FORMSCAFF (PRIVATE) LIMITED
versus
FORMAL CONSTRUCTION (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 16, 17 & 19 June 2014 and 6 August 2014

Civil trial

T.Z. Mazhindu, for the plaintiff
T.D. Muskwe, for the defendant

MAFUSIRE J: In April 2011 the plaintiff issued out a summons against the defendant. It claimed amounts under three heads. The first was said to be the unpaid rental balance for certain scaffolding equipment due by the defendant to the plaintiff as at 1 April 2010. The amount was US$20 128-60. The second was rental charges at the rate of US$472 per month from 1 May 2010 to the date that the defendant would return the equipment to the plaintiff or pay the plaintiff the replacement value of such equipment. The third and last was said to be the replacement value of the equipment. The amount was US$13 881-01.

The plaintiff's story was told by its two witnesses; Ms Geraldine Mountford, the cashier and credit controller at the time, and Mr Nathan Rodriguez who was in the sales department. The case was this. The plaintiff was in the business of renting out scaffolding equipment. The defendant was its long-standing customer. Their business relationship spanned over 20 years. In December 2008 the defendant hired the equipment for 6 weeks and paid. Because of their longstanding business relationship procedures had somewhat been relaxed. Among other things, the defendant had not been asked to sign any formal agreement. Furthermore, a purchase order from the defendant had been dispensed with.

The plaintiff's witnesses said in accordance with the plaintiff's standard terms and conditions of hire that are printed at the back of the Hire Advice Notes ("***HANs***") issued out on the collection or delivery of the equipment, a customer that fails to return the equipment remains liable for the rental charges at the plaintiff's hire rates until the equipment is returned or unless the customer pays for its replacement value. The plaintiff said the defendant failed

to return the equipment at the expiry of the 6 weeks period. The sum of US$20 128-60 represented the cumulative balance of the hire charges from the end of that 6 week period to the date of computation when the summons was issued. The sum of US$472 represented the plaintiff's hire rates per month at the time. The sum of US$13 881-01 represented the value of the individual items that the defendant had failed to return. The value was determined by the plaintiff from its price list.

The defendant's case was that it was not the one that had hired the plaintiff's equipment but a company called Health and Hygiene Zimbabwe (Private) Limited, also known as H & H, also known as Anchor Yeast (hereafter referred to as "***Anchor Yeast***"). The defendant said on this particular contract it had merely acted as agent. Its interest had merely been to facilitate the execution of the project in respect of which Anchor Yeast had hired the equipment and in respect of which it, the defendant, had been appointed the main contractor. Its driver had collected the equipment but the payment had been made by Anchor Yeast. If the contract had been breached it was to Anchor Yeast that the plaintiff was to look to for its money.

Thus, notwithstanding the way the issues had been settled and re-stated at the pre-trial conference, the central point for determination at the trial was whether or not it was the defendant that had hired the plaintiff's equipment at the period in question. If it was not the defendant that had hired the equipment, then that will be the end of the plaintiff's case. But if it was the defendant, the further question is whether it is liable for all those amounts in the plaintiff's summons. I shall determine the question of liability first and that of quantum later.

(a) **Liability**

Much of the defendant's case was made out during cross-examination of the plaintiff's witnesses. The defendant's one and only witness, Mr Freddy Junior Kudakwashe Chigwida, the contracts manager at the time, had little else to add in his evidence. In substance, the defendant's case was a confession and an avoidance. It admitted collecting the equipment from the plaintiff but said it had done so on behalf of someone else. The learned authors, HERBSTEIN AND VAN WINSEN[1], say that in a confession and avoidance situation, the defendant may admit the facts alleged in the claim but seek to avoid their legal

[1] *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa*, 5th edn, @ p 591

consequences by setting up other facts which, if established, will have the effect of such an avoidance.

I have examined the plaintiff's evidence and that of the defendant. I have considered the documents tendered by both sides as exhibits. In my view, where the defendant's case is a confession and an avoidance the evidential onus should shift to him to prove the facts constituting the avoidance. The overall onus remains on the plaintiff to prove his case on a balance of probabilities. In *Pillay* v *Krishna & Anor* 1946 AD 946 DAVIS AJA said the onus of adducing evidence and the overall onus of establishing a case on a balance of probabilities are two separate and distinct concepts. Quoting from several jurists he laid out the three basic rules governing the incidence of the burden of proof as follows[2]:

1 If one person claims something from another in a court of law, then he has to satisfy the court that he is entitled to it.

2 Where the person against whom the claim is made is not content with a mere denial of that claim, but sets up a special defence, then he is regarded, *quoad* that defence, as being the claimant: for his defence to be upheld he must satisfy the court that he is entitled to succeed on it.

3 He who asserts, proves and not he who denies, since a denial of a fact cannot naturally be proved provided that it is a fact that is denied and that the denial is absolute.

In this case I am satisfied that the defendant's case was wool over eyes. In cross-examination counsel was all over the plaintiff's witnesses but leading nowhere. The witnesses remained steadfast and unshaken. They stuck to their story. They made concessions where necessary. They were candid. Let me proceed to show some of this.

Amongst the plaintiff's documents were two HANs. On the front was recorded the name of the customer and details of the equipment hired. They also recorded the date of hire or of collection of the equipment, the registration numbers of the vehicles collecting and the customer's signature. On the flip side were the plaintiff's terms and conditions in small print. They were titled, inappropriately in my view, "***Conditions of Sales***". The printing was

[2] *Pillay v Krishna & Anor* 1946 AD 946 @ p 951 – 952

littered with both grammatical and spelling errors, a point counsel brought home during cross-examination.

The significance of the HANs was that, according to the plaintiff, under no circumstances would the equipment be released without the customer, or anyone collecting on his or her behalf, producing a HAN. It was common cause that on the two HANs that were produced as exhibits it was the defendant's name and address that were entered. It was the defendant's driver that had signed under "***customer's signature***". It was his name and national identity number that had been listed. To the plaintiff that was proof of hire by the defendant.

The defendant said it had done all that merely as an agent. For proof, it drew attention to another set of documents on plaintiff's bundle. These were the Hire Returns Notes ("***HRNs***"). In most respects HRNs were similar to HANs. But whereas HANs were a record of the equipment going out, HRNs were a record of the equipment coming back. On all the HRNs the defendant's name was listed together with that of Anchor Yeast. Furthermore, except for one which listed Rusape as the address from which the equipment had been collected, the rest of them listed an address in Harare. The address was said to be the headquarters for Anchor Yeast. Rusape was the site of the project where the defendant had been the main contractor. According to the defendant – and this came out more forcefully during cross-examination - this showed that the hirer of the equipment had been Anchor Yeast. The plaintiff knew that to have been the case. That is why the name Anchor Yeast had been entered on the HRNs, the defendant argued.

Defendant's reliance on HRNs as proof of hire by someone else other than itself was demonstrably a red herring. If it says it was merely acting as an agent then there was no evidence of that. It did nothing to warn the plaintiff that it was acting on behalf of someone else. For the time being I have to consider piece-meal the evidence and the exhibits.

When the HANs and the HRNs are considered together the HANs stand out as proof of hire and the HRNs as proof of returns. The HANs listed the details of the customer hiring out. The HRNs listed the details of the person bringing back the equipment. Among other things, the plaintiff's details were all over the front of the HANs, not least under "***customer's signature***".

On the flip side of the HANs were the terms and conditions of hire. The defendant argued that these terms and conditions, being at the back, and being made available only after the customer had already paid, and after the hire agreement had been concluded, should not

be read into the contract. I will accept that. At any rate, the plaintiff's witnesses, particularly Mr Rodriguez, said this was a verbal contract. But still, this does not detract from the fact that of the two sets of documents, the HAN was more likely the contract document than the HRN. Furthermore, on the HRNs in question, under customer's details, were the names of the plaintiff's own employees! This is consistent with the evidence of the plaintiff's witnesses that it ended up collecting the equipment by itself when the defendant would not return it. Therefore, a HRN is a record of the equipment returned not the proof of the contract of hire.

I must continue with the piece–meal analysis. Amongst the plaintiff's bundle were photocopies of two receipts of payment issued by the plaintiff. A great deal of time and energy were spent on them. The date on those receipts was 14 January 2009. The defendant pointed out that the contract of hire had been in December 2008. The equipment had been collected on 15 and 17 December 2008. The plaintiff's terms were strictly payment upfront before collection. In those days of hyperinflation how could the defendant have been allowed the latitude to pay a month later, the defendant queried?

The defendant also highlighted some subtle details on those two receipts. They had been copied on one sheet of paper, one after the other. The one receipt was serial no 009109 for ZW$40.5 trillion. The other was serial no 009110 for ZW$37.18 trillion dollars. However, the latter receipt had also been copied on a second sheet of paper. There were some subtle differences between the copy of this receipt on the first sheet where it appeared together with the first receipt, and the second copy where it appeared alone on a separate sheet of paper. The difference was that at the top of the second photo copy where the receipt appeared alone was inscribed the words "***6 WEEKS HIRE 15/12/08 – 26/01/09***"**.** At the bottom, above, Ms Mountford's signature, was the inscription ***"@ 12 946 666 666 666-70 /wk***". If the two were copies of the same document why were there those differences? The plaintiff's case was a total fabrication, Mr *Muskwe*, for the defendant, charged.

The defendant was not yet finished. ZW$40.5 trillion dollars and ZW$37.18 trillion dollars was a lot of money. It was not practical to have paid it in cash as the receipts showed. The defendant produced a copy of its own bank statement. None of the entries matched amounts of such magnitude. Thus the defendant had no capacity to have made that kind of payment. It was Anchor Yeast that had made the payment.

However, I was satisfied with the plaintiff's explanation. The witnesses highlighted the fact that those receipts showed that they had been issued to Formal Construction, the defendant. They highlighted that the name "***Fred Chigwida***" had been written in brackets

after the defendant's name. The defendant's witness, Freddy Junior Kudakwashe Chigwida, shared the same first name with his father who was the defendant's major shareholder. Neither Freddy Chigwida, the father, nor Freddy Chigwida, the son, was known to Mrs Mountford at the time. But she said she had issued the receipts to the person that had tendered the money to her and whose name had been given to her by the sales department. Mr Rodriguez said he knew Mr Chigwida Junior personally. They had concluded the contract of hire together. It was him that had led Mr Chigwida to Mrs Mountford in accounts department for payment and it was Mr Chigwida that had tendered the cash.

Regarding the different details on the two photo copies of receipt no 009110, the plaintiff produced the entire receipt book for the period in question. It contained the original fast copies of the receipts that had been issued to customers at the time. It was on the fast copy that the details appearing on the second photo copy had been inscribed by Mrs Mountford. The full inscription read "***COMBINE INVOICES TO GET HIRE RATE PER WEEK 6 WEEKS HIRE 15/12/08 – 26/01/09***". The inscription had been for the plaintiff's own records. It would not appear on the original of the receipt handed to the defendant. The two payments had been made on the same day. The receipts had been photocopied on the one sheet of paper. Later on, after the inscription, the second receipt had been copied onto a separate sheet. With respect I neither saw nor read anything sinister in that.

Regarding the alleged impracticality of paying such huge amounts in cash, the plaintiff produced a bearer cheque dated 2008 for ZW$10 trillion dollars. The witnesses explained that it would have required just a few of those notes to make up the two amounts in question. I found this quite plausible.

Regarding the apparent contradiction that the plaintiff's terms were cash upfront before collection of equipment yet in this particular case the equipment had been collected earlier than the payment, the plaintiff's witnesses said because of the long-standing relationship between the parties the defendant had been given the latitude to collect first and pay later. That the parties had been in a business relationship for a very long time was common cause. The plaintiff said it had been over 20 years. The defendant said it could not have been more than 17 years. Its reason for saying 17 years was because it had only been incorporated in 1997. But in my view, whether it was 20 years or 17 years, is neither here nor there. Both are very long periods of time. At any rate, Mr Rodriguez conceded that 20 years was only a figure of speech to signify a long time. Thus, I find it plausible and a matter of

business sense that given such a lengthy period of relationship the parties would relax certain of their terms and conditions to accommodate each other.

Still on the receipts, Mr *Muskwe* tried to attack from another flank. But he soon ran into a brick-wall. He had retorted, how could the receipts have recorded both the names of the company and that of an individual if the business had been with the company and not the individual? Furthermore, how come it was only the two receipts from the plaintiff's receipt book that had recorded both the defendant's name and that of Mr Chigwida?

Mrs Mountford explained that if the customer wished it she would record both the name of the company and that of the individual tendering the payment. Mr Chigwida must have wished it. Furthermore, it was not true that it was only the two receipts in question on which both the company name and that of the individual had been record. She drew attention to receipt no 009013 in the receipt book. It had been issued in the name of "***Nattineat Enterprises***" with the name "***Bradley Joseph***" in parentheses. In my view, Mr *Muskwe* was wise to abandon the point.

The defendant produced its own set of documents. This was in an effort to show that it could not have been the hirer of the equipment, but Anchor Yeast. Among them were the documents used by it to tender for the project. The project was the construction of a factory for Anchor Yeast at Rusape. The significance of those documents was that they showed that the defendant's contract with Anchor Yeast had been "***labour-only***", not supply and fix. The defendant said with a labour-only contract it would not have required scaffolding equipment. The client would provide.

However, the defendant's documents took it nowhere. They did not meet the plaintiff's case that it was the defendant that had hired its equipment. Furthermore, the plaintiff pointed out that the defendant's contract documents had expressly listed what Anchor Yeast, as the client, would provide or make available to the defendant as the contractor. These had included a vehicle, the provision of water and electricity, and the provision of some space for the erection of temporary working sheds. Specialised works such as electrical fittings, steel fixing, plumbing, and the like, had also been excluded from the contract. The plaintiff's point was that if the so-called labour-only contract had been so specific on what the client would or would not provide, a significant tool of construction such as scaffolding equipment would naturally have been mentioned if it was for the client to provide.

In my view, the defendant's tender documents for its contract with Anchor Yeast had no probative value.

I have already mentioned the defendant's bank account for the relevant period that the defendant produced to show that none of the transactions matched the amounts paid to the plaintiff for the equipment hire. The plaintiff dismissed the bank account on the basis that such transactions did not show that it was not the defendant that had paid the plaintiff. I agree. This was part of the defendant's wild goose chase.

The next document for the defendant was an e-mail communication dated 24 February 2009 from Anchor Yeast to the defendant for the attention of the defendant's witness. It was some kind of complaint by Anchor Yeast against the defendant on the delay by the defendant to transfer some items of the equipment to it. The e-mail read:

> "Following our meeting last week on the outstanding shutters, I note with concern that the shutters have since not been transferred to Anchor Holdings on the expected date of Saturday 21 February 2009. I am however in possession of the supplier invoice of US$600 for the delay in returning the shutters that you should meet. This can however escalate if nothing is done regarding the return of the shutters. I wait for the payment of this invoice and the delivery of the shutters."

The defendant singled out the words "***… supplier invoice …***" to get the plaintiff's witnesses to admit that the "***supplier***" referred to was Anchor Yeast and that therefore the plaintiff was billing Anchor Yeast directly. But the witnesses were non-committal. They said the plaintiff was not privy to the defendant's relationship with Anchor Yeast.

Again the e-mail takes the defendant's case nowhere. In fact, it actually exposes it as the party right at the centre of the missing or unaccounted for items. The actual invoice was not produced to show in whose name it had been made out. But the e-mail actually places the responsibility for its payment on the defendant's door-step. That is what the words "***… invoice of US$600 …<u>that you should meet</u>…***" must have meant. The words "***I wait for payment of <u>this</u> invoice and the delivery of the shutters…***" put the issue beyond contest.

It seems clear to me, just by this e-mail, that the scaffolding equipment was needed for the project. Whether the equipment was needed by the defendant itself as the main contractor or by some other sub-contractor does not matter. Whatever may have been the case, the defendant had been responsible for the procurement and delivery of the equipment. The defendant may have been entitled to re-imbursement of the cost of hire from Anchor Yeast, the client, but to the plaintiff, it remained accountable for that equipment.

The defendant accused the plaintiff of "double-dipping". It was common cause between the parties that in separate proceedings in this court, the plaintiff had sued Anchor Yeast for certain sums of money for equipment hire. The defendant claimed that by the instant proceedings the plaintiff was trying to claim the same amount again. As proof the defendant produced an unsigned and unissued "***Defendant's Plea***" by Anchor Yeast's lawyers, Kantor & Immerman. The "plea" was just a bare denial of liability of certain amounts being claimed by the plaintiff in those proceedings. It had been sent to Muskwe & Associates under cover of a letter that in part read as follows:

> "We advise that the proceedings involved **Formscaff (Private) Limited v** (sic) **Anchor Yeast (Private) Limited HC 617/12** but we are of the view that the matters are inter related."

I have failed to appreciate how that document could be of any value. Mr *Muskwe* latched onto the words "***… but we are of the view that the matters are inter related…***" and argued that this showed that the plaintiff was "double-dipping". This is absurd. The plaintiff explained that Anchor Yeast had hired its equipment on a separate occasion. When it had delayed in payment and in returning the equipment, the plaintiff had sued. Anchor Yeast had since paid. The case had been finished. Clearly the cases were unrelated.

The plaintiff further contended that the defendant had itself tried to join Anchor Yeast to these proceedings but had failed. Plainly, this "defendant's plea" business was yet another pointless and time wasting excursion by the defendant.

The rest of the defendant's case was that the plaintiff had not written any letter of demand to the defendant. A letter of demand, the defendant argued, would have given an insight as to who, between Anchor Yeast and itself, had hired that equipment. In my view, this is not a defence. A letter of demand is not always a pre-requisite to a claim. At any rate, in defendant's summary of evidence, Mr Freddy Chigwida was going to say that on various occasions the plaintiff's officials had demanded payment for the scaffolding equipment but that he had referred them to Anchor Yeast. Furthermore, the plaintiff showed that the invoices making up the claims had been posted to the defendant's usual address. Of course, the defendant claimed that it had not seen them. It also said that delivery by ordinary post was unreliable and that it had not been the mode of communication between the parties. It said the plaintiff should have delivered such documents. However, for the reasons already stated above I am satisfied that the plaintiff proved its case on a balance of probabilities.

In the premises I hold the defendant liable to the plaintiff for the outstanding scaffolding equipment.

(b) **Quantum**

The defendant's defence on quantum was tied to that on liability. Although it would say something in respect of the specific sums of money claimed by the plaintiff under the different heads, its overall position was that it owed the plaintiff nothing because it was not the one that had hired the equipment. I will proceed to deal with the plaintiff's claims under the three heads and examine the defendant's responses thereto.

(i) The claim for US$20 120-60

This claim was for the outstanding hire charges from the expiry of the 6 weeks period to the time of the summons. The defendant posed little or no challenge to it. Its plea was just a bare denial. The plaintiff produced copies of invoices which were marked exhibit 1(l) and which it said were in respect of the hire charges. Barring any arithmetical errors they seem to add up to the amount of the claim. I accept the amount as proved.

(ii) The claim for US$472 per month from 1 May 2010 to the date of the return of the equipment

The basis of the plaintiff's claim was that in terms of clause 6 of the terms and conditions of hire printed at the back of the HANs, a customer that fails to return the equipment at the expiry of the agreed hire period remains liable for the hire charges at the previously agreed rate. The clause read as follows:

> "At the end of the period of Hiring, the Hirer shall, at his own expense, return the goods to the Owner's address shown overleaf. The Hirer shall pay to the Owner, the hire rates for the goods from the time they leave the Owner's yard and until the goods are received by the Owner at its yards."

The defendant's main challenge was that it was incompetent for the plaintiff to have claimed both the hire charges and the value of the equipment that had not been returned. Unfortunately, this defence was not developed to any extent. On my part I have failed to understand why the plaintiff cannot claim this amount together with the value of the equipment. In my view, the plaintiff's claim under this head is one for holding over damages. Holding over damages are probably more readily understood in a landlord and tenant

situation in respect of an immovable property. Where the lease agreement has terminated for whatever reason and the landlord becomes entitled to repossess the property, or where someone has bought a property and the sitting tenant or occupant whose right to continued occupation has terminated for whatever reason, the landlord or the purchaser is entitled to holding over damages from the tenant or occupant, from the date that the tenant or occupant was obliged to have moved out, to the date that he actually does. The normal measure of the holding over damages is the rental value of similar premises: see *Van der Merwe* v *Erasmus & Anor* 1945 (2) TPD 97, at p 102.

In the present case, I have already accepted the defendant contention that the plaintiff could not rely on the terms and conditions of hire. This is because it was not shown that these terms and conditions had been brought to the defendant's attention and incorporated in what was purely a verbal agreement between the parties. However, that cannot defeat the plaintiff's claim under this head. A claim for holding over damages is available under the law. The plaintiff would have been able to lease out the equipment if the defendant had returned it. In my view, it was not necessary for the plaintiff to have shown that if the equipment had been returned it would definitely have leased it out to someone else, or rather that there was demand for such equipment during the period in question. It was incumbent on the defendant to have returned it. Because it did not, the defendant was liable to pay the rental charges at the previously agreed rate of hire. There was no much challenge by the defendant that this rate was US$472 per month.

The defendant lamely raised the point that the plaintiff was obliged to mitigate its damages. But again this point was not developed to any extent. In what way could the plaintiff have mitigated its damages?

Theoretically, the plaintiff is entitled to the rentals until the outstanding equipment is returned or paid for. This would mean that up to the time of the trial in June 2014, a period of 49 months from 1 May 2010, the defendant's bill for holding over damages, at US$472 per month, would be US$23 128. However, according to the plaintiff's witnesses and its exhibits the figure was US$57 229-61 as at 31 May 2014. This figure was not explained. But at a quick glance it seems that some, if not all, of the invoices making up the claim under (i) above have also been repeated under this head.

Be that as it may, the plaintiff's approach, in my view, is not correct. The defendant's point that the plaintiff was obliged to mitigate its damages is valid even if it failed to develop the point properly. The principle is well known. In the field of employment law, for example,

the Supreme Court, in the case of *Ambali* v *Bata Shoe Co Ltd* 1999 (1) ZLR 417 (S), forcefully stated that an employee who has been dismissed wrongly or otherwise should not just sit back and watch the clock tick as he or she waits to claim damages. He must look for alternative employment. His or her entitlement to damages will be limited to the period which he would be expected to have found alternative employment. What that period is depends on the circumstances of each case. At pp 418 - 419 McNALLY JA put it as follows:

> "I think it is important that this court should make it clear, once and for all, that an employee who considers, whether rightly or wrongly, that he has been unjustly dismissed, is not entitled to sit around and do nothing. He must look for alternative employment. If he does not, his damages will be reduced. He will be compensated only for the period between his wrongful dismissal and the date when he could reasonably have expected to find alternative employment. The figure may be adjusted upwards or downwards. If he could in the meanwhile have taken temporary or intermittent work, his compensation will be reduced. If the alternative work he finds is less well-paid his compensation will be increased.
>
> There are also those, and Ambali is one of them, who seem to believe that they must on no account look for alternative employment; that so long as their case is pending they must preserve their unemployment status; that if they look for and find a job in the meanwhile they will destroy their claim.
>
> It cannot be emphasised too strongly that this is wrong. … [I]f an employee is wrongfully dismissed his duty to mitigate his loss arises immediately. If he is offered a good job the day after his dismissal he must take it, or forfeit any claim for damages. If he is offered a good job only after he has been unemployed for six months, he must take it. If in the meantime he has instituted proceedings for reinstatement, he may continue there, but his claim for damages will usually then be limited to his loss over the six month period."

I believe the principle of *Ambali* applies with equal force to the plaintiff's situation in this case. The period of hire of the equipment by the defendant was from mid-December 2008 or early January 2009 because of the annual shut down common in the construction industry. The exact date when the 6 weeks expired or when exactly the defendant would return the equipment was not properly canvassed in court. But I estimate it to have been not later than the end of February 2009. For some reason, the plaintiff's computation on exhibit 1(l) seemed to have started from 14 May 2009. It was not explained why. The summons was issued in April 2011. That was 2 years later. The reason for the delay was not explained. The HRNs were dated August 2009 and September 2009. Thus, even if I were to make allowances for the period that the plaintiff was hunting down its equipment and making a reconciliation of what items had been recovered and what had not, I still find that the delay from September

2009 to April 2011 when the summons was eventually issued too inordinate. With expedition the plaintiff could have sought and obtained relief in a year or two. That would have cut-off the rental charges.

Furthermore, the plaintiff has not shown that it was unable to replace the missing equipment on its own and seek reimbursement from the defendant afterwards. Still further, even if its claim for holding over damages would not be defeated by reason of the fact that it did not show that there had been a demand for the equipment had it been returned, nonetheless, in my view such a contingence is relevant on the question of mitigation of damages. A straight claim for hire charges like the one made by the plaintiff takes no account of the myriad of other contingent factors such as loss of, or damage to, the equipment, natural wear and tear, and the like.

With all due respect, none of the parties was of any assistance on the question of mitigation of damages. Nevertheless, I do not believe that the plaintiff should suffer absolution from the instance. In a claim for damages the loss claimed may not be established with mathematical exactitude or precision. In *Esso Standard SA (Pty) Ltd* v *Katz* 1981 (1) SA 964 (AD) it was noted that in some types of cases damages are difficult to estimate, but that they cannot be assessed with certainty or precision will not relieve the wrong doer of the obligation to pay for his breach. The plaintiff is entitled and required to adduce the best evidence reasonably available to him. In *Hersman* v *Shapiro & Co* 1926 TPD 367 STRATFORD J stated as follows[3]

> "… monetary damage having been suffered, it is necessary for the court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the Court is very little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the Court is bound to award damages. It is not so bound in the case where evidence available to the plaintiff which he has not produced; in those circumstances the Court is justified in giving, and does give, absolution from the instance. But where the best evidence available has been produced, though it is not entirely of a conclusive character and does permit of a mathematical calculation of the damages suffered, still, it is the best evidence available, the Court must use it and arrive at a conclusion based upon it …"

In the circumstances, I have to make a value judgment. I hold that the plaintiff is entitled to holding over damages for a period of no more than 12 months. At US$472 per month, the damages amount to US$5 664.

[3] At p 379 - 80

(iii) Claim for US$13 821

This amount was said to be the replacement value of the missing equipment based on the plaintiff's catalogue prices. The plaintiff made a reconciliation of the equipment hired out against the equipment returned or recovered. Then against the missing items it applied values from its catalogue.

The defendant's main challenge was that the claim under this head was mutually destructive with that under (ii) above. It was said that the plaintiff could not claim both the replacement value and continue to charge for the hire.

The defendant's further challenge was that in the absence of its own representative there could have been no proper reconciliation of the missing items. Finally, the defendant challenged the propriety of a claim based on the plaintiff's own in-house prices.

The overall difficulty that I had with the defendant's approach was that it would raise points but leave them half-baked. On the other hand the plaintiff was just marginally better. But in general many things were just thrown in and it was left to the court to sift through the morass.

Regarding its claim under this head, the plaintiff produced a number of schedules with some workings on them. They were titled "***Equipment Reconciliation***". The plaintiff also produced another schedule titled "***Cost of Replacement Value on Equipment not Returned***". In evidence it was explained that the schedules showed the values of the individual items that had not been returned. For example, the first entry, under the heading "***Steel Tubes***", listed "***materials***" against a figure of 40.55; "***paint and labour***" against a figure of 8.69 and VAT 15% against 7.30. The total cost was listed as 55.95. That figure was then multiplied by 147.90 and a figure of 8,275.01 was juxtaposed. It was the same pattern with the rest of the entries. The last entry on the second page of the schedule had a figure of US$13,881.01 against the inscription "***TOTAL REPLACEMENT VALUE***".

No attempt was made by counsel to take the plaintiff's witnesses through any of those entries or figures to explain what exactly they represented. It was not explained the basis of the plaintiff's so-called catalogue prices. The plaintiff was introduced as a company in the business of leasing out scaffolding equipment, not the manufacturing of it.

In the premises given that the list of what equipment was said to have been lost by the defendant was arrived at unilaterally by the plaintiff, and given that it was not shown how the so-called replacement values of such missing equipment was arrived at, I am not satisfied that the plaintiff proved its claim under this head. But I am also not satisfied that the defendant is

entitled to judgment on it. In principle the plaintiff is entitled to claim the cost of replacing the missing equipment. Therefore the proper result, on this point is, in my view, absolution from the instance.

(c) **Disposition**

In the final analysis I make the following orders:

1 The defendant shall pay the plaintiff, the sums of:

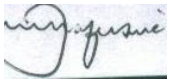
1.1 US$20 128-60 (twenty thousand one hundred and twenty eight dollars and sixty) being the balance outstanding and due by the defendant to the plaintiff in respect of certain scaffolding equipment hired by the defendant from the plaintiff in or about December 2008 and which the defendant failed and/or neglected to return;

1.2 US$5 664 (five thousand six hundred and sixty four dollars) being the holding over damages due by the defendant to the plaintiff in respect of the scaffolding equipment aforesaid,

2 The defendant is absolved from the instance in respect of the plaintiff's claim for US$13 881-01 (thirteen thousand eight hundred and eighty one dollars and one) relating to the purported replacement value of the scaffolding equipment aforesaid.

3 The defendant shall pay the plaintiff's costs of suit.

6 August 2014



Mugomeza & Mazhindu, plaintiff's legal practitioners
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