PRIMAC ENTERPRISES (PRIVATE) LIMITED t/a
PRIMAC TELECOMMS
versus
NATIONAL HANDICRAFT CENTRE (PRIVATE) LIMITED
and
VICE SECURITY COMPANY (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 22, 23 September 2010, 13, 14 October 2010, 1 November 2010
and 9 February 2011

S Ndawana, for the plaintiff
J Dondo, for the first defendant
V N Shamu, for the second defendant

MTSHIYA J: In this action the plaintiff prays for the following relief:

1. The sum of USD 5 753-90.
2. Interest on the said sum at the prescribed rate for the date of service of the summons to date of payment.
3. Costs of suit on attorney and client scale.

The background to the claim is captured in the plaintiff's declaration as follows:
On 25 October 2005 the plaintiff and the first defendant entered into a three year lease agreement in respect of the first defendant's property known as the "boardroom". The salient feature of the lease agreement for the purposes of this judgment was that it did not cover the issue of security. However clause (W) of the lease agreement provided as follows:

> "Other matters not embraced by this agreement could always be discussed by both parties and streamlined accordingly".

In line with the above clause, it is alleged, the parties agreed that the first defendant would arrange and secure security for the premises and the plaintiff would pay a certain percentage of the security charges. The record shows that the plaintiff was invoiced for security services offered by the second defendant. The first and second defendants, however, deny that such an arrangement was ever put in place.

On 18 April 2008 the leased premises were broken into resulting in the plaintiff losing the following goods:

i. Five (5) Atec Central Processing Units (CPUs).
ii. One (1) CPU Atec casing with CDRom and motherboard less hard drive.
iii. One Flat Screen monitor with an LCD screen.
iv. Samsung lightscribe DVD and CD burner.
v. Fifty (50) Software CDs.
vi. Ten (10) blank CDs
vii. One (1) blank DVD.
viii. Linux, Internet biling and Antivirus software.
ix. USB cable for digital camera
x. Telephone codes.

The plaintiff, through this action, now prays for the replacement value of the stolen goods from both defendants, the one paying the other to be absolved.

On 22 September 2010, the plaintiff led evidence from its first witness, Mr Alvin Dumisani Ncube (Mr Ncube).

After the plaintiff had led evidence from its first witness it, then gave notice to amend its summons and declaration. The intended amendment would result in the plaintiff praying for "a return of the lost computers or their values thereof in the amount of US$5 753-90".

The application for amendment was opposed by both defendants.

Mr *Dondo* for the first defendant submitted that the intended amendment introduced a new cause of action. He said the amendment was meant to resuscitate the plaintiff's case after it had collapsed following the evidence of its main witness.

Mr *Shamu*, for the second defendant, was also of the view that the amendment was based on an afterthought as the matter had already progressed.

In introducing the amendment, Ms *Ndawana* for the plaintiff, submitted that the amendment would bring clarity since the action was anchored on compensation for the loss of the plaintiff's goods. She said the defendants could either deliver the goods lost or pay their value. That route would resolve the issue of whether or not the plaintiff was entitled to make a claim in foreign currency since the loss occurred before the multi-currency system was introduced in Zimbabwe in February 2009.

It is correct, as submitted by Ms *Ndawana*, that in terms of r 132, of the High Court Rules, 1971, the court can, at any stage of the proceedings, allow amendment of pleadings by either party "for the purposes of determining the real question in controversy between parties". I was, however, *in casu,* not persuaded that the amendment was necessary and therefore refused to grant it.

I took the view that, the amendment, coming soon after hearing evidence from the plaintiff's main witness, was designed to reconstruct the plaintiff's case. I also did not believe that the intended amendment could have any effect in the determination of this case. Thus on that basis I dismissed the plaintiff's application to amend summons and declaration. The matter then proceeded.

The first witness called by the plaintiff, Mr Ncube, had testified that he was the Managing Director of the plaintiff. He said because of the nature of his equipment, he had from the commencement of the lease agreement in 2005, indicated to the first defendant the need for security and had even offered to assist in identifying a security firm. He said a Mr Chihota had informed him that the landlord (first defendant) would indeed provide security for the leased premises. The landlord had, from 2005 up to the time of the break-in on 18 April 2008, billed the plaintiff for its portion of the security costs. In support of his evidence, Mr Ncube referred the court to receipts and statements of account appearing on pp 1-4 of the document he produced as exh 1.

Mr Ncube said when the burglary occurred police were informed. The matter, according to him, was then left in the hands of the police and the two defendants.

Mr Ncube also testified that in 2008 there was a change of management in the first defendant. He said that despite the new management denying the existence of a lease agreement, the first defendant continued to bill the plaintiff for security services. He confirmed that goods listed on p 2 of this judgment were indeed stolen after the burglary. He said some of the goods were purchased in Zimbabwe dollars whilst some of them were purchased in South Africa and paid for in foreign currency. He said the replacement values were in United States dollars and no depreciation had been factored.

Under cross examination, Mr Ncube said that although, the plaintiff could provide invoices and receipts as from 2005, it had thought the few it produced in exh 1 were sufficient to prove its case. He maintained that the plaintiff and the first defendant had reached a verbal agreement on the issue of security as supported by the invoices produced in court. He said up until 18 April

2008, the first respondent had indeed provided security. It was his evidence that the first defendant had breached the verbal agreement by failing to provide security yet it continued to bill and receive payment for security.

Mr Ncube said, as between the first and second defendants, the plaintiff was not clear as to who was responsible for the loss. The plaintiff had merely been told that the second defendant was guarding the premises at the material time. He said the verbal agreement did not include the second defendant and he did not know the name of the company that was guarding the premises at the time of the loss.

The second and last witness of the plaintiff was Mr Austin Munyavhi (Mr Munyavhi). He said his company, Utsanzi Product Industries, also rented premises from the first defendant and the company had the same security arrangements as the plaintiff (i.e. with the landlord being responsible for security and lessee paying for part of the security bill). He said he, like the plaintiff, also received invoices for security as from 2005 when he became a tenant.

Mr Munyavhi denied the existence of a Tenants Association at the time he became a tenant. He, however, said a Tenants Association was formed later but he was never a member of it.

Under cross examination, Mr Munyavhi said his company was no longer a tenant of the first defendant. He said he had left after the expiry of his lease and had no grudge with the first defendant. He said he was not aware of the verbal agreement between the plaintiff and the first defendant. He, however, maintained that security arrangements were the responsibility of the first defendant. He also did not know if the second defendant was the one guarding the premises. He said as tenants they were only involved in the issue of security in the sense that they liaised with the first defendant's accounts department whenever they noticed security was not provided.

At the close of the plaintiff's case Mr *Dondo,* for the first defendant, said he was under instruction from the first defendant to apply for absolution from the instance since it was not clear on whether or not the plaintiff's claim was based on delict or breach of contract. He argued that if at all any loss occurred, compensation would have to be based on Zimbabwe dollars at the time of such loss (i.e. 18 April 2008). He also said it was not proper to argue for a replacement of old goods with new ones.

In response to the application for absolution I was of the opinion that the plaintiff had a story which required clear rebuttal from the other side. The receipts against invoices from first

defendant appeared to confirm a contractual arrangement. I therefore felt it would be premature to seriously consider the application for absolution. I dismissed the application.

The first defendant then called its first witness, a Mr Martin Kwaramba (Mr Kwaramba). The witness said he had been employed by the first defendant for 18 years as a Buyer. He said he knew of the arrangements relating to security. He said that at the material time all tenants were responsible for their security in respect of premises let out to them. The landlord only collected payment for onward transmission to the security companies concerned. He said the Tenants Association had agreed that payments should be made through the first defendant. He had heard about the burglary of 18 April 2008 but argued that the first respondent was not responsible since security matters were the plaintiff's responsibility. He did not agree with the value placed on the plaintiff's goods.

Under cross examination Mr Kwaramba, said as a buyer he only got to know something relating to security arrangements during budget meetings. He said, unlike others, Kingsport had its own security arrangements in place. He said the first defendant never contracted with the second defendant for security. He said when it was agreed that the first defendant should make arrangements for security, some tenants did not pay and as a result there was no security as from 2007 to 2008. He said the second defendant was never asked to guard any premises.

The last and second witness called by the first defendant was Mr Kingston Mhako (Mr Mhako). Mr Mhako said he was the Managing Director of Kingsport. His company had, in 2006, signed a lease agreement with the first defendant similar to the one signed between the plaintiff and the first defendant. The first defendant, he testified, had not undertaken to provide security for his company. To that end his company, which was small, had until July 2007, relied on the first defendant's security arrangements. He said his company had, as from August 2007, directly engaged the second defendant. He said that in 2007 all other companies at the premises had no security. He had asked the first defendant, as landlord, to arrange for all tenants to discuss the issue of security but that had failed until he made his own arrangements in August 2007. He said the plaintiff did not attend meetings that were called to discuss security. He further stated that as from 1 February 2008, the first defendant became responsible for security arrangements but only for those tenants who contributed/paid for the security. His company was the only one paying. Mr Mhako said when the burglary occurred on 18 April 2008, the plaintiff's premises were not guarded. It was only his company that had security.

The second defendant called one witness. It called Mr Sephen Partze Musha (Mr Musha) who said as at 18 April 2008 the second defendant was only contracted to Kingsport. He said the second defendant was not responsible for security in the plaintiff's area. He therefore did not know why the second defendant was being dragged into court.

The second defendant closed its case after Mr Musha's evidence.

In her closing submissions Ms *Ndawana* stated that the evidence before the court showed that the first defendant indeed undertook to provide security at the premises leased to the plaintiff. To that end, she submitted, the first defendant, as from 2005 to 18 April 2008 when the burglary occurred, sent invoices to the plaintiff on a monthly basis for payment for rent, electricity and security. The plaintiff paid for all invoices it received from the first defendant inclusive of payment for security.

Ms *Ndawana* submitted that the plaintiff's claim was for compensation for the loss of its goods at a fair value as depicted in the quotations appearing in exhibit 1. She concluded that the first defendant, having undertaken to provide security and having received payment for security, had failed to provide such security and was therefore liable to compensate the plaintiff for the loss it suffered. She declared:

> "What is clear from the evidence led is that the first defendant undertook to provide security for the premises leased to the plaintiff, and indeed received payments for the provision of such security but failed to do provide the security.
>
> It is therefore apparent that the first defendant is liable to compensate the plaintiff for any loss incurred as a result of its failure to provide such security. From the evidence led by the first defendant, it became clear that the second defendant was not engaged by the first defendant to provide security for the premises occupied by the plaintiff. Plaintiff was effectively paying for a service it was not receiving".

The above submission clearly absolves the second defendant from liability.

On the issue of the claim being expressed in foreign currency, Ms *Ndawana* cited the cases of *Watergate (Pvt) Ltd and Commercial Bank of Zimbabwe* (SC 78/05) and *Makwindi Oil Procurement (Pvt) Ltd v National Oil of Zimbabwe* 1988(Z) ZLR 482 (SC) where payment in foreign currency was said to be acceptable if a party proved that its loss was in foreign currency. In such a case the loss would most be fully compensated in foreign currency. She argued that the thrust in the court's ruling should be to ensure that "damages are meaningful and that there is compensation to the plaintiff". (See *Fabiola v Louis* HH 25/09).

In casu, she argued, the introduction of the multi-currency system in February 2009 actually vindicated the wise position taken by the plaintiff. She observed that in practice

dollarisation had already occurred. Furthermore, she argued, in *Leighton v Eagle Insurance Company Limited & Others,* HH 193/02, the effect of inflation had been recognised when SMITH J said:

> "It would be grossly inequitable to fix blindly in every case, that the date for assessing damages is the date of the delict. The court can take judicial notice of the rampant inflation in the country… It would be most unfair to the plaintiff to award him damages assessed at the costs prevailing in 1996 with interest at the prescribed rate from that date. It would be much fairer, and more realistic, to fix damages at today's costs".

All in all, she submitted, the plaintiff had proved its claim and there was nothing illegal about the plaintiff's claim being made in foreign currency. She therefore urged the court to grant the relief as prayed for.

Mr *Dondo*, for the first defendant submitted that the plaintiff had failed to place before the court evidence which would entitle it to be granted the relief it sought. He said there was no explanation as to why an important issue such as security was not included in the lease agreement. He argued that the evidence of the first defendant to the effect that the issue of security was left to the individual tenant had been corroborated by Mr Mhako who testified that the landlord had asked everyone to organise their own security.

Mr *Dondo* said there was no reason for the court to accept the plaintiff's story and reject that of the first defendant. He said that the plaintiff had failed to prove the existence of a contract and the breach thereof relating to the issue of security.

Mr *Dondo* went further to submit that the claim, having been instituted on 14 November 2008, could not have been expressed in United States dollars when the loss had been suffered in Zimbabwe dollars. He said the Mkwindi case (*supra*) did not lay down a strict rule that the issue of foreign currency was the only determining factor in matters of this nature. To that end, he argued, the plaintiff had not established that its normal business was in United States dollars. Furthermore, he argued, the bulk of the plaintiff's goods were not new and had bee purchased in local currency (Zimbabwe dollars) as demonstrated by the plaintiff when in its letter of demand it asked for ZW$467 Billion. He said even if the first defendant were to be found liable, it would not be equitable to compensate the plaintiff on the basis of values relating to new goods.

Mr *Shamu* for the second defendant, submitted that the evidence led in court clearly proved that the plaintiff could not lay any claim against the second defendant. There was no evidence to indicate that the first defendant had ever engaged the second defendant to provide security at the

premises leased by the plaintiff. Agreeing with the firs defendant's council, Mr *Shamu* also said the plaintiff had failed to prove its loss in foreign currency.

In terms of the pre-trial conference minute the issues that fall for determination in this judgement were listed as follows:-

"1. Whether first defendant did not agree to provide security for the leased premises?

2. What was the purpose of the security services?

3. Whether second defendant was not contracted to provide the security services at the leased premises?

4. Whether first defendant/second defendant are liable for plaintiff's loss in any way?

5. What is the reasonable value of plaintiff's lost goods?"

Without ignoring any of the issues listed above, I shall now proceed to determine this matter in following manner:

1. Did the first defendant undertake to provide security for the premises leased to the plaintiff?

It is common cause that the lease agreement did not cover the issue of security. It is however, the plaintiff's contention that in terms of an enabling clause, namely Clause (W) quoted herein in full at p 1 of this judgment, the first defendant agreed that it would provide security upon payment of a requisite fee by the plaintiff. In confirmation of that contention, in its further and better particulars filed on 9 October 2009, the first defendant admits that it invoiced the plaintiff for security services provided by the second defendant but the plaintiff "never paid the amount on the invoices relating to security". Indeed pp 2 and 4 of exh 1 show examples of invoices from the first defendant dated 15 March 2008 and 19 February 2008. Also at pp 1 and 2 of the same exhibit we have receipt numbers 011527 (dated 5 April 2008) and 011513 (dated 29 February 2008) issued to the plaintiff by the first defendant for:

(a) rent and bills; and

(b) rent and rates.

Both invoices include costs for security.

Mr Ncube's evidence was to the effect that the plaintiff had at all material times paid for security services as billed. There was no rebuttal of what a Mr Chihota had told Mr Ncube. His evidence was, in my view, corroborated by Mr Munyavhi's evidence. Mr Munyavhi testified that although tenants could have a say on who was finally contracted to provide security, the entire responsibility for security was in the hands of the first defendant. Tenants

could only raise issues with the first defendant on security when there were problems. That evidence, in my view, remained intact because Mr Mhako's evidence was to the effect that he only arranged his own security for Kingsport after a break-in. Accordingly the probabilities are that prior the break in Mr Mhako had also relied on security arrangements put in place by the first defendant.

There was little to gain from Mr Kwaramba's evidence because from his own admission he only heard of security issues during budget meetings. He had no first hand knowledge on how security was arranged.

The second defendant denied being contracted by the first defendant to provide security for the premises leased by the plaintiff. The second defendant, however, agreed that it provided security for Kingsport who actually signed a contract for such service. That was the only contract produced in court. It therefore means that whereas the plaintiff made payments to the first defendant for security as agreed outside the lease agreement, the first defendant, in breach of that agreement, did not make arrangements with any of the security firms to provide security at the premises leased to the plaintiff.

My finding therefore, on a balance of probabilities, is that there was indeed an undertaking by the first defendant that it would provide security to the premises leased by the plaintiff. The first defendant breached that undertaking by failing to arrange for the provision of security after the plaintiff had, as per arrangement, made payment for same. I believe that the plaintiff paid for security as arranged.

The above finding also answers the issue of whether or not the second defendant ever entered into a contract with the first defendant for the provision of security at the premises leased to the plaintiff. As correctly conceded by counsel for the plaintiff, the evidence led in court revealed "that the second defendant was not engaged by the first defendant to provide security for the premises occupied by the plaintiff". The second defendant demonstrated in its evidence that where it contracted with another party for the provision of security, it drew up a formal contract – such as was the case with Kingsport.

Although in its pleadings, the first respondent had alleged that the second defendant had contracted to defend the premises occupied by the plaintiff, no evidence was led in court to prove that averment.

Given the above it is clear that no liability attaches to the second defendant with respect to the plaintiff's entire claim. In those circumstances the second defendant would be entitled to costs for being dragged to court for no apparent reasons.

2. <u>If first defendant is liable for plaintiff's loss, what is reasonable compensation for the plaintiff's lost goods</u>

I have in this judgment already made a finding on a balance of probabilities that the first defendant was in breach of a contract and therefore liable for the plaintiff's loss.

As indicated elsewhere in this judgment, the first defendant submitted that the plaintiff cannot be compensated in foreign currency because it suffered its loss in Zimbabwean currency. Furthermore, the first defendant argued that any form of compensation, if any, should not relate to new goods since the goods stolen were old (i.e. 2 years old).

There is no dispute that the loss, affecting the plaintiff, occurred. There is also no dispute that at the time of the loss, 18 April 2008, the multi-currency system was not yet born. Having established that as a result of the breach of contract, by the first defendant, the plaintiff suffered a loss for which is wants to be compensated, this court has a duty to determine what fair or adequate compensation should be given to the plaintiff.

I believe that, taking into account earlier court decisions (i.e. Makwindi (*supra*), Watergate (*supra*) and Fabiola (*supra*) it would not be in the interests of justice for this court to deny the plaintiff the relief it seeks just because the loss was suffered in Zimbabwean currency – which currency is no longer in use. We have *in casu* a situation where, notwithstanding the fact that the plaintiff suffered its loss in Zimbabwean currency, it has been able to put forward a fair value to its loss in foreign currency. The only other challenge to that value is that it relates to new goods. That, in my view, is a misplaced argument because all what is required is fair and adequate compensation for the plaintiff. The main thrust should be to address the loss suffered fairly and adequately. To that end I can only reiterate the point by quoting MAKARAU JP (as she then was) when in Fabiola *supra* she said the following:

> "It appears to me that the issue I have to determine is whether to extend the approach that has been taken in the Makwindi case and be innovative to enough to suggest that where a loss has been suffered and can be calculated in both the local and in a foreign currency, the court has a 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 that currency is the foreign currency as opposed to the 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 a plaintiff the redress that he or she seeks".

I fully associate myself with the above and find same applicable to this case. I would accordingly find it difficult to deny the plaintiff the compensation it has prayed for. My view is that the compensation claimed reflects a fair value of the goods lost by the plaintiff.

I shall therefore order as follows:-

IT IS ORDERED THAT:

1. The plaintiff's claim against the second defendant be and is hereby dismissed with costs.
2. The first defendant be and is hereby ordered to pay the plaintiff the sum of US$5 753-90 as compensation for the plaintiff's goods that were stolen.
3. The first defendant be and is hereby ordered to pay interest on the sum of US$5 753-90 at the prescribed rate from the date of this order; and
4. The first defendant be and is hereby ordered to pay costs of suit.

Gill Godlonton & Gerrans, plaintiff's legal practitioners
Chinamasa, Mudimu & Dondo, 1st defendant's legal practitioners
Vasco Shamu & Associates, 2nd defendant's legal practitioners