PIONEER PROPERTIES (PRIVATE) LIMITED
versus
MESSAGE NCUBE t/a FOUNDATION COLLEGE

HIGH COURT OF ZIMBABWE
CHINHENGO J
HARARE 11 February 2004

Default Judgment Application

P. Kawonde, for the plaintiff
Defendant in default

CHINHENGO J: The plaintiff (lessor) sued the defendant (lessee) for $486 539,21 arising out of a lease agreement between the parties. Clause 8 of the relevant lease agreement provides that –

> "(i) The lessee hereby acknowledges, subject to the provisions of clause 6 above, that the interior of the leased premises and outbuildings including all keys, locks, glass windows, electrical and plumbing fittings and fixtures, taps and other appurtenances of the said premises are in good order and in a clean and sanitary condition. He undertakes to make good and repair and replace at his own cost and charge any or all of the items mentioned immediately above during the currency of this Agreement and at the termination of this lease to return and redeliver the same to the lessor in good order and condition, fair wear and tear alone excepted.
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> (ii) The lessee hereby acknowledges that he will be responsible for repairs to the electrical and plumbing fittings, plugs, elements, washers and valves within the leased premises or facilities that he is using."

Clause 6 referred to in para 1 above is not relevant to the purpose of this judgment. It is clear from clause 8 that the lessee assumed liability for repairing damaged utilities specified in that clause during the time that he remained in occupation of the leased premises and/or at the time that the lease agreement is terminated.

The lessor's claim is for the cost of repairing door locks and electrical fittings. The lessor alleged in its declaration that on 29 January 2003 it cancelled the lease agreement but the lessee refused to vacate. From the written submission made on behalf of the lessor in

support of this application, it is mentioned in response to one of my queries, that eviction proceedings were instituted in the magistrate's court prior to the institution of the action in this court and those proceedings are pending. The lessor's action is therefore founded on clause 8 of the lease agreement. It alleged that on 7 April 2003, it carried out repairs of electrical fittings and locks at a cost of $486 539,21. As it was the lessee's responsibility to carry out these repairs at his cost the lessor claimed the cost from the lessee.

After summons was served on the lessee and an appearance to defend was entered, the lessee failed to file its plea despite being served with a Notice to Plead and Intention to Bar. The lessor then applied for default judgment by way of a chamber application since the lessee was barred for failure to file his plea.

When the application for judgment in default was placed before me on 18 November 2003, I was of the *prima facie* view that the lessor's claim was not a liquidated demand and I raised some queries with the lessor's legal practitioner. One of them was:

> "Is this claim not in the nature of damages giving rise to the need for the plaintiff to prove his damages. Claim is not liquidated."

The lessor's legal practitioner respondent by letter addressed to the Registrar of this court and dated 20 January 2004. He said:

> "3. The claim is not one in the nature of damages. It is a liquidated claim. Authority for this proposition is found in Jones and Buckle *The Civil Practice in the Magistrates Court in South Africa* Sixth Edition p 500-501 where it is said 'a liquidated amount in money is an amount which is either agreed upon or which can be ascertained promptly and summarily'.
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> The learned author goes on to demonstrate instances where courts have held to be liquidated amounts in money an ordinary shop account, definite sums expended for clothes and medicines, the purchase price and cost of erection of a fence which should have been erected by plaintiff on defendant's failure to do so.
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> The last example is on all fours with the case at hand."

The issue is whether the amount expended by the lessor in this case in respect of the repair of door locks and electrical fittings is a liquidated amount in respect of which judgment in default may be entered for the lessor in terms of Order 9 of the High Court Rules 1971. Order 9 r 57 permits the granting of a default judgment if the plaintiff's claim is for a debt or liquidated demand only and the defendant has failed to enter appearance or having entered appearance has been barred for default of a plea. Order 9 rr 58 and 59 respectively provide for the procedure to be adopted by the plaintiff where his claim is not for a debt or liquidated demand only on where his claim is for a debt or liquidated demand only but argument in relation to any aspect of the suit is considered necessary. In terms of these rules the plaintiff is required, without notice to the defendant to set down the case for judgment on an appropriate day specified in subrule (1) of r 223 which we commonly refer to as the "unopposed roll" or "motion court". There are, therefore, two instances when a plaintiff who asks for judgment in default is required to make an application in terms of r 223(1) – where the claim is not for a debt or liquidated demand only or where it is for a debt or liquidated demand only but argument is considered necessary in respect of any aspect of the suit. Order 9 r 60 provides for a third instance where such an application should be made i.e. where the claim is for damages and evidence as to *quantum* should be adduced.

A liquidated demand is based on a liquid document. It is trite that a document cannot itself be liquid or illiquid but it is the liability evidenced by that document which can be liquid or illiquid. See *Chequers Outfitters (Bloemfontein) Pty) Ltd v Sussman* 1959 (3) SA 55 (O) at 57. The question which ordinarily arises, as it did in this application, is whether in a particular case the plaintiff's claim is a liquidated demand. A liquid document (and so also a liquidated demand) has been described as one which on a proper construction evidences by its terms and without resort to extrinsic evidence (a) an acknowledgment of indebtedness; (b) in an ascertained amount of money; (c) the payment of which is due to the creditor. See *Western Bank Ltd v Pretorius* 1976 (2)

SA 481 (T) at 483. In *Union Share Agency & Investment Ltd v Spain* 1928 AD 74 it was held that it is necessary to prove indebtedness where the indebtedness arises upon the fulfillment of some condition or the happening of some event. The important point is to appreciate the difference between the indebtedness being subject to the happening of an event and the payment being subject to the happening of an event. To understand this distinction the words of RAMSBOTTOM J in *Inglestone v Pereira* 1939 WLD 55 at 62-3 are pertinent. He said:

> "The principle is readily understood. Where the existence of the obligation to pay, i.e. the debt, is dependent upon the fulfillment of a condition, there is no obligation to pay until the condition is fulfilled; and where the document shows that the obligation is conditional in this sense, then it does not appear from the document itself that any obligation has ever come into existence, the document is not a liquid document and provisional judgment cannot be given. Where, however, the document shows the existence of an obligation by the debtor but payment is claimable upon the happening of some simple event e.g. the notice demanding payment has been given or the debtor has made default, the happening of that event can be proved by extrinsic evidence, if put in issue, but unless put in issue, is proved by simple allegation in the summons – see *Spain's* case at 78. The distinction is between a document which shows an existing debt and one which shows that the document is subject to the happening of an event, and if this distinction is borne in mind. … the various cases … become clearer."

See also *CSD Enterprises (Pvt) Ltd v S & T Import and Export (Pvt) Ltd & Ors* 1980 ZLR at 242C where WADDINGTON J said that a document will be illiquid if extrinsic evidence is needed to prove a contingency giving rise to the indebtedness the position being different where evidence is needed to prove a contingency upon which payment only is dependent. The present case is based on a clause in a lease agreement in terms of which the lessee's liability is acknowledged. That liability, to my mind depends on the happening of an event in the future i.e. that the locks and electrical fittings have been damaged and they are no longer in good order. This contingency would seem to me to render both the liability of the lessee and the lease agreement illiquid because it must be established that the event has happened and that

the lessor has in fact incurred the expenditure. In *Belingwe Stores (Pvt) Ltd) v Munyembe* 1972 (1) RLR 244, the defendant had been the manager of the plaintiff's store and as such in control of its stock in trade. He had undertaken in writing liability to the plaintiff in respect of the value of any stock found to have gone missing or otherwise unaccounted for. On stock-taking in October, 1971, the plaintiff found that stock to the value of $1 047 was missing. He subsequently applied for default judgment and the question arose as to whether the plaintiff's claim was for a debt or a liquidated demand only. GREENFIELD J held that an admission of liability by a defendant is a actor which may enable a court to regard such a claim as liquidated. Similarly in the present case, clause 8 of the lease agreement is an admission of liability by the defendant. But in my view there is a point of distinction between the present case and *Munyembe*'s case *supra.* To illustrate this distinction I will quote from GREENFIELD J's judgment at 246A-B where he said:

> "It will be noted that Annexure "B" is in the form of an undertaking unlimited as to time "to make good any loses in my stock", apparently by monetary payments. The document does not directly say how loses are to be ascertained, nor does it refer in terms of the "value" of the stock. Moreover, Annexure "A", which claims that stock to the value of $1 047 is missing, does not say whether this represents the cost of the stock or the price it was expected to realize on sale to customers. It is, however, implicit, I think, that the taking of stock on 1st May, 1971, and on 3rd October, 1971, was conducted by the same method as used prior to signing of Annexure "B" and that the defendant would be conversant with this method. I think it can also be assumed that the stock values would be estimated on the same basis at each stock-taking." (**emphasis is mine**)

I have underscored what I think distinguishes *Munyembe*'s case from the present. GREENFIELD J found as a basis upon which the extent of the defendant's liability was to be assessed the established method of taking stock and the means by which the value of the stock was estimated. The present case does not have these features. Although the defendant accepted liability in advance in terms of clause 8 of the agreement the method by which the value or cost of damage to the locks

and electrical fittings was not provided for. So even though liability was admitted, the plaintiff's claim remained illiquid in view of the absence of agreement on the method of calculating the cost of repairs or the value of the damaged fittings. Had the plaintiff assessed the damage and received an estimated cost of repair and the defendant had refused to honour its bill, the present claim could probably have qualified as a liquidated claim.

This brings to the second issue. Is the plaintiff's claim one for damages? In my view it clearly is. In *Standwin Investments (Pvt) Ltd v Helfer* 1961 R & N 69 BEADLE CJ had to decide whether a claim for the value of goods as an alternative to a main claim for the return of the goods themselves is a liquidated claim. He came to the conclusion, based on the practice in the Cape Province Division, that the alternative claim was a liquidated claim. He also reached this conclusion on the basis that it was in essence a vindicatory claim. At 680E-g BEADLE CJ said:

> "There appears to be a considerable amount of authority, particularly in the Cape, on this question: *Warmsley v James,* 15 SC 120; *Hunkin v King* 1980 C.T. L.R. 421; *Union Government v Simon* 1914 CPD 612; *Du Toit v Grobler,* 1947 (3) SA 213 (SWA); and *Beringer v Beringer,* 1953 (1) SA 38 (E.D.L.). All these cases deal with this question, and in all these cases it was held that it was competent to give judgment for an alternative claim such as this, under a Rule which is almost identical in its terms to Rule 5 Order 2. In none of these decisions, however, do the judgments point out how this particular claim can be regarded as a claim other than one of damages. Mr *Pudney,* however, has suggested that, as the main claim is a vindicatory one, the claim for the value of the goods instead of the goods themselves also takes the character of a vindicatory claim, and this it is not regarded as a claim for damages. This is a plausible argument, and the only one that I can think of which justified these decisions; but I would prefer to express no firm opinion on its soundness."

He then went on to show what the practice of the courts in the Cape was and to accept that practice.

The plaintiff's claim in the present case cannot be regarded as a vindicatory action in any sense. There is a need in this case to show by more than just an allegation in the summons or declaration that the

event happened i.e. that the defendant damaged the locks and electrical fittings. There is a need to establish the nature of the damage to the locks and the electrical fittings and the reasonableness of the charges for labour and materials. Additionally the plaintiff's claim is one for damages. I am, therefore, unable to grant default judgment. This is a case covered by r 59 or by r 60 of the Rules of this Court and in respect of which the plaintiff is required to set down the case for judgment on an appropriate day specified in subrule (1) of r 223.

It is therefore ordered that the plaintiff (applicant) may apply in terms of r 59 or r 60 of the High Court Rules 1971 for judgment to be entered in its favour. This is to say the matter should be referred to the unopposed roll to enable the plaintiff to prove his entitlement to judgment and the *quantum* thereof.

Kawonde & Company, the plaintiff's legal practitioners.