CONSTANTINOS BAKARIS
and
GEORGE KATTAVENOS

HIGH COURT OF ZIMBABWE
KUDYA J
HARARE 4-7 and 17-19 December 2007 and 14 January 2009

Civil Action

E.T. Matinenga, for the plaintiff
Mrs. J. Wood, for the defendant

KUDYA J: The parties are brothers-in-law. They own four immovable properties in equal shares. These are Tawona of Galway Estate (Tawona); Lot 4 of York of Galway Estate (Lot 4); Subdivision B of York of Galway Estate (Subdivision B) and Stand 244 of Mangula Township 2 of Lot 1 of Plateau, Mhangura (Mhangura property).

The parties are not able to work together. On 4 April 2002, the plaintiff issued summons out of this Court seeking the termination of their joint ownership of Lot 3A of York, Goromonzi District (Lot 3A) in a fair and equitable manner; the rendering of a full account of the net rentals from tenants on this property from January 1993 within 30 days of this order; the debatement of such accounts; the payment by the defendant to the plaintiff of one half of such net rentals and costs of suit. The summons was served on 12 April 2002 and the appearance to defend filed on 26 April 2002. The defendant sought further particulars on 31 May 2002, which were supplied on 17 June 2002. The defendant filed his plea on 5 July 2002. On 13 February 2003 the plaintiff filed a notice of amendment in which he included Subdivision B, Lot 4 and the Mhangura property as due for termination and distribution. Tawona was only incorporated by an amendment that was entered into by the plaintiff on 16 February 2007.

The latter amendment had been preceded by an agreement reached by the parties at the pre-trial conference held before HLATSHWAYO J on 26 September 2003. In that agreement the parties reached an out of court settlement on the termination of their business relationship and ownership of Lot 3A. In addition, they agreed to negotiate on a *bona fide* basis the

division between them of the four properties in dispute which they accepted they owned on an equal basis within two weeks from 26 September 2003.

They failed to resolve the division of the properties in question. At the pre-trial conference of 16 July 2004, the joint minute of which they signed on 28 November 2006 and filed on 6 December 2006, the matter was referred to trial for the determination of a fair and equitable partition of the four properties in question. The costs of that pre-trial conference were to be in the cause.

The trial failed to commence on 30 July and 24 September 2007 because of the unavailability of the defendant. It started in earnest on 4 December 2007. At the conclusion of the trial on 19 December 2007, I postponed the matter for judgment. From 28 December 2007 until 28 April 2008 I was a member of a constitutional inquiry and thereafter until September 2008 I was involved in electoral petitions. These activities made it difficult for me to deliver this judgment with promptitude. The delay to the parties is regretted.

THE PLAINTIFF'S CASE

The plaintiff did not testify. He called the evidence of his son Nicholas Bakaris who was born in 1976; an accountant Anthony Derek Lamb, a valuator Nicky Masaya, a project manager and consultant engineer Trenly Miles and one Roger Boka. Two bundles of documents, one with 357 pages and the other with 157 pages were produced for the plaintiff by consent as exhibits 1 and 2 respectively. They cover the activities that were carried out on some of the properties and the attempts that were made to distribute them.

The plaintiff's son testified on 4 December 2007. His mother is the defendant's sister. He alleged that he had personal and intimate knowledge of his father and uncle's joint business operations. He established through the valuation reports in exhibit 2 the joint ownership of these four properties. This is apparent from the title deeds that are part of these evaluation reports that were compiled in July and on 14 November 2007 by a registered and experienced valuator, Mr. Masaya.

It was the evidence of Nicholas that Tawona was purchased by and transferred to the parties on 15 June 1989. It had a farm house. The parties obtained a permit on 30 September 1997 to subdivide the farm into 328 stands varying in size from 600 m² to 57 000 m² for residential and commercial development. They demarcated 286 medium density stands and commenced to sell them in 1999 to the general public. 104 stands of varying sizes were

purchased. Of the balance of 182 stands that were not purchased, 2 were promotional, 4 had flat rights and 1 had hotel rights.

He stated that initially he sold the 30 stands with the help of his sister and Andrew Brown of Instamac (Pvt) Ltd. The proceeds were banked in the joint Jewel Bank account held by the parties. The money was used to develop infrastructure at the site and to purchase pipes for water and sewage reticulation and bitumen for road construction.

The project picked momentum and the parties employed the services of Ian Figg to market the remaining stands. Figg sold approximately 50-60 stands. The purchasers paid by way of cash and cheque. All the cheques were banked but none of the cash amounting to $8 313 380.40 (before the revaluation of our currency of August 2006) was banked.

The amount of the missing cash was established by Erasmus, Murphy and Associates (EMA), a private secretarial company that was engaged by the witness and the defendant to audit the whole project from its inception to the period covering the Figg sales. The reconciliation accounts produced by the company and their bases are found on pages 137 to 215 of exhibit 1. The company produced its report on 6 January 2003. It found that cash amounting to $8 313 380.40 had been received from purchasers of stands who were all issued with receipts by the defendant. The money was not paid into the Tawona Garden Estates bank account. It also established, by letter dated 23 July 2007, that the defendant had since 1992 used his own money, in the sum of $1 806 501.00, to meet the expenses of the project for land preparation, surveying, town planning and water and suggested that appropriate exchange rates be used to determine the time value of money in the intervening period.

In the earlier report EMA indicated that the defendant paid into the project account in December 2002 a sum of $3, 9 million. The firm was to compile the year end accounts for the three years 2000, 2001 and 2002 as soon as it obtained all relevant information. It indicated that "To this end all information has been received and recorded, except for certain expenses which have been incurred by the partners of Tawona Garden Estates." EMA was, however, instructed by the plaintiff's son to surrender all the information and records to Lorraine Castedo Estate Agents before it could prepare these year end accounts. EMA closed its local operations and all its directors immigrated to South Africa.

On receipt of the EMA report, the plaintiff's son confronted the defendant who failed to account for the missing money. The defendant also failed to supply him with the receipt books pertaining to the missing amount. He made a report to the police of fraud, which he later

withdrew. He calculated that the amount that was missing was equivalent to the cost of 5½ stands of 800 m². The view that some of the receipt books were missing contradicts paragraph 5 of the EMA report of 6 January 2003 which stated that "all transactions involving Tawona Garden Estates, including all landowners and relevant clients, have been properly accounted for and recorded by Erasmus, Murphy and Associates".

Some of the purchasers failed to abide by the terms of the agreement and the sale of 20 stands were cancelled and the purchasers reimbursed. The reimbursement cheques were signed by the parties.

After Figg, the parties engaged Lorraine Castedo Estate Agents to sell the remaining stands. It sold approximately 30 stands. All the money was accounted for. It also corrected a few errors that had been made by EMA.

He was corrected by Mr. *Matinenga*, for the plaintiff, that the project was not a partnership. He testified that Instamac was engaged to deal with the water development for the project. The defendant left for Greece in 2003. Save for a period of 2-3 weeks in 2005, he never came back to Zimbabwe. The project has stalled due to the unwillingness of the defendant to work with the plaintiff.

Prior to 2003, expenses were met from the joint project bank account. Though the account had sufficient funds to meet the expenses of the contractors on site, the money could not be accessed due to the defendant's uncooperative attitude. When he left for Greece there was an amount of $2, 4 to $2, 8 million in the joint bank account. This was enough to fund phase one to completion. The money less three zeroes was eroded by inflation and could not be accessed without his cooperation to complete that phase. He refused to let proxies act for him even though before he left he let his wife sign agreements of sale on his behalf.

All the efforts of the plaintiff to get water to the project with stakeholders, Instamac and the Ruwa Local Board were compromised by defendant's attitude. The dispensation that the plaintiff received for the purchasers to start building was revoked. The plaintiff's son, on behalf of Tawona Garden Estates, formed the Ruwa River Consortium with Intermarket Holdings Ltd (the owners of Springvale Park), Markus Park and Fairview Park to meet the water requirements for Tawona. The operational details of the consortium are covered from pages 246 to 327 of exhibit 1. Noteworthy were the invoices from Stewart Scott indicating the payments made by the plaintiff from his own resources to meet the project's share of expenses in the consortium. Pages 328- 334 of exhibit 1 highlight the calculation of cost of the

embankment that was built for the water tanks. He relied on the table prepared by Lamb on page 75 of exhibit 2, as the basis for the plaintiff's claim for the partitioning of the four properties. The estimated values were first calculated for July 2007. These were updated for November 2007 in a bid to provide the time value of money in our hyperinflationary environment. The cost of completing infrastructure on the stands that were sold was estimated at $475, 8 billion. The cost of the Reservoir Embankment was $10, 4 billion, which was paid by the plaintiff for which half the amount was the defendant's fair share.

The roads were done by Instamac and were paid from the project funds. He agreed with the valuer's observations that though the gravel base was intact these had collapsed beyond repair and needed to be redone.

He produced exhibit 3, a report by Instamac of 15 February 2007 to the defendant's wife on the state of the infrastructure at Tawona as at April 2004 entitled "Completed Works on Phase One Tawona Gardens". Instamac left the site in April 2004 and handed all the plans and records of the works undertaken to TSW Consulting Engineers. It did not rule out theft of sewer and water pipes and fittings and vandalism of manholes in the absence of maintenance or security at the site since 2004. The following had been done:

a) road works : 65% complete
b) storm water drainage: 70% complete
c) water reticulation: 65% complete
d) sewer reticulation: 70% complete
e) collector sewer Phase 1 to Trunk sewer: 30% complete
f) Mains Water connection: 50% complete.

He adopted the report and highlighted that the position had deteriorated. He could not say what the actual position was on the state and presence of the pipes that were laid and covered. He relied on the estimate of $475, 8 billion required to complete the works.

He agreed with the valuation of Tawona of $225, 7 billion as at 14 November 2007.

Lot 4 is an undeveloped vacant stand measuring 2, 2781 hectares which was transferred to the parties on 10 March 1989. It was valued at $24 billion. The plaintiff's son stated that the plaintiff and the defendant jointly paid rates until 2003. The plaintiff paid rates on his own until sometime in 2005 when he requested the local authority to split them into two. The rates were shown in the valuation report as $220 134.00.

Subdivision B was transferred to the parties on 13 September 1989. It has a house at the rear and Plaka restaurant at the front. It measures 1, 2140 hectares and is durawalled. The valuation report gives more information on the developments that are on this property. In addition to the main house and restaurant is a flat let, 2 staff houses, a prolific borehole and two water reservoirs for 1 500 liters and 2 000 liters, 3 garages and 3 gazebos. It was valued at $89, 2 billion.

The plaintiff's son stated that he used to occupy the main house but it has been vacant since 2003 when the defendant's son disconnected its power and telephone services. Exhibit 5 was discovered by the defendant on the day the witness testified. It was written by Tasso Copanakis on 20 November 2007 as a response to a letter of 30 July 2007 from First Sellers (Pvt) Ltd. Tasso stated that he was the owner of Copanakis Concrete Products and had in that capacity sold a cement tank, a brick moulding machine, moulding trays for durawall pillars, trays for durawall panels, an electric motor, concrete mixing machines, moulds for roof tiles, wheelbarrows, shovels, ramas, trowels, an electric cable, roofing asbestos, fence and pillar and an iron beam to hold asbestos to various persons in 1992 before he emigrated from Zimbabwe.

The witness averred that all this property was donated to him and the defendant by Copanakis. When he moved to Harare from Mhangura in 2001 he recalled seeing the cement tank and the roofing asbestos, fence and pillar and an iron beam to hold asbestos at the premises. He could not recall seeing the other property. Most of it was collected by various purchasers between 2001 and 2003.

He denied the defendant's allegations that were made by Rami Phiri to the police on 6 October 2005 in Exhibit '7' that he vandalized the house by removing a toilet seat, plugs, switches, lamp holders, kitchen suite, carpets and pipes. He averred that he took 2 geysers to Ruwa Supermarket and one to the butchery and durawall panels to a certain house in Borrowdale. Further that he took the carpets and kitchen suite to Mhangura. He accepted removing the items but averred that he was the one who had put them there in the first place.

In 1998 Econet leased the area between the main house and the restaurant and set up a communication mast. It has been paying rentals to the defendant. Before 2003, the defendant claimed that he ploughed the rentals into the parties' joint business operations. Nicholas maintained that the plaintiff had not benefited from the proceeds from the rentals.

During the last 6 years the restaurant and bar has been leased by retired General Mujuru who pays rentals directly to the defendant or his nominees. In a letter addressed by the

plaintiff's legal practitioners to General Mujuru on 16 January 2006, the plaintiff averred that he had not received a portion of his rentals since August 2003.

He produced exhibit 4, the certificate of investment from the Zimbabwe Investment Centre issued on 2 March 1999 for the 2 years to 1 March 2001. It relates to the joint venture La Galerie Restaurant between the defendant and a Swiss national Jean-Francois Gross from premises at 98 Cheltenham Park Drive in Ruwa. The witness was unable to link the certificate with Plaka restaurant. He could not understand how the defendant could enter into such an agreement to license the restaurant without the plaintiff's consent. The estimated amount of rentals received from Plaka was $2, 6 billion. He obtained the figures from one Patricia who manages the restaurant.

Stand 244 Mhangura was transferred to the parties on 20 June 1986. It was valued by Mr. Masaya at $21 billion. The estimated value of the movable property arrived at by Lamb was $1, 2 billion. The accounts that were used to arrive at this figure were set out by Lamb from pages 95 to 157 of exhibit 2. They cover the period from 2002 to 31 December 2006. The share of profit for each party is set out in theses pages while that for 31 December 2006 is provided at page 95 of exhibit 2.

The plaintiff's son produced the letter that was written by Lamb to the defendant's wife on 28 February 2007 as exhibit 6, which he averred had been overtaken by the table on page 75 of exhibit 2 that was also produced by Lamb . The plaintiff's son also relied on the information on page 81 of exhibit 2 from TSW Project Managers and Consulting Engineers to arrive at the estimated cost of completing Tawona Phase One. The consultants used the consumer price index (CPI) and the Old Mutual share price variation to arrive at the estimated cost of $475 billion as at November 2007 using the April 2007 base of $10 billion. They could not use the CPI because the data for the months of May to July 2007 was not available.

The plaintiff's son noted that the cost of completing the infrastructure was more than the total value of all the properties of $359 billion. He stated that while the estimated divisible amount shown on page 75 of exhibit 2 indicated negative equity for the plaintiff, he would recoup his losses once development commenced full steam.

This witness collated information which he either made available to or was produced by experts whom he commissioned, to justify the mainstay of the plaintiff's claim on page 75 of exhibit 2, as updated in November 2007.

He was cross examined. He contradicted himself with regards to Mhangura. In one vein he stated that the Mhangura business was not profitable and in another maintained that Tawona was purchased from the three tranches of $350 000.00, $200 000.00 and $150 000 emanating from these operations that he delivered to the defendant when he was 13. When Mhangura was bought he was 10 years old. At that time he could not have known the nature of the agreement that existed between the parties. With respect to Mhangura, he again maintained that the only assets that remained for distribution were the mixer, roller and ovens. He relied on the registration books of the lorry and trailer that were produced as exhibit 16A and 16B as proof that these vehicles belonged to his father. The Mhangura accounts demonstrated that the operation was consistently profitable and the vehicles were part of its asset base. The treatment of the vehicles in the accounts justified the contention by Mrs. *Wood,* for the defendant, amply highlighted in the registration books, that the registration books were not proof of ownership.

He stated that he had been managing the plaintiff's business affairs through a power of attorney since he was 18 as amongst other reasons his father was not proficient in English. He knew that the original claim of the termination of the joint ownership of Lot 3A and the rendering and debatement of the rental accounts with respect to the business operations on that property had been settled between the parties. He accepted that the claims that he sought in his evidence in chief on improvements, rentals and on all the missing movables that he alleged had either been sold or misappropriated by the defendant had not been pleaded. He pretended that he was not aware that claims going back to 1996 for rentals were prescribed notwithstanding that in replication in the original claim the plaintiff conceded that he could only claim ancillary relief for debt owed from 12 April 1999.

He did not know when Lot 4 and Subdivision B were purchased. The title deeds that he produced indicated the dates that title was registered in the joint names of the parties. The dates on which these properties were purchased were provided by the defendant's son by reference to the agreements of sale on pages 3 to 12 of exhibit 12. The plaintiff's son conceded that these two properties were physically purchased by the defendant. He, however, maintained that the defendant was at all material times acting as an agent of the parties. He disputed the averment that the defendant used his own money to purchase the properties and donated a half share to the plaintiff. He was not shaken from his view that the defendant used the funds generated from the joint business operations on Lot 3A and not his personal funds to

wall both properties. He also accepted that the rates for both properties were, until 2003, paid by the defendant but averred that he did so from the proceeds of the joint business ventures.

He failed to produce proof of the rentals that were paid to the defendant for the restaurant and the Econet mast on Subdivision B. He conceded that when Subdivision B was purchased, two dilapidated houses were on the stand. Plaka was constructed in 1995/96 after one of the old houses was pulled down. He denied that it was built from the joint effort of the defendant and Mrs. Gross. His view was that the parties used joint business funds to build it and Mrs. Gross equipped and managed the restaurant. He accepted that the plaintiff did not pay any rentals during the 10 years that he used the house on Subdivision B.

He maintained that the property listed in exhibit 7 by Rami Phiri was purchased by the parties from Copanakis for $150 000.00 and stated that it was on the basis of joint ownership that he was able to use the brick making equipment to mould bricks for sale at the site for three years and remove one of the concrete mixers from the site in 2007. He accused the defendant of disposing the rest of the property for personal gain.

He accepted that the subdivision permit obtained by the defendant for the two properties would form a basis for equitably partitioning them, provided it was valid and the plaintiff was reimbursed the expenses he incurred and paid his share of the funds misappropriated on Tawona.

The plaintiff's son abandoned his earlier pretensions that the defendant did not participate in the purchase, design, survey and development of Tawona. He accepted that the defendant was instrumental in assembling the team of Mr. Navally and Terence Jules to plan, design and survey Tawona. He conceded that the defendant fenced Tawona. It became clear that he gilded the lily in his evidence in chief when he alleged that he and his sister Maria were personally involved in the sale of stands on Tawona before Ian Figg was engaged. He reluctantly accepted that his own contribution was carried out through Brown and Godfrey. It turned out during cross examination that at that time he was reading for a BA degree in Hotel and Restaurant Management at a university in Switzerland (1996-1998) while his sister was reading Marketing at Cape Town University in South Africa (up to 2000). He stated that between 1996 and 2002, his parents spent most of their time in Greece. The permit for Tawona was granted in March 1997 and developments commenced in 1999. The person who drove the Tawona project was clearly the defendant.

He based his allegations of misappropriation of funds on the accounts prepared by EMA. He used them to exculpate Figg from any wrong doing. He stated that the receipts that were prepared by the defendant went missing in 2005. It would appear that this was after EMA had surrendered them to Lorraine Castedo. After all, EMA indicated in January 2003 that it surrendered all the Tawona receipt books to Lorraine Castedo at his instance.

To his knowledge 104 and not 114 stands remained unsold on Tawona. He conceded that the contemplation of the parties was that at the conclusion of the Tawona project each party would receive a commercial stand and a one-half share of all the remaining stands. He accepted equating 5½ stands with the missing amount of $4, 3 million dollars. He ignored the personal contribution of the defendant to the tune of $1, 8 million and was not prepared to provide its time value worth.

It transpired that the only development which the plaintiff undertook without the participation of the defendant was in the construction of the embankment for the water reservoir. He stated that when the defendant came to Zimbabwe in 2005 he refused to participate in the Ruwa River Consortium. During that visit, the defendant also refused to sign agreements of sale preferring to sign refund cheques. The plaintiff's son denied that the defendant was willing to meet his share of the Ruwa River Consortium expenses but was asked not to pay because the amount had been whittled down by inflation. While in Greece, the defendant had rebuffed the Tawona Residents Association's desire to assist in developing Tawona. At first Instamac acted as the mediator between the parties but failed to break the impasse between them. In 2005, it became apparent that the parties could not work together to develop Tawona. This was apparent when on 7 July 2005 the plaintiff caused the Department of Physical Planning to freeze the application for the further subdivision of Tawona made by the defendant through CD Consultancy on 20 July 2004.

It was clear that as a layman in the development project, the plaintiff's son relied heavily on the opinions of the experts that he engaged. He uncritically accepted those opinions as demonstrated by his reliance on the table prepared by Lamb. He accepted the use of the Old Mutual Implied Rate (OMIR) to calculate the time value of money in a hyper inflationary environment which characterizes the Zimbabwe economy. He accepted the valuations that were carried out by both Masaya and Miles. He paid a blind eye to the incongruous valuation by the experts which placed a worth of $80 billion on 5½ stands against $180 billion on 104

stands. The basis for the disparity in value was that one was developed while the other was farmland, a distinction that in reality did not exist.

All the four properties were purchased when the plaintiff's son was 10. Mhangura was transferred to the parties when he was 10 while the other properties were transferred when he was 13. He was too young to appreciate the nature and extent of the business relationship between the parties. He seemed to believe that the parties were in partnership in deference to Lamb's opinion. He was corrected in this regard by his counsel as was Lamb. That both Lamb and the witness were wrong on the nature of the business relationship between the parties was demonstrated by the further particulars supplied by the plaintiff. In paragraph 27 of his request for further particulars, the defendant asked the plaintiff whether he was alleging the existence of a partnership and if so to set out its terms. The plaintiff responded that his claim was based on the *action communi dividundo*. The plaintiff's son also failed to give credible evidence on how these properties were purchased and paid for. It was highly unlikely that at that tender age he would be entrusted to carry what were then huge amounts of cash from Mhangura to Ruwa for the purchase of Tawona. The amounts he allegedly delivered for the purchase of Tawona were far in excess of the purchase price for that farm. They would have exceeded the full purchase prices disclosed in the transfer documents for all the four properties.

The documents that he produced in exhibit 1 and 2 showed that the parties were joint owners of the properties and businesses in issue. The Deed of Transfer from National Foods Ltd to the parties of 20 June 1986 and its special power of attorney together with Lamb's documentation referred to the Mhangura operations as a partnership.

Mrs. *Wood* sought to persuade me to find that the plaintiff's son was arrogant, rude, evasive and self opinionated. I, however, found him to be malevolent and dishonest. He sought to underplay the primary and pioneering role of the defendant in the acquisition, and development of the four properties in dispute. The defendant utilized personal and joint funds and expended his time and energy in the purchase of these properties and in the development of Tawona, and the other two Ruwa properties. His time and energy were not equaled by those of the plaintiff and his children. The plaintiff's son's malevolence was further demonstrated by the allegations of fraud and subsequent arrest of the defendant; charges which he withdrew for lack of evidence rather than for filial love. His malevolence was further demonstrated by the irrelevant and prejudicial testimony of Roger Boka which sought to portray the defendant as a criminal who flouted exchange control regulations and swindled purchasers of their money.

His dishonest became apparent from the manner in which he manipulated the expert opinions that he sought to his father's advantage but to the defendant's detriment. At first he pursued an honest attempt to achieve a just settlement. The correspondence from the plaintiff's legal practitioners of record of 18 December 2006 confirms that he was negotiating in good faith as did Lamb's letter of 28 February 2007. By the time he testified, the plaintiff's son was motivated by greed. He sought to cheat the defendant of his fair share in the joint venture. He ambushed the defendant by leading evidence that was divorced from his pleadings. The weaknesses in the expert evidence also affected his testimony.

In my view, he was a dishonest witness who was shaken in cross examination.

The second witness for the plaintiff was Anthony Derek Lamb. He has been a Chartered Accountant registered with the Institute of Chartered Accountants in Zimbabwe for the past 40 years. Under cross examination he supplied his qualifications in planning and development in the construction industry. Between 1968 and 1970 he was a director of Pettigrew, a Rhodesian Construction company which built Ashdown Park at the time. He, over the years, has had experience in the planning and construction of Seke National in Chitungwiza and under his influence Huruyadzo Supermarket complex was built in St. Mary's Chitungwiza. He is also involved in the development of high class cluster homes at 55 Stonechart Lane in Borrowdale and in phase three for Mr. Nadalet's Fairview Park in the northern area of Ruwa.

He has been the secretary of the Ruwa River Consortium for the past 5 years. It was set up to develop the northern properties in Ruwa. The principals of the consortium are Springvale Park, a subsidiary of Intermarket Holdings Ltd; Mr. Nadalet, Mr. Markus Mhindu and Tawona. He referred to the parties as partners throughout his testimony. His duties involve the management of the members and liaison with stakeholders like the Ruwa Local Board. He has never met the defendant. He has dealt with the plaintiff's son, the last witness and has acted as a mediator between the parties by engaging them through the plaintiff's son and the defendant's wife. He alleged that he owed no allegiance to either party.

In his mediation attempts he wrote exhibit 6 on 28 February 2007. It was based on the financial figures and information availed to him by the plaintiff's son found between page 137 and 216 of exhibit 1. These figures were compiled by Erasmus Murphy and Associates. In their letter to the two parties of 6 January 2003 they commented that a figure of $8 313 300.40 that was receipted at Ruwa Supermarket for the sale of stands for Tawona Garden Estates

could not be accounted for, that defendant had expended his personal money to defray expenses of land preparation, surveying, town planning, water projects for which he had not been reimbursed going back to 1992 and recommended that a time value for money method be used to retain the value of compensation. They also stated that the defendant had paid into the Tawona account $3, 9 million in December 2002. They further stated that they had all the information necessary to compile the year end accounts for Tawona for 2000, 2001 and 2002 save for the expenses incurred by the "partners of Tawona Garden Estates". This letter was updated on 30 July 2007 by the same author who stated that the accounts had not been prepared as all the documents were transferred on the instructions of Nicholas Bakaris to Lorraine Castedo Estate Agents. By the later date EMA had closed and its directors emigrated from Zimbabwe.

Lamb worked on the assumption that these figures were accurate to compile the table on page 75 of exhibit 2. This table was first prepared as at the end of July 2007 but was updated as at the end of November 2007. The differentials in the two sets of figures in 2007 reflect the time value of money in Zimbabwe caused by hyperinflation. He used the Consumer Price Index to calculate the values as at the end of September 2007, the latest figures then available from the Central Statistical Office. He then used his own index from September to November to update the values. His index was arrived at by comparing the prices of goods that make the CPI basket in September and at the end of November. He gave the example of three items; that is, a crate of eggs in September was $1, 2million and in November $4, 2 million, The Herald was $100 000.00 and $300 000.00 while fuel was $550 000.00 and $1, 4 million a liter respectively.

He did not make use of the Old Mutual Implied Rate, which is related to the value of the Old Mutual share on the Zimbabwe Stock Exchange in comparison with its US dollar value on foreign bourses where it trades like the London Stock Exchange and the Johannesburg Stock Exchange. He distrusted the impetus on its movement on the local bourse on the basis that it was driven more by sentiment (irrational exuberance) rather than by any fundamentals. His view was that it did not set out the true rate of inflation in the country. In any event it gave a higher rate of inflation than would his index.

THE CONSOLIDATED TABLE OF LAMB ON PAGE 75 OF EXHIBIT 2

C. Bakaris and G. Kattavenos
Estimated Partnership Division: July and November 2007

Estimated Value in Millions	Estimated Value July in $ Millions	C.B.	G.K.	Estimated Value November in $ Millions	C.B.	G.K.
Fixed Property Valuation	67 100,00	33 550,00	33 550,00	359 900,00	179950,00	179 950.00
LESS						
cost to complete infrastructure for sold properties	(28 938,33)	(14 469,17)	(14 469,16)	(475 845,19)	(237 922,60)	(237 922,59)
Durawall &roofing assets disposal for own gain G.K.	9264,80	4 632,40	4 632,40	185 357,88	92 678,94	92 678,94
Property Sales not banked into partnership bank	6 600,00	3 300,00	3 300,00	80 808,44	40 404,22	40 404,22
Rents Plaka not banked into partnership bank by G.K.	205,55	102,78	102,77	2 621,62	1 310,81	1 310,81
Reservoir Embankment Payments made by CB	720,03	360,02	360,01	10 436,33	5 218,17	5 2 18,16
Mhangura Bakery per Financial statements	1 215,91	607,96	607,95	5 978,46	2 989,23	2 989,23
LESS: Cost to complete reservoir relative to stands sold	(286,53)	(143,26)	(143,27)	(1 408,10)	(704,05)	(704,05)
GROSS VALUE	55 881,43	27 940,73	27 940,70	167 849,44	83 924,72	83 924,72
LESS: Amounts used for own gain						
(a) Durawall and roofing assets	(9 264,80)		(9 264,80)	(185 357,88		(185 357,88)
(b) Property Sales	(6 600,00)		(6 600.00)	(80 808,44)		(80 808,44)
© Rentals Plaka	(205,55)		(205,55)	(2 621,62)		(2 621,62)
Embankment share not paid	-------	360,01	(360,01)	--------	5 218,16	(5 218,16)
	39 811,08	28 300,74	11 510,34	(100 938,50)	89 142,88	(190 081,38)
Adjustment re difference in Capital Accounts of Mhangura	------	(44,26)	44,26	------	(217,64)	217,64)
DIVISIBLE AMOUNT	39 811,08	28 256,48	11 554,60	(100 938, 50)	88 925,24	(189 863,74)

The witness supplied the values for July 2007 and how the parties would share equally in the assets and liabilities of the properties in issue. He upgraded the values and each party's entitlement as at November 2007.

He relied on the figures provided by Seef Properties Real Estate Agents in Harare to compute the fixed property valuation. He did not interrogate the figures as he relied on their expertise in the field of valuation. He collated these valuations at page 76 of exhibit 2 to arrive at the figure of $67, 1 billion in July 2007 which he upgraded to $359, 9 billion as at the end of November 2007.

. On the cost to complete infrastructure for properties sold he used the information of 1 August 2007 provided to the plaintiff's son by Trenly Miles of TSW Project Managers and Consulting Engineers. Miles estimated the cost of completing Phase One of Tawona Garden Estates at $10 billion in April 2007. He had a base figure for April 2005. He utilized the consumer price index produced by the Central Statistical Office between April 2005 and April

2007 to arrive at $10 billion. By 1 August 2007 the official inflation figures for May, June and July were not available. He used the Old Mutual share price variation, which he qualified by the use of the words "if acceptable" to estimate the cost to complete phase one at $28, 9 billion as at 31 July 2007. It is this figure that Miles upgraded to $475, 8 billion as at the end of November 2007.

On the valuation of the durawall and roofing assets he relied on the quotation provided by First Sellers (Pvt) Ltd shown on page 90 of exhibit 2 addressed to the plaintiff's son on 30 July 2007. It listed the items allegedly disposed of by the defendant for his personal benefit that were bought by the partnership from Copanakis. The quotation for new items was $9, 3 billion. The items were listed as a cement tank, a brick moulding machine, 50 moulding trays for durawall pillars, 100 trays for durawall panels, an electric motor, 2 concrete mixing machines, 25 moulds for roof tiles, 4 wheelbarrows, 10 shovels, 3 compactors (ramas), 5 trowels 120 m (25mm 4 core) armoured cable, 20 roofing asbestos, fence and pillar and an iron beam to hold asbestos. By November 2007 they were worth $185, 4 billion.

To arrive at the value of property sales that the defendant did not bank, he stated that at the time of the non-banking, the money was equivalent to the cost of 5½ stands. The amount was reflected in the EMA report as $8 813 380.00 less the refund of December 2002 of $3 900 000.00. He used the prices for Damofalls which he found in newspapers and compared them with those that Nadalet and Intermarket were charging for 800 m^2 to compute the estimate of the misappropriated amount at the July and November 2007 figures shown in the table. He set them at $6, 6 billion and $80, 8 billion, respectively.

The value of rentals was not based on the actual amounts paid by the lessee but on a figure in local currency given to the plaintiff's son by a bookkeeper of the lessee which the witness converted to US$ at the official rate from 1999 to July 2007 as shown on page 79 of exhibit 2. The July figure of $205, 6 million translated to $2, 6 billion in November 2007.

As the secretary to the consortium he was knowledgeable about the construction of the reservoir embankment. The one built after pursuing various options was to be 7 ½ m high, 60m wide at the base and 45 m wide at the top. The civil contractor and consulting engineers were engaged and paid for what they did. The share of the parties was 13, 69% of the costs. These were paid to him by the plaintiff using his own cheques (page 328- 334 of exhibit 1 shows 4 cheques in his name and another 3 in the name of Ruwa Supermarket of $178 393 365.00). He said he often paid the service providers from his own account and settled these

amounts with the consortium members. In July 2007 the amount was equivalent to $720 million but it had risen to 10, 4 billion in November 2007.

He used the financial figures that were prepared by Accounting and Executive Service, an entity that was unknown to him, given to him by the Nicholas Bakaris to prepare the valuation figures for Mhangura Bakery. In July these were worth $1,2 billion but had risen to $6 billion in November 2007.

On the cost of completing the reservoir relative to stands sold he stated that the figures he provided were more than an estimate. Intermarket agreed to provide the money to construct it. On that basis R. Davis and Company was awarded the contract. It did the clearance and road works on site but could not continue after inflation made the cost of continuing unbearable. It was paid by Intermarket and the witness for the work done. R. Davis's initial contract price was $3, 5 billion on 10 June 2005. After the termination of the contract in September 2005, Costain quoted new figures on 12 June 2006 of $97, 5 billion. It was on this figure that the witness applied the CPI and his own index to extrapolate the new values after sharing the cost between the consortium members and apportioning the parties before me their equal share in his table of valuations. He then proceeded to deduct the amounts misappropriated by the defendant to arrive at each party's entitlement.

He produced exhibit 6, a letter he wrote to the defendant's wife who had asked him to propose the best way of apportioning the properties in dispute between the parties. He stated that the defendant's wife provided him with a map, Exhibit 8, entitled Tawona Development General Layout. On it she indicated the 104 stands that had been sold and those that remained for division. He studied the map which covered the residential stands and commercial stands, referred to letters by the parties' legal practitioners especially of December 2006 and what transpired at the pre-trial conference presided over by MAKARAU J at which he was present.

Exhibit 8 depicts the Mutare Road to the north. Originally the Ministry of Transport had reserved a width of 100m for a road on the northern side. Stands 8387 and 8388 were designated as commercial stands while stands 8391 and 8392 were set aside for Flats. Stand 8753 which is sandwiched between 8388 and 8391 was reserved for a car park. Adjoining it is stand 8390 which is for a church. The Ministry of Transport handed back 30m width of the reserved road to the parties. All these are on the northern side of the plan. Stands 8111, 8113 and 8114 are on the southern side of the plan. Stand 8113 is for a motel while Stand 8114 is for flats. The witness referred to the residential stands as high density stands.

He recommended firstly, that one party takes all the high density stands still to be sold and the adjacent property called Lot 4 of York in exchange for Motel and Flats land 8133 and 8111 and Subdivision B of Lot 4; and secondly that the recovered road reservation be divided equally between the parties. He drew a line perpendicular to Mutare Road and divided the map into two with the parties having the right to choose whichever portion they wanted from the recovered road.

The defendant's wife came with a relative called Mitch Pantzis. The relative did not go beyond mere criticism of the recommendations as being unfair. Nicholas Bakaris was invited to the meeting with the defendant's wife and relative. The defendant's wife was annoyed by her nephew and the meeting broke up without agreement on the division of the properties. His brief ended thus.

Exhibit 6 was addressed to Mrs. Kattavenos on 28 February 2007. The witness attended by invitation of the parties the pre-trial conference before MAKARAU J and heard the competing views of the parties. He used the estimates of costs prepared by professionals and the letter of 5 December 2006 from the defendant's legal practitioners to the plaintiff's legal practitioners which he believed nearly represented a fair distribution of the assets.

He took into account the cost of infrastructural development of high density housing at $45 000,00 per square meter as being nearly six times that of low density due to the greater number of roads to be constructed, sewerage and water connections. He found it difficult to realistically cost commercial and flat stands as these depended on usage and concomitant services required. He was unable to compare the value in m² of commercial stands to m² of residential stands.

He proposed that the plaintiff get the residential stands while the defendant received Motel land, Flats land, Stand 8111, the restaurant and part of Lot 4. He did not understand the division of the 30m recovered road into 3 instead of 2 parts. That was how Tawona was to be shared. The defendant did not choose any of the options that he suggested in exhibit 6.

He noted that Subdivision B had a derelict house and restaurant with a possible third party interest. His view was that plaintiff forewent his interest in the restaurant or all of Subdivision B for a reciprocal abandonment by defendant of his interest in Lot 4.

On the state of the infrastructure built on phase 1 and 2, he commented that it was decrepit and might need to be replaced in its entirety. 28 stands were still to be sold under those phases. The sale price at $45 000.00 m² was insufficient to meet the cost of infrastructure

and 15% VAT and 10% endowment to the local authority. He had not verified the cost of piping for sewerage and water reticulation, signage and rainwater controls. He noted that the proceeds from the first two phases had failed to meet the costs of putting up the infrastructure on the stands that had been sold. He also noted that a trunk road was essential for accessibility from north to south and would benefit both parties on Tawona.

Other major costs were the consortium expenditure for which Tawona was on 6 December 2007 liable for $1, 7 billion. The plaintiff paid his half share but the defendant was unwilling to do so. He feared that the failure to develop the stands could result in deprivation of ownership by the relevant Minister.

The letter of 5 December 2006 from the defendant's then legal practitioners to the plaintiff's suggested that the defendant receive:

1. Lot 4 of York (stand behind supermarket)
2. Subdivision B of York (stand with restaurant and house)
3. the flat stands on Tawona that is 8111 and 8114
4. the hotel stands on Tawona that is 8113
5. the large area on Tawona zoned for flats that is 8391 and 8392.

The plaintiff would get:

1. the two front commercial stands on Tawona, namely 8387 and 8388
2. the middle residential stands on Tawona that is stands 8076 to 8386 (excluding 8111, 8113, 8114 and 8112, which is open space).

The Church stand 8390 was to be sold and the money shared equally between the parties. The 30 m road space would be shared equally.

Stand 244 of Mhangura Township was to be valued and the costs shared equally and sold and proceeds shared equally

The contribution to infrastructure would be paid from the sale of the remaining stands from phase 1 and 2 for roads and water system development on Tawona and the remaining account balance would be met equally by the parties.

The witness suggested a third option that one party buys out the interest of the other. He was worried by the financial implications of the third option.

When he wrote exhibit 6 he was unaware of the need to adjust Plaka rents and money misappropriated by defendant.

He stated that the parties would need Town planning permission to divide Tawona into two through a north -south line. He assumed that permission would be granted, but if it was not then his proposition in this regard would not work.

In the light of new developments such as the factoring in of Plaka rentals, sums allegedly misappropriated, the treatment of Tawona as undeveloped farmland and outstanding infrastructure it was no longer possible in his view to give effect to proposals in exhibit 6. He could not value commercial, flat and motel land. He calculated the cost for each of the 179 unsold stands at $20 000.00 a figure which he had the audacity to say included the cost of developing the required infrastructure.

He was cross examined at length over two days. He could not say when he became involved in the dispute. He denied advising the plaintiff and stated that he maintained a detached professional approach with him without any thought of litigation. The table on p.75 was a brief for the plaintiff for which he expected to be paid at some future date. He denied being the brains behind the desire by the plaintiff to buy out the defendant and that he threatened to withhold water from the defendant. He was adamant that the two parties had a partnership for they in reality shared profits and losses in a predetermined ratio. He disputed that the business relationship between the parties was a joint venture. In the light of information on the withholding of rentals and some money from the sale of stands in Phase one; he believed that his recommendations in the letter to the defendant's wife were nugatory. In essence, he accepted in the light of his table that the defendant was not entitled to any tangible share in the partnership assets.

He accepted that he based his view without hearing the defendant's side of the story and stated that impartiality was irrelevant as he had to grapple with the reality of the facts presented to him. He did not see the need to talk to defendant as the report was for the attention of the plaintiff whom he believed was aware of the expenses incurred by the defendant. He accepted that if the defendant had incurred expenses then his table would be inaccurate.

He had to use the CPI, a consumer related index which was devoid of infrastructural development information on building and machinery indices. He said it was an acceptable method used by all professional organizations to track price movements. He reiterated how he came up with his own personal index and utilized it to estimate the rentals and the escalation costs of the reservoir. He accepted its limitations as eggs and cement were incomparable.

He relied on the TSW letter of 1 August 2007 to estimate the cost of infrastructural development which had an April 2005 base figure. He did not know the cost in April 2005. Notwithstanding his doubts about the efficacy and accuracy of using the Old Mutual Implied Rate, (used by TSW for the period April 2007 to the end of July 2007) he came to an estimate of $110 billion.

He accepted that the cost of equipment allegedly sold was based on new property which prices he halved to take into account its used status. The information was supplied by plaintiff at page 93 of exhibit 2. He was not given the actual rentals paid at Plaka but sought to use a US $ denominated estimate. He did it for the period from 1999 to cater for possible prescription as summons was issued in 2002.

He had p.138 of exhibit 1 which did not show the $1, 8 million paid by defendant. He did not appear to have calculated the loss arising from the time value of money between the time the defendant paid it and when he used it to arrive at the value of 5½ stands.

He maintained his testimony on the formation of the Ruwa River Consortium. It was for cohesion of the four principals. The embankment that was eventually constructed was 7½ m high with a base 60m and an apex 20m wide. The cost was made up of the civil engineering specifications and physical works. It was built on Zambuko, a property owned by a subsidiary of Intermarket Holdings Ltd. On completion, it will be handed over to the Ruwa Local Board subject to agreed financial arrangements. The Ruwa Local Board is entitled to 13% of the water approximating 1 mega liters per day. It was built from the realization that Harare water was inadequate to cater for the needs of the project.

His attention was drawn to some cheques drawn by the defendant in favour of RRC on 20 December 2000 and 13 January 2001 for $150 000.00 respectively. He stated that these were not for the consortium which had not yet come into existence but were for the Ruwa River Trunk Sewer Consortium for the development of the trunk sewer to service all the northern developers.

The consortium opened a bank account with Standard Chartered Bank Avondale branch to make payments on production of certificates from the civil engineers of work done. The operations were affected by a new monetary policy requirement for all cheque deposits to be withdrawn after five working days. The payments by the plaintiff to the witness by four cheques drawn in the plaintiff's name and three under the Ruwa Supermarket cheque book are reflected on page 328 to 334 and ranged from 4 September 2004 to 21 June 2005 were based

on the certificates raised by Stewart Scot civil engineers. This was done to reimburse him for using his own money to meet the expenses raised in the certificates.

He was questioned on his testimony on the Mhangura Bakery. He stated that he accepted the figures supplied by Accounting and Executors Services (Pvt) Ltd without verifying or questioning their accuracy. The fixed assets shown in the balance sheet were property, motor vehicles, furniture and equipment which as at 31 December 2006 had a book value of $1 409.00. He conceded that there was need to revalue these assets to reflect our high inflation. There appearance in the balance sheet showed that they were in existence otherwise the accountant who drew it up would not have included them.

It is noteworthy that pages 95 to 157 of exhibit 1 are dedicated to the Mhangura Bakery accounts for the period from 31 December 2003 to 31 December 2006. These balance sheets consistently reflect the declining book values of these fixed assets. They also depict the expenditures incurred on the motor vehicles in each of these periods. The share of profits of each partner is indicated. He did not demur from accepting and using them notwithstanding that they were not signed by either partner.

He stated that the figures in the table on p.75 of exhibit 2 were not prepared for litigation but were for the use of the plaintiff in his bid to buy out the defendant's interest in the partnership or to recover the expenses he defrayed on behalf of the defendant in the partnership. He denied that he had told the court that he prepared the figures to assist the plaintiff buy out the defendant's interest. He reiterated his version on how he arrived at the figures on the completion of the reservoir and maintained his evidence on how Tawona's share of costs was calculated.

He defined a high density stand as one below 1 000 m², a medium one as between 1 000m² and 2 500m² while a low density stand was one above 2 500 m². He refuted the plaintiff's testimony that the stands on Tawona were medium density. In his experience based on phase one and two of Fairview Park development the cost of infrastructural development of a low density stand was a sixth of that of a high density one. The high density stands needed sewer and water connections, culverts, headwalls and catch pits. He gave the size of a low density stand as being between 2 500m² and 4 900m² while a high density stand was between 300m² and 600m².

He stated that Mrs. Kattavenos walked out of the discussion because she had a row with the plaintiff's son and not because she disagreed with his suggestion. The plan she gave

him which she retrieved was not exhibit 8. That plan had been marked thereon with the parties' names against the stands she proposed be allocated to each party.

He agreed that the prices for stands were changing rapidly in Zimbabwe due to hyperinflation. He, however, did not accept that Tawona be apportioned in m² due to the different land usage rights, that is, residential, flat and hotel which had different values. It was not possible to give each an equal number of stands in one block because the parties would need to work together to put up common facilities like roads, sewage and water, a thing they were averse to. He believed that another way to resolve the impasse was to take 50% of the residential stands to meet infrastructural development and divide the balance equally between the parties.

The status report from TSW was verbal and not in writing. He was not able to put a value to the cost of the infrastructure on Tawona. Phase one required repair as it had been neglected and was decrepit. Some manhole covers were missing, pipes were exposed, trenches had fallen in on them and broken some while others were now misaligned. The seals on the joints were broken and there might be need to dig them up and replace them.

The open space next to the church could be used to pay the endowment due to the Ruwa Local Board. There was need to deal with the endowment due to the Ruwa Local Board which in terms of the permit was between 7 % and 13 % of the value of each stand. This could be set off against council's contributions to the construction of the reservoir. The Board could decide to set it off against the proceeds due to it on the water and sewer connection to be paid by the purchaser in the future when such a request is made or it could wish to fund it from the Reserve Bank of Zimbabwe's Parastatals and Local Authorities Re-Orientation Program-PLARP. In his experience no property developer was prepared to meet the cost which would be eroded by inflation by the time of recoupment. While local authorities prefer to be paid in land the permit decreed that such payment be made in monetary terms; as a percentage of the value of each stand.

He maintained that Tawona was undeveloped farmland just because some pegs had been removed notwithstanding that it had been subdivided and had pegs and infrastructure. He classified it as farmland because that is what it was being used for, yet some stands had already been sold which he was prepared to remove from that classification. He accepted that the cost of each stand was no longer $20 000.00. He maintained that the amount for stands misappropriated represented 16, 6 stands at the time given that the cost then was ($400 000.00

per 800m²) $500m². The defendant repaid $3, 9 million. If regard was had to the $1, 8 million the number of stands would be much less. The witness did not agree that the misappropriated money would have been equivalent to the cost of 5½ stands.

I am unable to agree with his calculation on page 78 of exhibit 2 concerning the 5½ stands. The original amount misappropriated was put at $8 813 380.00. A sum of $3, 9 million which was repaid in December 2002 was removed leaving a balance of $4 413 380.00. At the time a m² was sold for $2 000.00. The figure would represent ($4 413 380.00 ÷ $2 000.00) 2 206m². As each stand was of an average size of 800m², the number of stands represented by this sum at the time was (2 206m² ÷ 800m²) 2, 75. The explanatory note on page 78 indicates that there were 5½ stands because half of $2 000.00m² would go towards infrastructural development which was not put in place. I am not satisfied that the failure to put in place infrastructure could be used to increase the number of stands represented by the misappropriated money. It can be said he was entitled as a co-owner to half the missing money and thus simply owed the plaintiff the other half. The amount owing would be equivalent to 1, 4 stands if the refunded money is factored into the equation. Lamb's explanation that 16 stands were represented by the original missing money was wrong. That sum was equivalent to 5½ stands. This figure does not take into account the amounted that was refunded in December 2002. It also does not take into account the $1, 8 million of defendant's own money which he expended on the project.

Springvale is the trade name of Wentspring Investments (Pvt) Ltd, a subsidiary of Intermarket Holdings Ltd. On page 77 of exhibit 2 is shown a price schedule of Springvale Park as from 23 November 2007. It was signed by Stan Usayi on 3 December 2007. It gave the replacement cost per m² for an 800m² stand as $21 606 534.77 inclusive of VAT and $18 788 291.11 excluding VAT. The cost of such a stand stood at $12, 8 billion excluding VAT and $14, 7 billion inclusive of VAT. These amounts were a far cry from the values of Tawona that the plaintiff advanced as the basis for a fair and equitable distribution even going by his contention that half those figures would represent the cost of infrastructure. The plaintiff simply undervalued the undeveloped stands on Tawona.

Lamb differentiated Springvale from Tawona on the basis that it had its own reservoir and that its infrastructure was complete and thus fully developed. He therefore disputed that 193 stands were still to be sold putting the number at 179. He could not comment on the suggestion that the total number in square meters that were in dispute were 176 896m². He

disagreed that the value of Springvale could be used to calculate the value of the Tawona stands which would amount to $3, 8 trillion and net VAT $3, 3 trillion.

He suggested that the plaintiff should be allocated all the residential and commercial stands; and the defendant the four flat lands and the motel. This undermined his accounts which show that the defendant owed the plaintiff $189, 9 billion yet whoever received the stands would sell them at a higher figure than the $225 billion indicated in the accounts.

He relied on the valuation of land that was compiled by Mr. Masaya to come up with the figures which deny the defendant any share of the land. He stated that all accounts for use in court or by the taxman have to be certified. He did not do so for the present figures because he prepared them for the plaintiff to look for funds to buy out the defendant's interest. It seemed to me that in his mind this original purpose for producing these accounts undermined their veracity for sharing partnership assets in the absence of other necessary adjustments and variations. They were merely an indicator of the state of the partnership which was subject to revision.

It was clear from his testimony that in his capacity as the secretary to the consortium, Lamb had intimate knowledge of the developments undertaken by the consortium. I accept the accuracy of his testimony on the physical developments that he said took place.

He also relied on documents that were prepared by others, which were supplied to him by the plaintiff's son. He did not interrogate their assumptions and contents but used them on the assumption that they were accurate. The contents of those documents were not challenged. What was put in issue was their accuracy. He could not vouch for their accuracy. The bases of some of the documents were questionable. I have in mind the use of the Old Mutual Implied Rate, a formula that he was prepared to use notwithstanding that he did not agree with its rationale. He also used his own self-created index to project the time value of our currency. I failed to appreciate the relationship between the development cost of a stand with the cost of eggs, the Herald newspaper and fuel which informed his personal index. The factors of production which make the infrastructure of a stand and the basket of commodities he used in his index are as different as chalk is from cheese. The use of both his personal index and the OMIR were, in my view, irrational. Share prices are based on a variety of factors. These are grouped under the headings of fundamentals and sentiment. The historical and future performance of the businesses in which Old Mutual operates in, the strength of its management team, the economic environment in which they operate and the strength of those

business units are some of the fundamentals that affect its share price. Sentiment is often driven by speculation which may or may not have a basis in the fundamentals of the business units. Sentiment may cause a share to go north without any fundamental basis. The term irrational exuberance best captures the rise in share prices that is not based on fundamentals. The use of the share of one company, however widespread its tentacles, to determine the value of the currency of a country, undermines the power often arrogated by law to monetary authorities of that country. Countries are often in varying stages of economic development. A comparison of the share price of the same behemoth corporation operating in such disparate countries cannot be an accurate measure of the values of the currencies of those countries as against each other. In any event the factors that are used by monetary authorities to fix the value of currency are different from those used by investors to buy and sell shares. Small volumes of shares changing hands may cause the share price in one country to rise, while the absence of interest in another market may cause it to fall. In my view, the value of the Old Mutual share cannot be an accurate barometer of the value of the local currency against other currencies for the reason that Old Mutual is not a microcosm of the macroeconomic conditions in Zimbabwe or even for that matter of the other economies in which it operates. It is for these reasons that I am not satisfied that it is an acceptable method of assigning value to the local currency. The use of the Old Mutual Implied Rate in any of the calculations relied upon by Lamb would in my judgment be inequitable. In my view, it runs contrary to the accepted wisdom that the economic policy of any given country is the prerogative of that country's executive branch of government and not of the courts.

The table at page 75 of exhibit 2, which I have reproduced above is the mainstay of the plaintiff's case. It is however based on inaccurate, unacceptable and wrong assumptions, which destroy Lamb's credibility to the extent that he advanced it as a fair and equitable apportionment of the joint assets of the parties. Lamb's evidence was also coloured by his partiality towards the plaintiff. At all times he acted for the interests of the plaintiff. He relied heavily on the version of the plaintiff. Though at one stage he was approached by the defendant's wife to assist in resolving the impasse, after she declined to consider his proposition, he decided to act as an agent of the plaintiff. In court he attempted to paint himself as an impartial and honest broker. He was to concede that he compiled the table to assist the plaintiff in his bid to buy out the defendant's interest. The table serves to give away the defendant's interest for free to the plaintiff. I understood the absence of certification in the

document to mean that that table was to be used only as a negotiating tool by the plaintiff; as such, it was not an accurate portrayal of the contributions of the parties to the joint venture. That Lamb was driven by his own interests as the secretary to the consortium cannot be gainsaid. He was obviously frustrated by the attitude of the defendant to the development of the reservoir. He was aware of the plaintiff's desire to speed up the construction of the project. It would be natural in those circumstances for Lamb to prefer to work with the co-operative plaintiff rather than the unco-operative defendant.

Notwithstanding my criticism of his testimony, in determining this matter I will pay regard to the suggestions he made in his letter of 28 February 2007 because at that time he appeared intent on an equitable apportionment of the joint assets of the parties.

The next witness was Nikita Masaya. He has been in the employ of Seef Properties for 21 years. He has 17 years experience in all aspects of property sales management and valuation. He has been a registered estate agent and valuer since 1989; an associate member of the Real Estate Institute of Zimbabwe since 1995 and on the panel of the Master of the High Court for valuators of movable and immovable property; and plant and machinery for the past 15 years.

He personally carried out the valuations of the four properties in dispute firstly in July and then updated them on 14 November 2007 at the request of the plaintiff's son. He compiled standard reports which are replete with technical jargon. He stated that he acted with professional competence. Further, that he had no interest in the properties and that his remuneration was not dependent on the values of the properties. In conducting the evaluation of each property he paid regard to the location of the property and the title deeds to establish its ownership and size. He sought to establish the open market value of each property. This is the reasonable price that a willing, able and informed purchaser and seller, acting at arms length and within a reasonable time, would agree on. To arrive at this value he had regard to comparable properties with similar attributes on locality, age and design, and which enjoyed the same town planning characteristics and could be used by similar market segments. He also considered the highest and best use to which the properties could be put to in compliance with the conditions in their title deeds to achieve maximum returns. He considered the physical condition and capacity utilization of each building and factored in its future usefulness to arrive at its estimated value.

The valuation reports fully describe each property and annex the title deed to each property which is in the joint names of the parties. Mr. Masaya truly performed a thorough job.

He valued Tawona on 24 July at $42 billion and in November 2007 at $225, 7 billion. The value of Lot 4 was $4, 5 billion and $24 billion; of Subdivision B was $16, 7 billion and $89, 2 billion while of Mhangura Bakery was $3, 9 billion and $21 billion, respectively.

He acted on the information supplied to him that 286 stands had been subdivided but 104 were not part of the evaluation. At the site he saw roads, water and sewer reticulation. The roads were in a bad state. The tarmac had been washed out exposing gravel. Some sewer pipes had been laid and others had not. He was not able to establish whether they were functional or not. The conditions of all the services on Tawona were bad.

In evaluating the residential stands he took into account the services on the ground and worked out a rate to establish the cost per m² of each stand. He came up with $600 000.00 per m². Normally, land for flats and commerce carries a higher value than other residential land. He assigned it a value of $1 050 000.00 per m². He considered the land as farmland. He valued it at $225, 7 billion.

Lot 4 is a commercial stand which is close to most amenities like borehole/municipal water, electricity and telephone lines. He was, *inter alia*, influenced by these factors to arrive at its estimated value.

Subdivision B houses Plaka restaurant. He evaluated it as commercial property and compared it with other similar buildings in the locality to estimate how much the improvements would fetch in an open market. He did not use the value of rentals paid to arrive at its value as the rentals were sub economic due to our controlled operating environment. He arrived at the figure of $89, 2 billion.

As for Stand 244 Mhangura Township the site inspection revealed improvements of a building operating as a bakery and supermarket under one roof. The location, being a farming setting as opposed to an urban one, suppressed the value in comparison to Ruwa and could not be compared to Harare. He valued it at $21 billion.

He was cross examined. He utilized the parallel market exchange rate of the local currency against the US dollar as a guide line to upgrade the July figures and arrive at the November figures. He deposed that in July 2007 $42 billion was equivalent to US$215 000.00. He stated that the values were initially calculated in local currency and then converted to a

stable currency which stored value. Thereafter, the foreign currency equivalent was converted into the equivalent local currency at the parallel market rate.

He stated that the fact that it was subdivided did not increase the value of Tawona as the type of services that were on the ground were factored into the value. In this regard, he maintained that the estimate of $600 000.00 per m² for Tawona was fair value as this was farmland now being sold as subdivided residential land. He was referred to the Springvale Park figure of $21, 6 million for a fully serviced stand and asked to comment on the discrepancy with the value he was rendering for Tawona in the light of Lamb's testimony that servicing costs represented half the selling price. He could only say he was not familiar with the size and location of the Springvale Park stands. He conceded that the discrepancy was wide but maintained his value was fair. He referred to a Damofalls advertisement in the Herald of 7 December 2007 in which two stands of 460m² and 493m² were selling for $4 billion and $4, 8 billion. He stated that he was familiar with Damofalls which had both serviced and unserviced stands. He could only say that at the time of the valuation the figures he gave were fair. He accepted that in the light of hyperinflation, his valuation was already out of date. To his knowledge, Tawona stands were medium density. This was because the Ruwa Local Board deigned stands between 200m² and 500m² as high density, 600m² to 2 000m² as medium and above 2 000m² as low density. He could only provide the value of serviced stands after consulting the service providers.

He alleged that he took into account the prospect that Lot 4 could have commercial property status and could be subdivided into small commercial stands as it is in an area zoned for commercial stands by the Ruwa Local Board despite the fact that he valued it as a residential stand. This was contrary to the report on p.30 of exhibit 2 which treated it as a residential property. Treating it as commercial was contrary to the conditions on the title deed which dictated that only a house designed for use as a dwelling for a single family be erected thereon. He was again referred to two houses in the Herald of that day, 7 December 2007, for sale in Windsor Park and Zimre Park which were going for $80 billion and $130 billion. He did not accept that his value for Lot 4 which has a house and a restaurant were on the low side. He stated that the values for the houses in the newspaper were hope values that were thump sucked by salesmen masquerading as valuers.

On Subdivision B, he compared it with other commercial properties in Ruwa like Takeaways at TM complex in Windsor Park Ruwa. It had a high value due to its location

along a main road. The front part that houses the restaurant comprised 60% of the stand while the remainder with the house represented 40%. Though some fixtures had been removed from the house, these did not materially affect its value.

Mhangura was a dying town affected by an absence of viable agriculture. It was incomparable to Harare and Ruwa, which he placed in one category.

I found the witness knowledgeable in evaluation. The major blemish on his testimony was his reliance on the parallel market to set the values of the properties. His sterling work on Tawona was undermined by his failure to incorporate in his valuation model the views of developers that the cost of infrastructure had to be included in the value of each stand. The valuation model that he used had the effect of undervaluing the subdivided stands which in my view he wrongly considered as farm land. This failure on his part cascaded to the value used by Lamb for the Tawona project. It resulted in the incongruous value between 5½ stands of $80 billion and 182 stands of $ 225 billion. His valuation of Tawona was therefore faulty and unreliable. While the other valuations may approximate to the open market value, they were undermined by the use of the illegal parallel market rates. In addition by the time he testified and indeed at the time of judgment, these values had been eroded by inflation.

The plaintiff used these values to base his claim for the allocation of all the properties to him with no corresponding payment to the defendant. The claim rested on the contention that the defendant actual owed him money, if regard was had to the expenses that the plaintiff incurred on Tawona and the income received by the defendant for his sole benefit from rentals, disposal of movables and misappropriation from the sale of stands. The values that were computed by Masaya, however, failed to justify the plaintiff's claim in this regard.

The next witness called by the plaintiff was Roger Boka. He stated that he purchased Stand 8263 for $267 000.00. He made the first payment on 15 October 2001. He dealt directly with the defendant. He alleged that his initial payment on 15 October was $40 000.00. He also paid £200.00 on the same day to the defendant. He did not request for a receipt as he trusted the defendant who was not only a father figure but a family friend. He made the last payment of $40 000.00 to defendant on 27 January 2002.

Later, the defendant told him that he had an outstanding balance of $1, 1 million inclusive of interest charged at 4½% interest. This was liquidated through the set off of part of the cost incurred of $1 927 000.00 by the defendant on the repair, by the witness, of two of his

vehicles on 28 April 2003. The defendant only paid the witness the sum of $450 000.00 for the work done on both the Studebaker and Spitfire. One Lorraine Castedo wrote to the witness on 13 March 2003 canceling the agreement of sale on the basis that the witness was in breach. The stand was repossessed and he was asked to collect the $80 000.00 he had paid. She refused to accept his foreign currency claim and set off story in the absence of any confirming documents. He lost the stand as it was sold to another. He failed to talk to the defendant who had left the country.

He produced three documents as exhibit 9. These were the Tawona Garden Estate Offer to Purchase Stand which he completed on 17 July 2001 for Stand 8263 measuring 600m². The selling price was $267 000.00 of which a deposit of $93 450.00 was to be paid within 7 days of signature. The other two were a receipt dated 15 October 2001 of $40 000.00 signed by a signature different from that of the defendant on the three cheques that are on p177 and on the application for subdivision permit on page 232 of exhibit 1 and another for $40 000.00 of 27 November 2002 paid to Erasmus Murphy and Associates (Pvt) Ltd. He also produced exhibit 10. This was the letter written to him by Lorraine Castedo on 13 March 2003 canceling the agreement of sale due to non-payment and promising to refund him once the stand was repurchased. Attached to it were installment summary invoices showing that he paid a deposit of only $40 000.00 instead of the $93 450.00. An interest schedule of the outstanding amount of $227 000.00 which grew to $1, 1 million was also attached. Lastly, he produced exhibit 11 which consists of receipt numbers 57, 58 and 59, which the witness invoiced the defendant on 28 April 2003. Receipt 57 was for spray painting the green Spitfire and carrying out an engine service for a total cost of $875 000.00. Receipt 58 recorded the work carried out on the Studebaker for $1 052 000.00 while receipt 59 showed that the defendant paid $450 000.00 for the starter, coil and alternator for the Studebaker. The total amount that was shown in receipt 59 for the work done on the two vehicles was $1 927 000.00 from which the defendant owed the witness $1 477 000.00 after deducting the $450 000.00. On all the three receipts the terms of payment were indicated as cash.

Under cross examination he stated that even though the agreement to reserve the stand for seven days was signed in July, he made first payment in October because the stand was still available at the original price. This is confirmed by the statement from Lorraine Castedo. He had no proof of payment of £200.00. He said he was a student and received the pounds sterling from his late father and uncle, five in £20 denominations and the remainder in £50

denominations. He did not know the exchange rate that the defendant was using. He simply trusted him. His £200.00 story contradicts the interest schedule of his debt drawn by Lorraine Castedo which showed that he owed $1, 1 million. He said this was the amount that the defendant set off against the cost of the work he did on his two cars. If at all he paid $40 000.00 and £200.00 there was no way that his indebtedness would be similar to the amount that was set off. His own version on the first payments contradicts the reason for the set off story and the other payment through EMA of $40 000.00 in November 2002. It appears to me that the agreement was cancelled for late and non payment of the amount due. I am not satisfied that Boka told the whole truth in his story especially in the light of the fact that his cheques for fuel drawn at the defendant's service station at times were referred to drawer. His story under cross examination was that the defendant had told him at the end of 2001 that he owed him $100 000.00 which Lorraine had inflated to $1 million. This version was a departure from his evidence in chief. Indeed, the payments in exhibit 9 do not appear to have been made to the defendant as alleged by the witness in his evidence in chief.

I was not able to discern why this witness was called. His evidence was not related to the stands for which money was allegedly misappropriated by the defendant. Mr. Boka did not receive a stand. He received his refund. Other than seeking to show that the defendant had a criminal disposition, Mr. Boka's evidence was irrelevant to the issue at hand, that is, the equitable manner of apportioning the joint assets of the parties. I, however, did not believe Mr. Boka's testimony that he was cheated of his foreign currency by the defendant. I find that he was recruited by the plaintiff's son to besmirch the defendant, which finding goes to show the malevolent nature of Nicholas Bakaris.

The last witness called by the plaintiff was Trenly Miles, an engineer with TSW Project Managers and Consulting Engineers. He was consulted to carry out the structural work on Tawona. He produced the estimate on p. 81 of exhibit 2 of 1 August 2007. It concerned the estimated cost for completing phase 1 on Tawona. He used the CPI from April 2005 to April 2007. When he did the estimate in August the Central Statistical Office had not released the inflation figures for May, June and July 2007 and so he used the Old Mutual share price variations as quoted locally and abroad. He testified that this rate is posted on the Imara website. He further stated that Imara was a financial and investment company established in the 1950's as Edwards and Company which commanded respect in local financial circles for its expertise. He alleged that the Old Mutual Implied Rate was accepted in business circles as a

fair indicator of the value of the Zimbabwe dollar against major global currencies. He was the author of the information reproduced by Lamb on page 75 of exhibit 2 on the estimated cost of completing the infrastructure for the stands that were sold from 10 billion to $28, 9 billion to $475 billion.

The basis of his estimate was based on the state of the infrastructure on site as at the beginning of August and November 2007 in conjunction with the Instamac report compiled by Brown at the time the project was handed over to TSW in April 2004. At that time sewers were 95%, roads 60% and water works 60% complete. The only letter from Brown on record appears as exhibit 3. The percentages do not agree with those that were proffered by the witness. Neither do they agree with the contents in a letter written by one of the witness' partners Engineer WJ Waterworth on 11 April 2005 to the plaintiff's son on page 355 of exhibit 1. Waterworth indicated that the pavements though grass covered were complete but that surfacing was 20% complete; internal water reticulation was 90% complete but stand pipes had not been installed; and although the mains and the house connections had not been installed, the sewer reticulation and the house stub connections were 90% complete. Waterworth also stated that the manholes were complete. There were also no mains connections. At the time Waterworth believed that it would take 4 months to complete the outstanding works on phase 1. TSW accepted to become consulting engineers on 18 March 2005. The infrastructure had deteriorated quite dramatically at the beginning of November 2007. Sewers had not been used and had moved. Most water pipes were there but some were missing and stand boundary pegs were either stolen or missing. There was a flourishing maize crop.

He stated that the $475 billion was based on the rates and costs of the bill of quantities drawn for the project, but that figure grossly underestimated by 60 % to 70 % the actual cost of what needed to be done.

Under cross examination he made out that he based the first estimate on the original bill of quantities by Instamac. He used the total sum and not the individual figures of each item. He disagreed with Lamb who averred that by 6 December 2007 the Central Statistical Office had produced the indices to August 2007. He accepted that the Government does not recognize the Old Mutual Implied Rate. He himself did not compare the local bourse share value of Old Mutual with those on the London Stock Exchange but relied on the Imara website data which compared with the parallel rate of the local currency against foreign currencies.

He reaffirmed that the state of infrastructure on site at Tawona had deteriorated and that his figures on what was needed to complete phase one were no longer applicable. There was need for a reassessment of what still worked and what needed to be replaced. Clearly new pegs were required to mark the stand boundaries.

He had not worked out the total cost of laying infrastructure on Tawona though this could be extrapolated from the bill of quantities done initially by Instamac. He was unable to provide the ratio of the costs of infrastructural development to the selling price of a stand.

The basis of calling Miles was to justify the figure of $475 billion in Lamb's table. A reading of Miles's testimony shows how unreliable that figure is. It is based on an illegal parallel market costing. His figure relied solely on information posted on a website. He could not vouch for the accuracy of that information. The motivation of the website was unknown as were its sources of information. The blogger's information and methods are not recognized nor approved by those whose duty it is to set monetary and currency exchange policies. The use of an illegal formula to calculate the time value of money cannot be regarded as fair and equitable. While Miles' evidence served as a rich source of information, it failed to demonstrate the justification of the plaintiff's proposed apportionment of the joint assets.

THE DEFENDANT'S CASE

The defendant was also represented by his 24 year old son Nicholas Kattavenos who was his only witness. He was born on 28 January 1983. He holds a BA degree majoring in Accounting and Finance from the University of Portsmouth in the United Kingdom. He has always been involved in the running of his father's businesses since he was 16 and commenced to do so in his own right at 19. In September 2002 he left Zimbabwe for university. He produced a 48 paged document as exhibit 12 that was the bedrock of his testimony. His father was unable to testify because he was ill with lumbago in Greece and also because he was afraid that he would be arrested on his return to Zimbabwe, as had happened to him before on false allegations leveled against him by the plaintiff's son. His evidence rested on exhibit 12 and what his father told him.

The defendant came to Zimbabwe in 1975 from Rhodes Island Greece and worked for John Pantazis at the Ruwa Supermarket. At that time, the plaintiff who had arrived in the country in the 1960s was a carpenter at Fredrick Sage. In 1976, the plaintiff married the defendant's sister. Their families forged an intimate relationship.

In 1977 John Pantazis sold 50% of his shareholding in Ruwa Supermarket to the defendant. Again, in 1979 he sold to the defendant 50% of his Ruwa businesses which comprised of Ruwa Supermarket, Ruwa Take Away and Ruwa Service Station such that the defendant owned 50 % of Lot 3 of York. The defendant purchased it from his share of profits. John Pantazis then sold his entire shareholding to the defendant who in turn transferred half of Pantazis shares to the plaintiff with the result that defendant held 75% of the shares in the supermarket while the plaintiff held the remaining 25%.

Mhangura was acquired in 1986 through the joint efforts of the two parties. At the time it comprised of two separate entities known as Kappa and Alpha Stores. Initially the two parties held 25% each of the business while Pantazis held the remaining 50%. Pantazis then sold his shareholding to the defendant who in turn distributed it equally between the parties. Page 1 of exhibit 12 shows that in May 1982 four directors of Shortwood (Pvt) Ltd, that is, M. Pantazis, A. Pantazis, C. Bakaris and J. Brown approved the transfer of all the shares held by the two Pantazis directors, who thereupon resigned from the company, to the defendant and accepted the appointment of the defendant as a director and public officer of the company. Page 2 shows that the defendant purchased property and shares from John Pantazis for $337 000.00. By 6 February 1986 he had paid $150 000.00 in two tranches of $110 000.00 and $40 000.00 and left a balance of $187 000.00 which was to be liquidated by means of post dated bills. He averred that his father distributed half of the shares and property to the plaintiff because he was married to his sister.

The manner that the two operated was that the plaintiff ran the Mhangura business while the defendant ran the Ruwa operations without any party giving an accounting to the other of the profits and management of the business under his purview. To the witness' knowledge Mhangura Bakery was bought from N. Tselentis who bought it from National Foods. Later Centaur Stores and a farm were purchased by the plaintiff for his own account.

The bakery owned a 5 tonne truck and a trailer, bread ovens, mixers and scales. He did not accept the plaintiff's proposed apportionment of Mhangura Bakery. Page 89 of exhibit 2 purported to be the valuation of the Mhangura Bakery business in November 2007. The opening balance was the capital value that was in the balance sheet drawn by Accounting and Executor Services as at 31 December 2006 of $59 441 447.00 which using the official CPI was in September 2007 interpolated as $2 125 674 292 and at 30 November was cast as $5 978 458 946.00. The balance sheet indicated that the defendant's entitlement in the capital account was

$217 644 502.00 more than that of the plaintiff because he had not made any drawings from the business. The defendant's son did not accept the valuation because it did not revalue any of the movable assets. He disputed the value provided for the truck of $1 000.00. He disagreed with the evidence of the plaintiff's son that there were no motor vehicles in the Bakery as that evidence was at variance with the contents of the balance sheets (pages 95 to 157 of exhibit 2) which valued motor vehicles, furniture and fittings and equipment. The values progressively decreased in the accounts from $2 034 457.00 on 31 December 2002 to $1 829 980.00 ($1 045 285.00) less at the calendar year end in 2003 to $1 661 851.00 ($877 156.00) at 31 December 2004 to $1 523 255.00($738 560.00) in December 2005 and $1 408 694.000.00 (623 999.00) as at 31 December 2006 less in each year the value of property which had a fixed value throughout the period of $784 695.00, which gives the lesser amounts in brackets. The expenses associated with the motor vehicles (oils and repairs excluding insurance) were increasing each year from $5 335 623.00 in 2002 to $47 019 624.00(919 753.00) in 2003 to$66 800 483.00 ($4 863 592.00 for vehicle insurance) in 2004 to $337 348 137.00 ($37 906 583.00) to $ 1 507 995 961.00 ($99 328 788.00) in 2006. The figures in brackets represent the cost of motor vehicle insurance only.

He stated that his father did not receive any profits from Mhangura Bakery between 1992 and 2006.

Pages 3 to 7 of exhibit 12 cover the agreement of sale between Fotini Pantazis and the two parties in respect of Lot 4. It was sold for $3 000.00, which was payable on 6 February 1986. The defendant signed as the purchaser. Pages 8 to 12 depict another agreement of sale executed by John Pantazis on behalf of the seller Panthene Investments and the defendant (acting for the two parties as purchasers) on 6 February 1986 for Subdivision B of $70 000.00 payable by post dated bills in one installment of $5 000.00 on 6 February 1986 and five equal instalments of $10 000.00 beginning from 6 July 1986 and thereafter on the 6th of each succeeding month. The purchasers took over a bond from Gilchrist and Cooksey of $15 000.00. Subdivision B consisted of two houses that were both derelict.

The defendant's son stated that his father negotiated and paid for Subdivision B from his personal account. He referred to pages 13 to 19 of exhibit 12 in order to demonstrate that the defendant paid Gilchrist and Cooksey between 31 December 1988 and 10 December 1992 the sum of $23 848.28 by 15 cheques drawn from his personal account. The original cheques were produced in evidence as exhibit 13. Arrangements to cancel the bond were made after the

bulk payment of $15 172.60 of 20 October 1992 which was receipted on 24 October 1992. He further alleged that the defendant allotted a one half ownership to the plaintiff because he was married to the defendant's sister. He stated that the defendant paid the rates and taxes until 2003. He confirmed that half the rates for Lot 4 had been paid up to 2006.

Subdivision B was walled by the defendant. The house at the back was renovated using Ruwa Supermarket funds, which supermarket was 75% owned by the defendant. The renovations were done by Kufara Contractors at a cost of $178 470.00 (see invoice of 10 April 1992 on page 28 of exhibit 12.)The plaintiff's son lived in this house from 1993 to 2003. He did not pay any rent and his electricity, telephone and security guard expenses were met by Ruwa Supermarket.

The old house in front, which was to go to the defendant, was torn down and in its place the Ever Welcome Inn, a restaurant, was constructed by the defendant and Mrs. Gross. The latter's Standard Chartered Bank statement of account of 31 January 1997 with a credit balance of US $100 174.90 appears on page 22 of exhibit 12. The plaintiff was not involved in the construction and payment of the service providers but he approved of the project. Exhibit 4, the Investment Centre Certificate was a memorial of Mrs. Gross's involvement which she used to obtain a residence permit. Between 23 May 1997 and 8 December 1998, the defendant paid for the goods and services used in the construction of the restaurant from his Zimbank account. A schedule of 63 cheque payments is highlighted on pages 23 to 25 of exhibit 12. While he averred that it represents the purchases for the construction of the restaurant, the cheques do not show what was purchased. The Ever Welcome (Pvt) Ltd cheque book from which the cheques were removed was produced as exhibit 14. He produced two quotations (pages 26 and 27 of exhibit 12) from Homelux dated 13 December 2007 (valid for 14 hours) and MacDonald Timber Industries of 14 December 2007 (valid for seven days) showing that it would cost $ 2, 5 trillion to build a restaurant similar to Plaka and an additional $8, 5 billion to furnish it with the bar counter and ceiling that are presently in the restaurant. Mrs. Gross and the defendant operated the restaurant for 6 months and stopped due to managerial difficulties that surfaced. The defendant then rented it to various tenants. He stated that the plaintiff was not entitled to any rentals from the restaurant.

He stated that the plaintiff's son moved out in 2003 and removed all fittings and fixtures from the house before he flooded it with water. His actions became the subject of police investigations. He denied cutting electricity and water to the house used by plaintiff's

son, averring that he was out of the country at the time. He stated that the Econet mast is situated on Subdivision B; behind the restaurant on the portion of land at the front which the parties allocated to the defendant. He alleged that the rentals from Econet were used to pay rates for the whole property to the Ruwa Local Board.

He stated that the movable items listed in exhibit 5 and the subject of exhibit 7 belonged to the defendant. He referred to a letter dated 10 December 2007 written from Cyprus by Tassos Copanakis on page 48 of exhibit 12 as proof that these movable items were ever sold to the plaintiff. The letter further indicated that the cement tank and electric motor were not sold but left in the custody of the defendant.

The witnesses stated that the defendant paid $159 000.00 to Mr. Thorne for the purchase of Tawona. He produced 5 cheque leaves drawn from the defendant's personal account between 8 February and 31 July 1989, on page 29 and 30 of exhibit 12, to buttress his testimony. He agreed that the balance of the purchase price for Tawona was paid in cash by both parties.

He further stated that the defendant was instrumental in the incorporation of Tawona into the Ruwa Development Master Plan on 30 September 1997. The Ministry of Local Government, Rural and Urban Development approved the change in land use from farm land to urban development. The defendant expended time, energy and money on Tawona. He contracted Parsons Agencies to erect 1 980 meters of security fence at a cost of $23 760.00, which he paid on 11 and 14 December 1989 as appears on page 31 of exhibit 12. That fence was later stolen. He referred to pages 32 to 38 of exhibit 12 to indicate the primary role played by the defendant in the construction of the Trunk Sewer and Water Augmentation schemes for Tawona with other Northern property owners from 4 June 1997.

He further averred that the defendant continued to play a pivotal role in the affairs of Tawona until 2003. The letter from Andrew Brown of Instamac of 30 January 2002 addressed to the defendant and copied to the plaintiff and his son and daughter indicated the primary, controlling and overarching role that the defendant had in the project. The letter demonstrates the attempt by the plaintiff's daughter to derail the project because Instamac was answerable to the defendant in implementing the project. That letter also demonstrated that it was the responsibility of the parties to meet all the initial capital costs of the project, which they would recoup from the sale of stands. Instamac made it clear that the off-site and on-site

infrastructure costs would be built into the cost of the stands as had been done in the development of Gunhill and Bluffhill in Harare.

The defendant also started the marketing of Tawona stands and enlisted the services of John Brown and one Godfrey to sell them. He disputed that Nicholas Bakaris was actively involved in the sale averring that he used to spend 6 months in Greece. He also denied that Maria also sold stands as at the time she lived on campus at a South African university. The defendant opened an account with Zimbank for the project, for which both parties were signatories. The defendant signed on his own behalf while there were three people who signed for the plaintiff. Problems arose because the plaintiff, who had not been initially involved in the project, delayed its implementation because he wanted to be availed the paper work which had been generated in his absence before he could sign cheques.

He demonstrated that the defendant was involved in the sale of stands. Payment could be done to Instamac on site and when the workload became high to Mr. Figg or to the defendant at Ruwa Supermarket. The client would be shown the stands on site by Godfrey then sign an agreement and pay in terms of the agreement. That the defendant received payments for stands is clear from a note at page 47 of exhibit 12 from Mr. Figg directing two purchasers to pay over the weekend to the defendant. The receipted money would be collected later by Mr. Figg for banking.

He denied that the defendant had misappropriated funds. He stated that once the $1, 8 million found by Erasmus Murphy and Associates as owing to the defendant was nominalised to its 2003 value, its value would exceed the $4, 3 million his father had failed to account for.
He indicated that the fraud charges had been dropped because none had taken place. His father surrendered all the receipt books he used to record the payments to EMA from where they were collected by the plaintiff's son who in turn gave them to Lorraine Castedo. He confirmed that his father had not been to Zimbabwe since 2005.

The development of Tawona was put in abeyance by the present court case launched by the plaintiff against the defendant. When development stopped infrastructure was between 50% and 70% complete as stated by Instamac. He was not able to say what had depreciated by none use in the intervening period. His father had invested his time, energy and money in the project such that it would be incorrect to suggest that he was now disinterested in the continuation of the project. To this end the defendant's wife and the witness were in constant

communication with members of the Tawona Housing Committee who included its Chairperson Stanley Chimusvenga and Secretary Eunice Masvetu.

On the costing of a stand, he stated that the recommended practice was that the cost of infrastructure would make up 50% of the price at which a stand was sold. He therefore was unable to agree with the valuation of Tawona which was put at $600 000.00 per square meter regard being had to the Springvale average of over $20 million.

He had no knowledge of the foreign currency payments allegedly made to the defendant for the sale of some of the stands. Mr. Boka had a good relationship with the defendant like all other clients who shopped at the supermarket but many of his cheques were referred to drawer. The result was that he was denied the use of cheques at the supermarket. He stated that despite the period fixed for payment of the deposit, the defendant had allowed Boka to pay out of time as the receipt exhibit 9, dated 15 October 2001, was in the defendant's handwriting. He noted that the other receipt of 27 November 2002 was not receipted by the defendant but by Erasmus Murphy and Associates.

He accepted that the receipts exhibit 11 showed that Boka spray painted the defendant's two cars but believed that Boka was paid cash for his services as indicated in his receipts.

He stated that his father was in the country in March/April when Boka received the letter from Lorraine Castedo canceling the agreement of sale.

The defendant wrote to his sister, the plaintiff's wife, and sent her a map suggesting how they could divide the properties. Her response at the back of the map in Greek was that she did not want anything from the Ruwa properties. The map in question is found on pages 43 and 44, while the response in Greek is on page 45 of exhibit 12.

On page 41 the defendant suggested that 609 hectares on Subdivision B on which the restaurant was built be apportioned to him while the remaining 609 hectares on which the house his son used to occupy would be apportioned to the plaintiff. On Lot 4, the defendant sought to have the 1 139 hectares abutting the house on Subdivision B while the plaintiff would also get the remaining 1 139 hectares abutting the restaurant.

On how the properties should be partitioned, he first discounted Mr. Lamb's recommendation on the basis that he was commissioned by plaintiff to assist him to quantify his claim. He took the view that the document was for the plaintiff's use only and was not designed for Court.

He suggested that as Mhangura was adversely affected by the closure of the mine, it was best to sell the assets through a court appointed liquidator who would distribute the proceeds equally between the parties.

As for Lot 4, he suggested that it be divided along the terms set out in the sub divisional permit dated 25 March 1998, which he produced as exhibit 15. It approved the division of Lot 4 into two stands measuring 1 075 hectares each separated by a 15m wide road. The stand adjourning the restaurant on Lot 4 was designated commercial land while the one adjourning the house was designated residential land. The same road also subdivided Subdivision B into two equal stands measuring 6 070 m². He was not aware that it had since been cancelled. On Subdivision B the front area with the restaurant was designated into a commercial stand while the back area with the house was designated into a residential stand. He proposed that the back be allocated to the plaintiff with the defendant receiving the front portion. This was the desire of the parties when Nicholas Bakaris occupied the house and the defendant by mutual agreement demolished the old house and built a restaurant with Mrs. Gross.

The witness suggested that the Court utilize exhibit 15 in allocating Lot 4 and not page 43 of exhibit 12 and if the Court considered that an adjustment was necessary, then, the defendant's share in Mhangura could be awarded to the plaintiff.

He proposed that Tawona be divided in m² because of the inflationary economic environment prevailing in Zimbabwe. The first step would be to calculate the cost of completing the project in m² for the residential stands. Thereafter the remaining stands would be divided equally between the parties. He proposed that the two commercial stands 8387 and 8388, each measuring 14 620m² (according to page 347 of exhibit 1) and the two flat stands 8391 and 8392, measuring 13 750m² and 12 500m², respectively according to exhibit 8) be shared in such a way that each party gets one of each after calculating the square meters. The surrendered portion of the road could be divided equally in square meters. The same formula of calculating square meters and dividing them equally could be used in apportioning the flat stand 8114 (measuring 23 750m² on p.346 of exhibit 1) and the motel stand 8113 (measuring 30 000m²).

His view was that the cost of each stand in square meters would incorporate the cost of infrastructural development on that stand. This would mean that half the square meters of any

stand would be equal to the cost of infrastructure. The plaintiff stored some pipes in 2003 that were purchased by the parties for the project whose cost would have to be deducted from the cost of each stand. He further suggested that in the event that one of the parties does not develop his stands, then the one carrying out the necessary developments could be given the inactive party's square meters that would be equivalent to half the cost of each stand.

He did not accept exhibit 6 because it was predicated on the wrong premise that the stands were for high density development which would cost six times more than a low density development project. He was aware that Tawona was a low density project, so it would cost six times less. In my view, the stand sizes on Tawona vary in size from medium to low density given that, according to the valuer, high density stands range between 300 and 500 square meters while low density stands are above 2 000square meters. Tawona would require the same sewerage reticulation system as a high density project as the residential stand sizes would not accommodate the construction of independent septic tanks on each stand.

He averred that the defendant was willing to pay the cost of the embankment at the original cost and not at the cost computed by Mr. Lamb.

He was cross examined at length. Any evidence he gave on what happened before 1990 would be based on what he was told by his father. He did not dispute that the farm in Mhangura was not purchased by the plaintiff as he was merely leasing it from Mhangura Mine.

He was adamant that the lorry and trailer belonged to the bakery and not to the plaintiff as they have from 1986 consistently appeared in the financial statements as its assets. His version that the defendant was not involved in the running of Mhangura was at variance with the information in exhibit 17 which showed that he was a salaried partner who also shared in the profits of the partnership.

When Lot 4 and Subdivision B were purchased in 1986, he was a toddler of 3. When they were transferred to the parties in 1989 he was 6. When the Gilchrist and Cooksey bonds were liquidated in 1992, he was 9. He was too young to understand the nature of the business relationship between the parties. All he could say was that his father acted as an agent of the parties in executing the agreements of sale in exhibit 12 and paid his share of the purchase price from his cheques book. The fact that his father used his funds to pay his share of the purchase price did not mean that the plaintiff did not make any financial contributions towards

the purchase of these properties. His averment that his father donated a one-half share to the plaintiff was not pleaded. It was also not proved. It was at variance with his admission that while his father paid $159 000.00 (using cheques) of the $400 000.00, the outstanding balance was paid in cash by both parties.

He contradicted himself on the nature of the agreement between the parties on the restaurant. He accepted that as a joint owner of Subdivision B, the plaintiff had an interest in the development of the restaurant and that he must have given his consent to its construction. He had no personal knowledge that the parties had in 1992 informally apportioned Subdivision B between themselves, yet he maintained that the plaintiff took the house at the back while the plaintiff took the front portion where the restaurant was built. He could not explain why, in those circumstances, the renovation of the house that was allocated to the plaintiff was refurbished from the proceeds of Ruwa Supermarket while the restaurant was built by the defendant's own funds (per the invoice on page 28 of exhibit 12 dated 24 April 1992 (when the witness was 9) in the sum of $178 470.00). It seemed to me that he was not being truthful in his evidence when he distanced the plaintiff from the construction of the restaurant. The introduction of Mrs. Gross into the restaurant business did not mean that the legal relationship between the parties *inter se* had ceased to exist. I found the suggestion that it was built without the plaintiff's knowledge as suggested by Mr. *Matinenga* in cross examination without merit as the plaintiff lived on the property.

The defendant's son was simply not privy to the arrangements between the parties.

The balance sheet and the schedule to it reflects the Bedford TL 1260 (468-073Z) and trailer as fixed assets of the bakery. It also reflected the defendant as a salaried partner who shared in the profits equally with the plaintiff. The witness stated that the vehicle was used to ferry goods between Harare and Mhangura. The invoice on page 18 of exhibit 12 from Gilchrist and Cooksey (Pvt) Ltd, dated 24 October 1992 indicated that the $15 000.00 for repayment of mortgage and interest at 21% from 1 October to 20 October 1992 of $172.60 was paid, is in the joint names of the parties.

In one vein he alleged that the parties agreed that the plaintiff was in charge of Mhangura while the defendant ran Ruwa without accounting to each other and in another he stated that the defendant managed the Ruwa properties in consultation with the plaintiff. This prevarication was also apparent when he was asked on Tawona's future development path. He was doubled minded. He preferred the parties to engage a neutral contractor to complete the

project. He seemed to believe that the parties could continue to work together. He changed his mind when it was shown that in the exchange of correspondence on 16 and 24 June 2005 the parties were agreed that it was unhealthy and impractical for them to work together in the wake of disagreements and litigation. No doubt, this realization dawned on the parties after the plaintiff stopped the processing of the subdivision of the flat stands and the surrendered road land into thirty-three 1 000 m² stands on 7 January 2005 following the application made by the defendant on 8 November 2004 on the ground that he had not been consulted yet when the original permit of 30 September 1997 was issued, the defendant had acted in a similar manner.

He made out that the parties' attempts to reach a settlement failed. In 2004 both his parents came to Zimbabwe to settle the matter. In 2007, his mother was in the country for three months. She was misled by Lamb that Tawona was a high density development which would be six times more expensive than a low density project. While he was unable to give the qualifications of Kurayi Matsika, the author of the estimate of the construction of a building similar to the restaurant that appears on page 26 of exhibit 12 and of constructing a new bar by McDonald Timber Industries he demonstrated the estimate by Masaya under valued Subdivision B.

Under cross examination he did not dispute Mr. Miles' evidence, updated as at 27 November 2007 and accepted that the costs of completion could even be higher. In re-examination he refuted the figures given by Miles on the ground that they were inaccurate as they were based on the Old Mutual share price index. He suggested that a new evaluation on the cost of completing the project should be done by an independent evaluator using square meters and not monetary terms.

The witness spoke with a forked tongue. In one vein he denied that the defendant was reluctant to contribute money to develop Tawona and in another declined to contribute to the development of the North-South road demarcated in exhibit 8. He again denied that the defendant wanted the Tawona project to be self financing and yet he refused to seek outside funding to develop infrastructure. He averred that the cost of infrastructural development was imbedded in the value of stands. The defendant was reluctant to contribute financially to the Tawona project despite the denials of his son. He relocated with his family to Greece. His wife and son have visited Zimbabwe in order to resolve this matter.

The defendant did not produce any evidence of valuation of the properties. He was content to criticize that produced by the plaintiff. He proposed a general method of distributing the properties which was not based on value but on square meters.

He gave a glimpse on why the proposals of 5 and 18 December 2006 failed. The defendant could not accept a settlement which would deny him the restaurant. The counter proposal by the plaintiff in his letter of 18 December floundered on the rock of the restaurant. He did not accept Lamb's exhibit 6 or the plaintiff's counter offer in his letter of 18 December 2006 or Lamb's table on page 75 of exhibit 2 as the fairest way of allocating the properties in dispute.

On Mhangura, he preferred that a liquidator be appointed and the parties share the proceeds equally. He was also amenable to a buy out by the plaintiff provided Mhangura was evaluated by an independent evaluator appointed by the parties.

While he preferred that square meters be used to apportion the properties he was not averse to the plaintiff buying out the defendant's interest as long as an independent evaluator was appointed.

Mrs. *Wood* accepted that the defendant was a poor witness. In my view, he was overawed in cross examination. While he produced documents which demonstrated the defendant's pivotal role in the acquisition and development of the properties in question, his interpretation of those documents was contrived. He sought to rely on Greek tradition that was at variance with the documents that he produced. He erroneously subsumed that the defendant was in a joint business relationship with the plaintiff's wife. His age at the time the business relationship was cultivated undermined his knowledge of events. It was necessary for the defendant to testify on the nature of that relationship. Expressions of ignorance by the defendant's son on this aspect failed to advance the defendant's case. His evidence in this regard also contradicted the defendant's pleadings in this case and in paragraph 9.3 of his opposing affidavit in case number HC 7906/03.

Notwithstanding these observations, the totality of the documentation demonstrated beyond a shadow of doubt that the plaintiff and the defendant were equal joint holders of the four properties in question. In addition, the parties were partners in the Mhangura business operations; see Amler's, *infra*, at page 329. The documentary evidence also demonstrated that the defendant remained actively involved in the development of Tawona until 2004 by seeking a subdivision permit for the land earmarked for flats.

THE LAW

It was common cause that the plaintiff's claim was based on the *actio communi dividundo.* According to JOUBERT JA in *Robson v Theron* 1978 (1) SA 841 at 854H-855A the *actio communi dividundo* is a claim for the division of joint property. The learned JUDGE OF APPEAL stated thus:

> "The *actio communi dividundo* has a two-fold purpose, viz. to claim division of joint property and payment of *praestationes personales* (personal items of payment) relating to profits enjoyed or expenses incurred in connection with the joint property. *Van der Linden,* 1.15.15; *Voet,* 10.3.3 Van Leeuwen, *Censura Forensis*, 1.4.27.2,4."

To the same effect is *The Laws of South Africa* (LAWSA) vol. 27 paragraph 414 which states that:

> "The institution of the *actio communi dividundo* does not entail partition only but also an adjustment of the various claims amongst the co-owners. All extant expenses for necessary improvements, disproportionate gathering of fruits and losses suffered on account of the fault of a co-owner are set off against each other."

Robson v Theron, at page 855A-H, sets out the nature and effect of the *actio communi dividundo* and then summarizes it at 856G-857D in these words:

> "(B) The principles of the common law applicable to the *actio communi dividundo* may be briefly summarized as follows:
>
> 1. No co-owner is normally obliged to remain a co-owner against his will.
> 2. This action is available to those who own specific tangible things (*res corporales)* in co-ownership, irrespective of whether the co-owners are partners or not, to claim division of joint property.
> 3. Hence this action may be brought by a co-owner for the division of joint property where the co-owners cannot agree to the method of division. Since a partnership asset is joint property which is held by the partners in co-ownership, it follows that a partner may as a co-owner bring this action for the division of a partnership asset where the co-partners cannot agree to the method of its division. This would obviously cover the position where, after dissolution of a partnership, a continuing partner as a co-owner retains possession of an undivided partnership asset. A retiring partner as a co-owner would accordingly

be entitled to institute this action against the continuing partner as co-owner to compel a division of the partnership asset in question.

4. It is for purposes of this action immaterial whether the co-owners possess the joint property jointly or neither of them possesses it or only one of them is in possession thereof.
5. This action may also be used to claim as ancillary relief payment of *praestationes personales* relating to profits enjoyed or expenses incurred in connection with the joint property.
6. A court has a wide equitable discretion in making a division of joint property. This wide equitable discretion is substantially identical to the similar discretion which a court has in respect of the mode of distribution of partnership assets among partners as described by *Pothier*.

(C) The principles of the common law which are applicable to the *actio communi dividundo* have in Roman-Dutch law been extended to intangible things *(res incorporales)* which are held in co-ownership by means of the *utilis actio communi dividundo."*

The court has a wide discretion in partitioning and distributing the joint property. It is guided by what is fair and equitable in the circumstances before it. LAWSA, *supra*, at paragraph 414 graphically outlines the extent of the discretion in these terms:

> "If the parties cannot agree on the terms of partition or on the appointment of a suitable arbitrator, an *actio communi dividundo* can be instituted for the partition of the property. However, the court will not countenance such an application if the parties have not previously seriously endeavoured to reach an agreement on the terms of a partition. It is customary that a proposal of a possible division forms part of the application but the court is not bound by such a proposal. The court has a wide discretion to effect an equitable partition amongst the co-owners. The court usually endeavours to divide the property physically amongst the co-owners in accordance with the value of the property and each co-owner's share in it. If such a division is uneconomical or inequitable, the court may, for instance, allot the property to one co-owner and order him to pay compensation to the other co-owners. This type of division occurs as a rule in the case of indivisible articles such as a building, a painting or a

farm the partition of which would result in uneconomic portions. If a farm of one of the co-owners borders on a farm held in common, the court will usually allot a portion adjacent to his farm to that co-owner. In appropriate circumstances the common property will be decreed to be sold by public auction and the proceeds divided amongst the co-owners. In a case which concerned the partition of a farm which belonged to two brothers the court decided that the most equitable solution was to hold a closed auction with the two brothers bidding. The court also has discretion to postpone partition or sale of the common property if this will prejudice the co-owners or any one of them."

The same point is made by Kleyn and Boraine in *Silberberg and Schoeman's The Law of Property* 3rd edition at page 312-313. The learned authors state thus:

"For, if co-owners cannot agree on the manner in which the property is to be divided among them, the court will make such order as appears to be fair and equitable in the circumstances. Where the property, for example agricultural land, is indivisible the court will either order one of the co-owners to take it over and pay out the others, or it will order the property to be sold and the proceeds to be divided among the co-owners according to their shares. In *Kruger v Terblanche* 1979 (4) SA 38 (T) at 39 an order was made, by consent, that certain agricultural land, being indivisible, was to be sold to the highest bidder at a *private auction of the joint owners.* The applicable action is the *actio communi dividundo*, by means of which not only division, but also adjustment may be claimed. Adjustment may relate to, for example, damage caused to or profits enjoyed or expenses incurred in connection with the joint property."

See also Amler's *Precedents of Pleadings*, 5th Ed at p 240 and *Bennet NO v Le Roux* 1983 (2) ZLR 301(H) at 303E-304B.

RESOLUTION OF THE MATTER

It was common cause that the parties were unable and unwilling to manage the joint properties together. It was also common cause that between 2003 and 2007 they had seriously endeavoured but had failed to reach agreement on the terms of the partition of the four properties in question and the bakery business. In their negotiations the parties agreed that they were equal co-owners of the properties under consideration. This is clear from the offers and counter offers made in their respective correspondence of 5 and 18 December 2006 and in

Lamb's letter of 28 February 2007. I am therefore at large in determining the most equitable way of partitioning these properties.

Mr. *Matinenga* contended that in arriving at an equitable partition of the joint property, I was obliged to consider the expenses incurred and the profits, benefits and other advantages missed by the plaintiff in the joint property notwithstanding that these had not been specifically pleaded. Mrs. *Wood* disagreed. She urged me to disregard them on the ground that these had not been pleaded and as a result were prejudicial to the defendant.

It was common cause that the expenses that were incurred by the plaintiff were for the construction of the embankment for the water reservoir. Mr. *Matinenga* contended that the advantages that were enjoyed by the defendant to the exclusion of the plaintiff were for rentals from the restaurant and Econet; the value of the movable assets purchased from Copanakis and the cash misappropriated from the stand sales. He submitted that the starting point was to consider the parties as equal joint owners and allocate a one half share of the total value of the properties to each party. The second stage was to determine the expenses incurred by the plaintiff and the value of the advantages enjoyed by the defendant. The third stage was to deduct one half of the expenses incurred by the plaintiff in the construction of the embankment from the half share of the defendant and add it to the plaintiff's portion. The next stage was to deduct half the value of the advantages enjoyed by the defendant and add them to the plaintiff's portion.

Mr. *Matinenga* urged me to accept the evidence of value that was led by Masaya, Miles and Lamb, which was conveniently set out in Lamb's table. He submitted on the authority of *Maketo & Anor v Wood & Ors* 1994 (1) ZLR 102 (H) at 131 that the evidence on value was sufficient for me to come to a decision. He further submitted that Lamb's table accurately captured the fairest and equitable way of partitioning the properties between the parties.

In her submissions, Mrs. *Wood* did not impugn the formula advanced by Mr. *Matinenga*. She first attacked the sufficiency of the evidence that was adduced on the value of the expenses incurred by the plaintiff to the exclusion of the defendant. She relied on the principle of nominalism. She also disputed that the plaintiff had established on a balance of probabilities the following facts:

a) the actual amounts of rentals received by the defendant from the restaurant and Econet;

b) that movable assets were purchased from Copanakis for the account of the co-owners and even if that were proved, their values;

c) that the defendant had misappropriated cash from the sale of stands and even if he had done so, the amount that he misappropriated.

I will deal firstly with the submissions made by counsel on the necessity of pleading the ancillary claims of the expenses incurred and benefits enjoyed. Mr. *Matinenga* relied on the sentiments expressed by Kleyn and Boraine, *supra*, in the last two sentences of the quotation cited above; LAWSA, *supra*, which are both to the effect that the *actio communi dividundo* may be used to claim for adjustments for profits enjoyed and expenses incurred. It is axiomatic that pleadings must set out the cause of action in clear and concise language. In his declaration, the plaintiff sought the termination of joint ownership only. He did not seek ancillary relief for the four properties in question. He was the one who dragged the defendant to court. He was aware what it is that he wanted from the defendant. He was aware as shown by his initial summons that he had to set out separate claims for rentals and any other ancillary claims he may have sought. In the original summons he did just that in respect of his claims on Lot 3A, which were settled out of court on 26 September 2003. By his failure to plead the ancillary relief that he now seeks, he misled the defendant as to the nature and extent of his claim. After all, in our practice, a claim is set out in the declaration and not in evidence. This is done to notify the defendant of the nature of the claim against him so that he can respond to it appropriately. The defendant did not prepare his defence with the ancillary claims in mind. He was, therefore, prejudiced in the conduct of his defence.

In any event, I understood the text book writers referred to by Mr. *Matinenga* to say that a joint owner may use the *actio communi dividundo* to seek partition and or adjustments. In my view the use of the word 'claim' by these authors underscores the need for the plaintiff to specifically plead the ancillary claims that he set out in evidence. Amler's, *supra*, at page 241 on the authority of *Robson v Theron*, *supra*, at 857C and *Rademeyer v Rademeyer* 1968 (3) SA 1 (C) underscored the need to claim for the ancillary relief that the plaintiff sought. Accordingly, I agree with Mrs. *Wood* that as those claims are improperly before me, I cannot take them into account in the partitioning of the four properties in question.

In the alternative, Mrs. *Wood* submitted that the adjustments sought by the plaintiff were not proved. She conceded that the expenses incurred by the plaintiff in the construction of the embankment were proved. These were in the sum of $178 393 365.00 (see pages 328-334 of exhibit 1) and the defendant was willing to pay half that amount as his share. The plaintiff did not lead evidence on the actual rentals that were received by the defendant for which he sought an adjustment. There was no basis for using a complex and mysterious formula for estimating the rentals received when the actual amount was ascertainable. The plaintiff proved to be his own worst enemy by failing to plead this adjustment. On the movables that were allegedly purchased from Copanakis, the documentary evidence produced by the defendant from Copanakis destroyed the plaintiff's pretensions that these assets were jointly owned. But even if they were proved to have been jointly owned, the plaintiff failed to prove their value. The use of a single quotation for new property was an inadequate method for evaluating used property. Furthermore, it would appear on the authority of *Phillip Robinson Motors (Pty) Ltd v N.M. Dada (Pty) Ltd* 1975 (2) SA 420(A) at 428F-G and 429F and *Parish v King* 1992 (1) ZLR 216 (S) at 225C-D that the plaintiff ought to have launched a delictual claim for the disposal of what would have been joint property. *Parish v King, supra*, makes the point that such disposal would amount to a delictual rather that a contractual breach.

Mrs. *Wood* further raised the issue of prescription against some of the adjustment based claims. The plaintiff amended his settled claims after the defendant raised prescription on his claims for rentals in the settled claims for Lot 3A. He was aware that by the date of trial in December 2007, all claims sought after 4 December 2004 would have prescribed. The movables purchased from Copanakis fell into this category as they were sold in 2003. Into this category would fall all rentals sought and all sums allegedly misappropriated from the sale of stands. I agree with her submission in this regard.

As regards the amount that was allegedly misappropriated, the evidence used by the plaintiff indicates that this could be in the region of $2, 5million if regard is had to the $1, 8 million of his own money that the defendant expended. The plaintiff stated that the misappropriation took place between 2001 and 2002. The defendant handed all the books of account to Figg who in turn surrendered everything to EMA who in turn handed all to Lorraine Castedo. In the absence of reconciliation from either EMA or Lorraine Castedo of the sums received by the defendant and those handed to Figg, there was no evidence to show that any money was misappropriated. The schedule by EMA simply listed the amounts of money that

were in the receipt book that was compiled by the defendant. The EMA accounts did not indicate the presence of a deposit book or any sums that were banked by Figg. There was insufficient evidence to prove misappropriation, which needed to be proved beyond a reasonable doubt because of the criminal connotations involved. See *Pitluk v The Law Society of Rhodesia* 1975 (2) SA 21 (RAD*)* and *Mugabe and Mutezo v Law Society of Zimbabwe* 1994 (2) ZLR 356(S) at 363-365B.

The plaintiff failed to justify the necessity for an adjustment of the expenses he incurred and the benefits he alleged accrued to the defendant. His ancillary claims would also fail on the ground that they were not proved by the evidence that he called.

Mr. *Matinenga* also submitted that the values of the properties had been proved by the evidence called by the plaintiff. He urged me to use them in partitioning the properties in a manner that achieves a clean break between the parties. The estimates on value were eroded by inflation by the time of trial and more so by the time of judgment. I have already dealt with the deficiencies in the methodologies that were used by Masaya, Miles and Lamb in setting the values of the four properties.

The method used by Lamb of upgrading values is contrary to our law. It offends against the principle of nominalism that was enunciated by E M GROSSKOPF JA in *SA Eagle Insurance Co Ltd v Hartley* 1990 (4) SA 833 (A) at 840F-G in the following terms:

> 'It would represent a revolutionary transformation of our legal system if courts were to be called upon to determine the true economic value (in terms of purchasing power) of all obligations sounding in money. I need not, however, labour this point: currency nominalism, for whatever reason, is firmly entrenched in our law.'

At 839G she had defined currency Nominalism in these terms:

> 'This result seems to me to be in conflict with the principle of nominalism of currency which underlies all aspects of South African law, including the law of obligations. Its essence, in the field of obligations, is that a debt sounding in money has to be paid in terms of its nominal value irrespective of any fluctuations in the purchasing power of currency. This places the risk of a depreciation of the currency on the creditor and saddles the debtor with the risk of an appreciation.'

See also *D'ambrosi v Bane and Others* 2006 (5) SA 121 (C) at 126C-I

The learned JUDGE OF APPEAL emphasized at 841 E-F that while the principle affected monetary debts it did not apply to general damages. In dealing with such damages one

would be determining, not a monetary debt but the valuation of a non-monetary loss, which had to be made in terms of the currency values obtaining at the time of valuation, and not in an earlier time. She further noted that a valuer of a farm would not use the currency of the past and concluded that "a monetary debt is not, however, subject to a similar type of valuation. It has to be paid according to its nominal value". (underlining is my own for emphasis)

The principle was adopted in Zimbabwe by CHINHENGO J in *Muzeya v Marais & Anor* HH 80/2004 at pages 10-12 and passing reference was made by the JUDGE PRESIDENT in *Marume & Anor v Muranganwa* HH 27/2007 at page 4 of the cyclostyled judgment. Courts have adopted a conservative approach to the question of determining the true economic value of money because they defer to the executive branch of government the formulation of economic policy. The Prescribed Rate of Interest Act [*Cap 8:10]* is one piece of legislation which empowers the Minister of Justice, Legal and Parliamentary Affairs to revalorize currency through the management of interest rates. He is best suited than a court of law to assess the competing economic interests of inflation, money supply growth, export performance and balance of payments support amongst other variables. See also *Eden v Pienaar* 2001 (1) SA 158 (W).

The principle of nominalism militates against the upgrading of values as was employed by Lamb in his table. While nominalism would not apply to evaluation, of the properties in issue or any other property for that matter, it would apply to monetary debts such as those that the plaintiff referred to as adjustments. It would apply to the dura wall and roofing assets disposal; property sales not banked, Plaka rents not banked and reservoir payments that appear in Lamb's table. It would not apply to fixed property evaluation, the cost of works in progress, that is, the cost to complete infrastructure for sold properties and the cost to complete the reservoir that appear in the same table.

In resolving the issue before me, I will be guided by the principles that I have set out in regards to the wide discretion that I have and the law to achieve an equitable apportioning of the four properties and the bakery business. Even though Mhangura Bakery is a partnership, it is within my common law powers to divide its assets between the co-partners. See *Theron's* case, *supra,* at 857A. The defendant was amenable to the plaintiff buying him out as long as an independent evaluation of the all the assets of the bakery was commissioned by the Court.

In dealing with Lot 4, Subdivision B and Tawona, I will by guided by the caution in Amler's *Precedents of Pleadings*, *supra,* at page 240 that to achieve an equitable distribution

the court is empowered to divide the property if that can be done physically and legally. The full quotation states thus:

> "The general rule is that the court will follow the method which is fair and equitable to both parties. Examples of such methods include a division of the property, if that can be done physically and legally; *Badenhorst v Marks* 1911 TPD 144; a sale by public auction and division of the nett income *Estate Rother v Estate Sandig* 1943 AD 47; an allocation of the property to the one co-owner *Robson v Theron supra*; and a private auction restricted to the co-owners and a division of the nett amount *Kruger v Terblanche* 1979 (4) SA 38 (T)."

The ideal situation would be for the Court to allocate each party a one half share in Lot 4 and Subdivision B in terms of the subdivision permit No 12/1997, exhibit 15. It was unclear from the evidence whether the subdivision permit for these two properties was cancelled. Exhibit 15, however, indicates that the permit for the subdivision of the two properties was granted on 25 March 1998. The subdivision permit envisages the construction of a 15 meter wide road across these properties which have the effect of dividing each property into two equal portions. While I could order registration of title to each party against each portion of each property, the construction of the road would require the parties to work together. Past experience and the breakdown of the business and personal relationship between them is such that they will not be able to work together. It would thus be inequitable to apportion each party a share in terms of the subdivision permit exhibit 15. The allocation of the portions on each property may be difficult bearing in mind that the front portions would be used for commerce while the back portions would be for residential development. The defendant sought the front portions on the basis that he holds greater interests in the restaurant on Subdivision B. He would end up with the more valuable commercial portions while the plaintiff would be saddled with the less lucrative residential stands. The defendant's prayer in this regard would not be equitable.

The other option available would be to order the evaluations of the two properties and allow one of the parties to buy out the other in a specified time frame, failing which the properties would be sold to best advantage with the parties sharing equally in the net proceeds. This option would work but our hyper inflationary environment may result in injustice to the party whose portion is bought out or to both if the properties are sold and they

share in the net proceeds. The second option would thus be inequitable to either one or both parties.

In the exercise of my discretion, I am obliged to consider the sentimental attachments the parties have to the properties in question and the Mhangura property and business. The evidence showed that the plaintiff was in charge of the Mhangura operations. Until the economic down turn occasioned by the closure of Mhangura Mine and the land reform program, he lived in Mhangura. He is more attached to Mhangura than the defendant. The plaintiff was the only one who made drawings from the Mhangura operations. The defendant maintained that the Mhangura operations were solely managed by the plaintiff. The plaintiff also demonstrated his sentimental attachment to Mhangura by undervaluing the movable assets of Mhangura and by seeking to cling to the motor vehicles. The defendant was prepared to forego his share in Mhangura in exchange for an equivalent share due to the plaintiff in any other property.

One the other hand, while the parties are equal owners in Subdivision B, the defendant has greater sentimental value to it because of the work he carried out on the restaurant. He was also responsible for the renovation of the house in which the plaintiff's son used to live. The funds that were used on both buildings came from the supermarket in which the defendant held 75 % of the shares against the plaintiff's 25 %. That the defendant played an overarching role than the plaintiff was demonstrated in the questions that were directed at the defendant's son in cross examination concerning the construction of the restaurant. The defendant would ideally be entitled to a greater portion of Subdivision B.

Subdivision B has existing buildings and has a hectarage of 1, 2140 while Lot 4 has a wall around it and has a hectarage of 2, 2781. While Masaya's evaluations were inaccurate, they demonstrated that Subdivision B is more valuable than Lot 4. Masaya's unreliable valuation also showed that even the aggregate of the values of Mhangura and Lot 4 would not match half the value of Subdivision B. In my view, however, Lot 4 has more potential for future developments than Subdivision B.

I am of the view that the orders that I contemplated above of evaluations that are accompanied by buy outs or disposals would be cumbersome, dilatory, expensive and unsatisfactory. The most fair and just method of apportioning these three properties would be to allocate the Mhangura property and business; and Lot 4 to the plaintiff; and Subdivision B to the defendant. I will accordingly make orders to that effect.

The property which remains to be apportioned is Tawona. Both counsel correctly contended that the parties did not desire the apportionment of Tawona that was outlined in their respective correspondence of 5 and 18 December 2006. They were also agreed that the recommendations made by Lamb in his letter of 28 February 2007 were not workable. My view is that the net effect of the suggestions that were made in these three letters would require the parties to work together in the development of Tawona. It was common cause that they did not have such an inclination. Accordingly, I agree with both counsel that the suggestions that were made in December 2006 and February 2007 are unworkable and would result in injustice between the parties.

Tawona is a development project in which the parties have an equal stake. The defendant accepted that the plaintiff was the one who incurred expenses in the construction of the embankment. He was willing to pay a one half amount of the expenses. Based on my finding that these were not pleaded and that they had prescribed, the defendant is not legally obliged to pay them. The due amount, in the light of the principle of nominalism and after the revaluation of our currency in August 2006 and August 2008, would be insignificant. In fairness to the plaintiff, I find that the amount he paid would be counteracted by the incalculable and invaluable energy that the defendant injected into the development of the project before he left the country in 2003.

The defendant suggested an attractive method of apportioning Tawona that is based on square meters. The parties were agreed that the value of a stand incorporates the cost of developing infrastructure to the extent that half the value of the stand would be equal to the cost of infrastructural development. Mrs. *Wood* urged me to employ this method of allocation in such a way that whoever between the parties is ordered to develop the infrastructure would end up receiving a 75 % as against a 25% share of the property. The submission effectively means I would be obliged to award 75% of Tawona to one party and direct that party to take charge of infrastructural development. The remaining 25 % would go to the passive party. I find the suggestion fair and equitable.

I will adopt it with modifications. The evidence revealed that the defendant and his family moved to Greece in 2005, where he is now domiciled. He will be prepared to send his son to develop Tawona, if the Court so directs. The defendant's son indicated that the defendant was amenable to the plaintiff buying out his interest in Tawona, provided the value of the property was properly assessed by an independent evaluator. I am satisfied that the

defendant's interest in the development of the project has waned. The plaintiff's interest in the development of Tawona is still very high. The task of developing Tawona will thus fall on the plaintiff. He knows what needs to be done to complete the project. He is resident in Zimbabwe. He paid Tawona's share of the construction of the embankment. The most equitable way of apportioning the property would be to award to the plaintiff a 75 % share of Tawona and the remaining 25 % to the defendant. I will further direct that the plaintiff purchase the defendant's share in a specified time frame. If he fails to do so, then the property would have to be sold by public auction with the parties sharing equally in the nett proceeds thereof.

COSTS

Neither party's position has carried the day. In the circumstances each party shall bear his own costs.

DISPOSITION

Accordingly, it is ordered that:

1 a. Stand 244 of Mangula Township 2 of Lot 1 of Plateau registered under Deed of Transfer number 3731/1986 in favour of Constantinos Bakaris and George Kattavenos is hereby awarded to the plaintiff.

b. The defendant shall within 10 days of being called upon to do so by the plaintiff, sign all documents necessary to effect transfer to the plaintiff of his one-half share in the property described in (a) above, failing which the Deputy Sheriff shall sign all such necessary documents.

c. The costs of the transfer shall be borne by the plaintiff

2 The Mhangura business trading as Mhangura Bakery and Supermarket is awarded to the plaintiff.

3 a. Lot 4 of York of Galway Estate registered under Deed of Transfer number 2729/1989 in favour of George Kattavenos and Constantinos Bakaris is hereby awarded to the plaintiff;

b. The defendant shall within 10 days of being called upon to do so by the plaintiff, sign all documents necessary to effect transfer to the plaintiff of his one-half share in the property described in (a) above, failing which the Deputy Sheriff shall sign all such necessary documents.

c. The costs of the transfer shall be borne by the plaintiff.

4 a. Subdivision B of York of Galway Estate registered under Deed of Transfer number 8579/1989 in favour of George Kattavenos and Constantinos Bakaris is hereby awarded to the defendant.

b. the plaintiff shall within 10 days of being called upon to do so by the defendant, sign all documents necessary to effect transfer to the defendant of his one-half share in the property described in (a) above, failing which the Deputy Sheriff shall sign all such necessary documents

c. the costs of the transfer shall be borne by the defendant.

5 The plaintiff is awarded 75 % share of Tawona Portion of Galway Estate also known as Tawona Estate of Mutare Road registered under Deed of Transfer number 7916/1988 in favour of George Kattavenos and Constantinos Bakaris while the defendant is awarded the remaining 25 % share.

a. The Registrar shall, within 10 days of this order from his list of evaluators, appoint an evaluator other than Seef Properties;

b. The evaluator appointed in terms of (a) above shall evaluate the said property and submit his report to the parties and the Registrar within 10 days from the date of his appointment;

c. The costs of such evaluation shall be shared equally between the parties;

d. The plaintiff shall within 30 days of the receipt of the report referred to in (b) above make payment to the defendant in one lump sum of such amount as represents 25 % of the net value of the property;

e. In the event that the plaintiff fails to effect such payment within the period referred to in (d) above, the property is to be sold by public auction and the net amount distributed equally between the parties.

6 Each party shall bear his own costs.

Gill, Godlonton & Gerrans, plaintiff's legal practitioners

Byron Venturas & Partners, defendant's legal practitioners.