FORM SCAFF (PRIVATE) LIMITED
versus
CHARLES LINZI

HIGH COURT OF ZIMBABWE
KUDYA J
HARARE, 30 January and 1 February 2013

Civil Trial

B Mugomeza, for the plaintiff
B Furidzo, for the defendant

KUDYA J: The plaintiff company issued summons against the defendant, a building contractor on 16 February 2011 seeking payment of US$1 340-00 per month hire costs from 1 February 2009 to the date the defendant returns scaffolding equipment and the return or alternatively the value of that equipment in the sum of US$30 777-55. The defendant contested the action.

The plaintiff called the evidence of two witnesses. These were its credit controller Geraldine Mountford and clerk Munorwei Sibanda. In addition two documentary exhibits, the fifty paged bundle of documents exh 1 and the Form Scaff Current Item Based Price List Catalogue for February 2009, exhibit two were produced. The defendant testified and called one other witness. In addition he produced one documentary exhibit, exh 3.

Most of the facts in this matter were common cause. On 22 October 2007 the defendant completed a Form Scaff processing form on p 24 of exh 1 that set out his name, physical home address and postal address and the site address where the scaffolding material was to be used, his identification number, telephone and cellular numbers. He gave the site address as stand 2751 Hay hill Glen Lorne Harare. He paid a deposit of ZW$49 million. On dates ranging from 22 October to 2 November 2007 the defendant hired scaffolding equipment from the plaintiff listed in para 3 of the declaration. The hire advice notes listing this property form pp 26 to 31 of exh 1. He was aware of the fourteen conditions of hire at the back of each hire advice note that are reproduced on p 25 of exh 1. He agreed to pay the hire rates for the equipment during the period the equipment was out of the plaintiff's premises. He also agreed to pay the current full catalogue price on the property not returned or lost. On

27 February 2008 he returned some of the property, as listed in the hire return note on p 32 of exh 1 but did not return the property listed in para 6 of the plaintiff's declaration. All the above facts were agreed.

Geraldine Mountford prepared the reconciliation of outstanding equipment on p 33 to 39 of exh 1 as at 27 February 2008. The defendant did not challenge its accuracy. Munorwei Sibanda and Godfrey Ngomani collected the property listed in the hire return notes on p 46 to 48 of exh 1 on 14, 21 and 22 July 2008 from Nicetime Supermarket GLenary Snake Park Harare. Pages 49 and 50 of exh 1 extrapolate the equipment that was collected from Nicetime supermarket. The scaffolding equipment in question had been hired by Fourth Fort whose site address had been 837 Jacana Drive Borrowdale. The hirer one Tome signed the hirer return notes for the equipment collected from Nicetime Supermarket. The equipment tallied with that which had been hired out by Fourth Fort. Apparently Tome had been duped by a yard checker employed by the plaintiff one Norman Kapofu who collected the equipment from his site to Nicetime. Sibanda left the property at Nicetime that Norman alleged belonged to other hirers.

In her testimony, Geraldine Mountford used the plaintiff's catalogue price dated 4 January 2010 on pp 41 to 43 of the equipment on hire to calculate the weekly hire charges of each of equipment that was not returned. She calculated the charges at US$344-79. She multiplied the figure by four to calculate the monthly hire charges of US$1 340-00. Her arithmetic was not challenged. She stated that she dispatched invoices to the defendant at his postal address for payment of hire charges for the outstanding equipment such as the one dated 1 June 2010 on p 44 of exh 1. In his testimony, the defendant admitted to receiving such invoices until May 2009. He produced exh 3, a similar invoice of 13 June 2008.

In addition Geraldine relied on exh 2 to calculate the value in United States dollars of the equipment that was not returned. Her calculations are captured on p 40 of exh 1. She arrived at the value of US$ 30 771-55 for all the missing equipment. Again her arithmetic was accurate. It was her testimony that the defendant was informed of the change in the hire charge regime through the invoices that were dispatched to him.

In his defence the defendant stated that he diverted the property he remained with to Nicetime Supermarket where he was constructing the deck of the supermarket in partnership with Norman Kapofu. The partnership commenced in May 2008. He advised some coloured man at the plaintiff his intention to relocate some of the equipment to some place he did not identify. He averred that it was collected by the plaintiff in December 2008 in the presence of

Norman. At the beginning of 2009 he advised the plaintiff that it had collected property that he had hired. He continued to receive invoices in US$ until May 2009. He did not pay up because the equipment had been collected. He advised the plaintiff to stop sending him invoices as it had collected the equipment he had remained with. He challenged the claim sounding in foreign currency when the contract of hire was denominated in Zimbabwe dollars. He stated that the plaintiff could not unilaterally impose a hire charge in US currency without consulting him. He did not know how the plaintiff became aware of the presence of the equipment at Nicetime. He did not have a hire return note from the plaintiff to show the property in dispute was surrendered or the list signed by the collecting driver.

It became clear that the property collected in July 2008 was not the property that the defendant had in his custody. He maintained the equipment in dispute was collected in December 2008. He denied liability on the basis that the property had all been collected. He did not understand how the catalogue price was determined and whether it was in accordance with the rates stipulated by the construction industry.

He called Norman Kapofu. He testified that while he was employed by Crispen Thomu as a foreman for the construction of Nicetime Supermarket, he was moonlighting with the contractor, the defendant, who was his equal partner in that construction project. He stated that on a date in December 2008, Aleck a guard employed by the plaintiff who resided near Nicetime complex observed the clearly marked equipment of his employer in use. On the following day Sibanda visited the premises with Godfrey Ngomani. Sibanda returned the following day with Chiwanza the driver, Godwin Nyandoro, James and Arnold Mazivise and forcibly removed all the equipment belonging to the plaintiff from the site. Sibanda, the driver and the witness signed a collection list of all the equipment that was removed. The witness retained a copy that he handed over to Crispen Thomu. When the defendant came he made a follow up at the plaintiff's premises. He found them closed. The witness worked for the plaintiff as a yard checker until mid 2008 when he absconded from employment under a cloud. He outlined the system used by the plaintiff in the hire and return of scaffolding equipment that was in full agreement with that of Geraldine and Sibanda. A hirer was not permitted to transfer equipment from the site address without the written authority of the executive director Les Bennet. He emphasized that on collection, the plaintiff's driver would sign a collection list that would be countersigned by the hirer. The hirer would then follow up at the plaintiff's premises to confirm that the property collected was all received at

Formscaff. He would receive a hire return note to this effect on which he would append his signature.

Under cross examination he was not forthright about his reasons for leaving Formscaff. He disputed that the equipment collected from Nice Time had been hired by Fourth Fort. He denied having diverted that equipment from Fourth Fort to Nice Time. He unwittingly confirmed Sibanda's testimony that the basis for collecting the equipment on three different dates was to allow the deck to set. He also unwittingly confirmed Sibanda's testimony that he left some equipment that belonged to other contractors that the witness disclosed in his testimony as belonging to J and K. He disclosed under cross examination that he did not properly verify that Sibanda collected equipment belonging to the plaintiff only. He stated that when he was shown the plaintiff's claim in 2011, he did not have the collection list left by Sibanda with him that he said was with Thomu.

It is on the basis of the totality of the evidence led that I have to determine the three issues that were referred to trial on 20 October 2011.

1. **Whether the plaintiff collected the alleged outstanding scaffolding equipment from the defendant or any other person in 2008**

The onus was on the defendant to prove on a balance of probabilities that the plaintiff collected the equipment in issue. In *Manley Van Niekerk* v *Assegai Safaris & Film Productions* (*Pty*) *Ltd* 1977 (2) SA 416 (A) at 423H-424A VILJOEN AJA stated that:

> "In a case such as the present where the claim is brought *ex contractu* for the return of the leased article or its value, all that the lessor need to allege is that it hired the article out, that the lessee was obliged to return it and that he failed to return the article or its value. The lessee has to allege and prove that his failure to return it is due to some cause for which he is not to blame."

See also *Nel v Dobie* 1966 (3) SA 352(N) at 356E.

It was common cause that the equipment in issue was not returned to the plaintiff on 27 February 2008. The defendant averred that the equipment was forcibly collected in December 2008 by the plaintiff's agents who included Sibanda. The defendant was not personally present when the collection took place. He relied on the testimony of Norman Kapofu. Norman stated that Sibanda and Chiwanza left a signed collection list of the items that they removed. He failed to produce the list in question notwithstanding that he gave it on that very day to his employer Crispen Thomu who had also contracted the defendant to

construct Nicetime complex. The defendant has had four years to collect the list from Crispen Thomu since it was given to him and two years to do so since summons was served on him. Norman did not follow Sibanda to the plaintiff's premises on the day of the alleged collection or soon thereafter to sign for and collect the hire return note for the equipment. The defendant did not do so on his return from Bindura in December 2008 or even in January 2009. The defendant and Norman, did not, as expected seek the hire return note. These shortcomings confirm the plaintiff's version that the equipment in issue was not collected in December 2008. The mistake in Sibanda's summary of evidence that he collected some items hired out by Fourth Fort in December 2008 was corrected by the hire return notes compiled by the plaintiff and signed for on behalf of Fourth Fort by Mr Tome. The evidence of Sibanda that he collected the equipment hired out by Fourth Fort was unwittingly confirmed by Norman Kapofu. He agreed with Sibanda that he was in the company of Godfrey Ngomani. That he did so on three different days to obviate the collapse of the deck. The documentation confirmed the accuracy of Sibanda testimony.

I am satisfied that the defendant has failed to discharge the onus on him to show that the equipment in issue was collected by the plaintiff. I find that the scaffolding equipment in question was neither collected by the plaintiff nor surrendered by the defendant. It is deemed to be still in his custody.

2. The value of the outstanding equipment

Geraldine Mountford testified on the value of the outstanding equipment on behalf of the plaintiff. She outlined her computations and the bases for such computation. She calculated the value at US$30 771-55. Mr *Furidzo* for the defendant conceded that he did not challenge the computation or the basis thereof. The values of the lost or damaged items were in the contract of hire predicated on the current full catalogue price list produced by the plaintiff. Geraldine produced such a catalogue price list of each of the equipment it hires out as at 1 February 2009 as exh 2. I find that it correctly reflects the value of the outstanding equipment.

The only challenge raised by the defendant was that the plaintiff was not entitled to payment in United States dollars but in Zimbabwe dollars which was the currency of account at the time. The defendant lost sight of two factors. The first was that the payment of the lost or damaged goods is made at the time of judgment when the goods are held to have been lost. In the present case until judgment is granted, the defendant's main defence was that the goods

were not lost but were returned to the plaintiff. At the date of judgment, a multi-currency regime that includes the USD has been in operation since February 2009. The second factor is that clause 5 of the contract of hire refers to the "Owner's then current full catalogue price." The current catalogue price that the defendant consented to in advance on 22 October 2007 is the one captured in exh 2.

The further contention by Mr *Furidzo* that the ZW$49 million paid as surety should be subtracted from the proved value of the outstanding equipment has no merit. After all the Zimbabwe dollar was effectively demonetised and carries no value. It cannot be used at the date of judgment to lessen the value claimed by the plaintiff of US$30 771-55.

3. Whether the plaintiff is entitled to claim hire charges from 1 February 2009 in foreign currency and the amount of the hire fees in question

The submission by Mr *Furidzo* was that as the hire fees were denominated in Zimbabwe dollars they could not be charged in foreign currency after the introduction of the multicurrency regime without the consent of the defendant. It seems to me that the submission is without merit. Clause 6 of the contract of hire obliges the hirer to pay the hire rates of the goods during the time the goods are in its custody. The hire rates are computed on a daily basis. The functional currency regime from 1 February 2009 was the multicurrency regime. The defendant received invoices for hire charges denominated in United States dollars from 1 February 2009 until summons was issued on 16 February 2011. He did not challenge the rates or currency claimed. He did nothing. The plaintiff had no way of knowing that he was disputing the currency or amounts charged. In fact he could not make such a challenge as he held the view that the goods had been returned. In any event I agree with the sentiments expressed by MAKARAU JP, as she then was, in *Kwindima* v *Mvundura* 2009 (1) ZLR 168 (H) at 173 A-B that:

> "The court has discretion to award judgment in that currency that will redress the injury suffered and adequately compensate the plaintiff for the loss. It would then follow that where the currency is the foreign currency as opposed to local currency, then judgment should be in the foreign currency, for to award damages in the local currency, where the local currency has been rendered valueless by inflation might be to deny the plaintiff the redress he or she seeks."

The defendant did not challenge the computation so ably made in evidence by Geraldine Mountford of US$ 1 340-00 per month. I am satisfied that the plaintiff is entitled to that amount.

It is clear that the defendant does not have the outstanding in his possession. It was obvious from Norman Kapofu's testimony that the equipment co-mingled with that of J and K. He is therefore not able to return the equipment. I will therefore order that he pays the plaintiff the value of the outstanding equipment.

Accordingly it is ordered that:

1. The defendant shall pay to the plaintiff the sum of US$ 1 340-00 per month as hire charges for the outstanding scaffolding equipment from 1 February 2009 to 1 February 2013, being the date of judgment.
2. The defendant shall pay to the plaintiff the sum of US$ 30 771-55 being the value of the outstanding scaffolding equipment.
3. The defendant shall pay the plaintiff's costs of suit.

Mutezo & Mugomeza, plaintiff's legal practitioners
Kanokanga & Partners, defendant's legal practitioners