The plaintiff may have to go away and come back with better evidence next time. HERBSTAIN & VAN WINSEN *The Civil Practice of the Supreme Court of Appeal of South Africa*[3], at pp 918 – 919 note that in Roman – Dutch an "instance" was different from an "action", even though both were claims instituted and prosecuted by means of legal process. "Action" comprised both the law and the cause of action. "Instance" referred only to the judicial ventilation of the cause of action and the law. According to DE VILLIERS CJ in *Corbridge* v *Welch* (1892) 9 SC 277 absolution from the instance is a form of judgment which enables the plaintiff to take fresh proceedings without exposing himself to a plea of *lis finite*.

When faced with an application for absolution from the instance at the close of the plaintiff's case, the court has to consider whether there has been evidence upon which it reasonably ***might*** find for the plaintiff. In other words the court has to decide whether the plaintiff has established a *prima facie* case against the defendant. The court is not being called upon to decide whether it *should* or *ought to* give judgment against the defendant. This test was laid down in the case of *Gascoyne v Paul and Hunter* 1917 TPD 170 at p 173. It has been followed in numerous other cases. In this jurisdiction BEADLE CJ adopted and illuminated the difference between "***might***" and "***ought to***" in the case of *Supreme Service Station (1969) (Pvt) Ltd and Goodridge (Pvt) Ltd* 1971 (1) RLR 1.

HARMS JA, in the case of *Gordon Lloyd Page & Associates* v *Rivera* 2001 (1) SA 88 (SCA) adopted the following formulation[4]:

> "The test for absolution to be applied by a trial court at the end of a plaintiff's case was formulated in *Claude Neon Lights (SA) Ltd* v *Daniel* 1976 (4) SA 403 (A) at 409G – H in these terms:
>
> '… (W)hen absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by the plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. (*Gascoyne* v *Paul and Hunter* 1917 TPD 170 at 173; *Ruto Flour Mills (Pty) Ltd* v *Adelson* (2) 1958 (4) SA 307 (T)'
>
> This implies that a plaintiff has to make out a *prima facie* case – in the sense that there is evidence relating to all the elements of the claim – to survive absolution because without such evidence no Court could find for the plaintiff (*Marine & Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (A) at 37 G – 38A; …)"

[3] 5th edition by A. C. Cilliers, C. Loots and H. C. Nel
[4] At p 92

It is the practice of our courts in an application for absolution that in the case of doubt as to what a reasonable court ***might*** do the judicial officer should always lean in favour of the trial proceeding[5]. HERBSTEIN & VAN WINSEN, in the same edition above, at p 923, say that a court should be extremely chary of granting absolution at the close of the plaintiff's case. At this stage the plaintiff's evidence must be assumed to be true unless very special circumstances exist, such as the inherent unacceptability of the evidence adduced. In *Theron* v *Behr* 1918 CPD 443 JUTA J remarked, at p 451, that judges are very loath to decide upon questions of fact without hearing all the evidence. The remark found favour with SUTTON J in *Erasmus v Boss* 1939 CPD 204[6]. It was also adopted by BEADLE CJ in the *Supreme Service Station* case, *supra*[7]; SMITH J in *Standard Chartered Finance Zimbabwe Ltd* v *Georgias & Anor* 1998 (2) ZLR 484 (H)[8] and MATIKA J in *Bailey NO* v *Trinity Engineering (Pvt) Ltd & Ors* 2002 (2) ZLR 484 (H)[9].

In the instant case I have to decide whether or not through Mr Matanda the plaintiff has laid out such a *prima facie* case against the defendant as to warrant the defendant's witnesses taking the stand. In other words, has Mr Matanda established, not on a balance of probabilities – for that is not the test at this stage – but on the face of it, that the defendant breached the lease agreements in respect of the premises and the rent-to-buy agreements in respect of the machinery by failing to pay the rent amounts? Has the plaintiff, through Mr Matanda, established on the face of it, that the defendant neither exercised the option to buy the machinery nor paid for it?

It is my considered view that through Mr Matanda the plaintiff has established nothing. Mr Matanda was the least qualified to testify for the plaintiff, let alone establish a *prima facie* case of breach of the agreements by the defendant. Mr Matanda's testimony was classically hearsay evidence. I agree with Mr *Samukange* that it was not such evidence as would be classified as first-hand hearsay under s 27 of the Civil Evidence Act upon whose colours the plaintiff has laid its mast. That section reads as follows:

"**27 First-hand hearsay evidence**

[5] Per BEADLE CJ in *Supreme Service Station (1969) (Pvt) Ltd and Goodridge (Pvt) Ltd* 1971 (1) RLR 1
[6] At p 207
[7] At p 5 -6
[8] At p 553B – C
[9] At p 487

(1) Subject to this section evidence of a statement made by any person, whether orally or in writing or otherwise, shall be admissible in civil proceedings as evidence of any fact mentioned or disclosed in the statement, if direct oral evidence by that person of that fact would be admissible in those proceedings.

(2) Evidence of a statement referred to in subsection (1) shall be admissible even where the person who made the statement is called as a witness in the proceedings concerned.

(3) If a statement referred to in subsection (1)-

(a) is not contained in a document, no evidence of the document shall be admissible unless it is given by a person who saw, heard or otherwise perceived the statement being made;

(b) is contained in a document, no evidence of the statement shall be admissible except the document itself, or a copy of the document if such copy is admissible in terms of this Act or any other law.

(4) In estimating the weight, if any, to be given to evidence of a statement that has been admitted in terms of subsection (1), the court shall have regard to all the circumstances affecting its accuracy or otherwise and, in particular, to-

(a) whether or not the statement was made at a time when the facts contained in it were or may reasonably be supposed to have been fresh in the mind of the person who made the statement; and

(b) whether or not the person who made the statement had any incentive, or might have been affected by the circumstances, to conceal or misrepresent any fact.

(5) This section shall not be construed as limiting any provision of this Act or any other law providing for the admissibility of statements made by persons who are not called as witnesses to testify to such statements." (my underlining)

Mr Matanda produced Mr Dowson's file. In terms of subsection (1) that was all he could do. He could not vouch for the authenticity of any of the documents inside that file or the truth or accuracy of the statements. He was not there when they were made.

Some of the documents in Mr Dowson's file had been made by him. Others had been made by other people. Whilst Mr Dowson would probably have vouched for those statements made by him he would not be able to do so in respect of those documents made by others. But Mr Dowson was not coming to testify. It was Mr Matanda who came. But Mr Matanda was far removed from those documents.

Subsection (4)(a) of s 27 of the Civil Evidence Act provides that in assessing the weight to be given to a statement that may be first-hand hearsay evidence under subsection (1) regard must be had to all the circumstances affecting its accuracy.

The statements in Mr Dowson's file on which the plaintiff placed much reliance to prove the defendant's breach included computations by the bookkeepers. It was common cause that owing to the rapid deterioration of the Zimbabwean currency during the period in question the amounts payable, the amounts paid or the balance said to be owing had been calculated and re-calculated, assessed and re-assessed several times over even when Mrs Trelc herself was still alive. The parties had entered into numerous compromises. On several occasions each of the parties, either directly or through their lawyers, would submit their own computations and versions of the dispute for confirmation by the other. None of them was saying anything with any degree of certainty. Evidently the parties were relying on information supplied by other people. In my view it is "***such circumstances***" as "***affecting … accuracy***" that subsection (4) is all about. In the absence of the authors of those statements or someone who might have witnessed them being made I found it unsafe to place any weight on Mr Dowson's file.

Mr Dowson's file fails on the test in paragraph (a) of subsection (4) as well. The statements were made some years after the execution of the agreements in question and after those agreements had either been performed or breached. From the correspondence it was evident that the statements could not reasonably be supposed to have been made by someone in whose mind the information was still fresh.

The statements contemplated by s 27 are undoubtedly original statements. Those are what may be admissible as first-hand hearsay evidence. In terms of paragraph (b) of subsection (3) copies are only permissible if they are admissible in terms of the Act or any other law. None of the documents in Mr Dowson's file was an original statement. Section 11 of the Act provides as follows:

> "**11 Admissibility of copies of documents**
>
> Except as otherwise provided in this Act or any other enactment, a copy of a document shall not be admissible to prove the document's contents, unless-
>
> (a) all the parties to the civil proceedings concerned consent to the production of the copy; or

(b) the court in its discretion permits the production of the copy, being satisfied that the original document-

(i) has been destroyed or is irretrievably lost; or

(ii) is in the possession of another party to the civil proceedings, who refuses to produce the original document; or

(iii) is in the possession of a person who cannot be required by law to produce the original; or

(iv) is outside Zimbabwe; or

(v) for any other good and sufficient cause, cannot reasonably or practicably be produced."

In this matter none of the conditions set out in s 11 for admissibility of copies of documents was met. The defendant did not consent to the production of Mr Dowson's file through Mr Matanda. Right at the onset Mr *Samukange* objected to Mr Matanda being called at all. It was only because I overruled the objection that Mr Matanda testified. That puts paid to any argument based on paragraph (a) of s 11.

With regards to paragraph (b) Mr *Mukwachari* was demonstratively not alive to its requirements. Nothing was said about any of the conditions in sub-paragraphs (i) to (v).

Mr Mukwachari sought to argue that Mr Dowson's file contained business records as contemplated by s 14 of the Act. That section reads

"14 **Business records**

(1) ……..

(2) A statement contained in a document shall be admissible as evidence of any fact stated therein of which direct oral evidence would be admissible if-

(a) the document is or forms part of the records appertaining to or kept by or for a business or at any time formed part of such records; and

(b) the statement in the document was made, or may reasonably be supposed to have been made, in the ordinary course of or for the normal purposes of the business-

(i) by a person who had or may reasonably be supposed to have had personal knowledge of the fact concerned; or

(ii) on the basis of information supplied directly or indirectly by a person who had or might reasonably be supposed to have had personal knowledge of the fact concerned.

(3) A document which is admissible under this section may be produced in evidence by any person who for the time being has custody of the document or is responsible for managing the business for which the document was produced." (my underlining)

Thus business records under s 14 are records made in the ordinary course of the business or for its normal purposes. The plaintiff was into production and maintenance of heavy duty equipment and machinery. The documents in Mr Dowson's file were in essence for the disposal of the plaintiff's business and its stock. Thus the nature and character of those documents was the direct opposite of the documents contemplated under s 14, namely documents produced in the ordinary course of business or for the normal operations of the business because it cannot be said that documents for the sale of a business are documents in the ordinary course of that business. The plaintiff could not rely on that section.

In the circumstances I consider that through Mr Matanda the plaintiff has not laid out a *prima facie* case for the defendant to rebut. I would have granted absolution from the instance if Mr Matanda's evidence was all there was to the plaintiff's case. It was not.

I have looked at the matter holistically. The breach of contract by the defendant, although denied by Mr *Samukange*, in fact did happen. In the defendant's plea there was an acknowledgement of late payments of some rentals. Furthermore, in HC 4817/03 this court issued an eviction order against the defendant, albeit in default. That order is still *extant*. The defendant was duly evicted from the premises. The action had been based on the defendant's breach.

In HC 8827/03 and HC 8915/03 CHINHENGO J allowed the defendant to retrieve its own equipment from the premises but ordered that the machinery which was the subject of the rent-to-buy agreements be retained by the plaintiff until determination of this case. In its counter-claim the defendant claims an order declaring it the owner of the machinery. This is on the basis that it duly exercised the options and duly paid for the machinery. So any absolution from the instance at this stage would be quite academic. The trial still has to proceed in terms of the defendant's counter-claim. The counter-claim deals with exactly the same issues as in the main claim.

In reality, in his plea the defendant has confessed and avoided. In essence it has said that it may have paid late but nevertheless that it did eventually pay. So its witnesses must take the witness stand to prove that payment. He who alleges must prove. Absolution from the instance is not designed to shield someone from taking the witness stand.

In the premises the application for absolution from the instance at the close of the plaintiff's case is hereby dismissed. The costs shall be in the cause. The trial shall resume on a date or dates to be agreed upon by the parties in consultation with the registrar.

T.H. Chitapi & Associates, plaintiff's legal practitioners
Venturas & Samukange, defendant's legal representative