JEOFREY G MUKORERA
versus
OCEAN BREEZE ENGINE & COOLING SYSTEMS

HIGH COURT OF ZIMBABWE
MAKARAU J
HARARE 12 and 27 February 2008

CIVIL TRIAL

Mr S. Tsaurayi for plaintiff.
Defendant in default.

MAKARAU J: The distortions caused by the galloping inflation currently characterizing our economy are graphically shown in part, by the claims that are being brought before the courts. The above, in my view, is one such example.

While inflation is a fact that they must take judicial note of, courts must in my view be wary that the distortions caused by inflation in the economy are not transported wholesale into the law thereby causing distortions of legal principles.

The plaintiff operates a butchery from Muzarabani Business Centre in Mashonaland Central. In 2003, he thought of adding to his assets by having a freezer room installed at the butchery. He approached the defendant who in or about September 2003, gave him a quotation for installing a 6x8x8 cubic metre cold room for $13 million. In terms of the written quotation, the plaintiff was required to pay 50 % of the total cost as a deposit and to show confirmation of the order. A deposit in the sum of $5, 4 million was duly paid on 29 September 2003 and installation was to be done in a week's time. On 17 October 2003, the defendant delivered the cold room, ready to install and commission it. Upon realizing the error, the plaintiff declined to accept delivery and installation of the cold room whereupon the defendant returned to Harare with the cold room. Efforts to get the defendant to return and install a freezer room were in vain, prompting the plaintiff to approach his legal practitioners for assistance.

In April 2004, the defendant refunded the sum of $1 955 000-00 to the plaintiff, retaining the sum of $3 445 000-00 as necessary expenses incurred in manufacturing and attempting to deliver the cold room to the plaintiff. Unhappy with this development, the plaintiff issued summons claiming a payment of the sum of *"$13 000 000-00 of $2 480 000-00 which is current $657 200 000-00, with room to in increase it to match the current costs of*

installing a freezer room at trial" (sic) together with interest at the prescribed rate from date of the deposit to date of payment in full and costs of suit.

At the trial of the matter, the claim was amended to $53 billion.

The matter was defended. In its plea, the defendant denied that it ever quoted the plaintiff for the supply and installation of a freezer room and averred that it quoted it for the supply and installation of a cold room.

At the trial of the matter, the defendant was in default and in terms of rules 59 A and 60 of the High court Rules, 1972, I called upon the plaintiff to lead evidence on the amount of his claim.

The plaintiff's evidence was largely a rehash of the facts of the matter as I have detailed above. In addition, the plaintiff adduced into evidence a quotation that he obtained from a company called Commercial Refrigeration in the sum of $202 billion. The date of the quotation is not given on the handwritten quotation which also includes a component of foreign currency. When asked to explain his claim in the sum of $53 billion, the plaintiff had the following to say in part:

> "I am claiming an amount that has the same value as the amount that I paid to the defendant in 2003."

He went on further to explain that the amount he is claiming is one quarter of the total amount of the quotation from Commercial Refrigeration just as the amount that the defendant retained was a quarter of the quotation it had given him.

At the commencement of the trial I was under the impression that the plaintiff's claim was one of damages. It was with this response that it appeared to me that he is simply claiming a refund of the amount that the defendant retained as expenses of manufacturing the cold room and traveling to and from Muzarabani with the wrong refrigeration unit, not at its nominal value but at its appreciated value, taking into account the impact of inflation. His claim appears to me to be one for a debt and not for damages arising *ex contractu*. The plaintiff's evidence was to the effect that the sum of $3 445 000-00 that was retained by the defendant in 2004 now has the same value as $53 billion which he claims. It became clear to me from this response that the plaintiff is raising inflation as the basis of his claim.

The plaintiff's stance was reaffirmed by *Mr Tsaurai* when he addressed me on the issue. His argument was to the effect that the plaintiff is entitled to claim the same percentage of the amount that it will now costs to supply and install a freezer room as was the percentage of the amount that the defendant retained in 2004 to the cost of installing a cold room in 2004.

Judges have often used telling adjectives to describe submissions they did not expect from legal practitioners such as "startling" or "ingenious". Neither term aptly describes my sentiments at being presented with this submission.

I hasten to remark that the matter before me although set down for trial, proceeded as an application for default judgment.

Ordinarily, a request for default judgment is hardly denied as by his default, the defendant is taken to have admitted all the averments made by the plaintiff. I am also aware of the school of thought that holds the view that it is not for a judge or the court determining an application for default judgment to act as the unpaid and un-briefed counsel for the defendant who is in default and deny a plaintiff judgment on issues that the defendant may not have raised if in attendance. Thus, a court dealing with an application for default judgment is perfectly within its rights to enter a default judgment not on the merits of the matter but on the technical basis that the defendant is in default even in cases where it is of the opinion that a defence may have been available to the defendant.

There is in my view however a limit to the non- participatory role that a court may play in an application for default judgment. In my view, where a claim is clearly not well founded in law, a court may not give judgment on such a claim simply on the basis that the defendant is in default. Similarly, where damages have not been adequately proved to the satisfaction of the court, judgment may not be entered in the claimed sum again simply on the basis that the defendant is in default. The basis for drawing the limit to the non-participatory role of the court in my view is the fundamental principle that after the parties have made their submissions to the court, the decision or order that is made is solely that of the court and such decision or order must find a basis in law at all times.

In my view, the claim before me is a case compelling me to abandon my non-participatory role for two reasons. Firstly, I take the view that the plaintiff's claim, being a claim in which the alleged debt has been appreciated to take into account inflation, is badly founded in law. Courts will take inflation into account when assessing damages in certain delictual claims but inflation on its own cannot be a cause of action.

In *Edward Marume and Another v Todd Muranganwa* HH 27/07, I had occasion to deal with the issue of inflation in another application for default judgment. The following were my views on the matter:

"In my view, the issue involves a detailed discussion of 'currency nominalism" and "revalorization" and the place of such concepts in Zimbabwean Law".

The concept of currency nominalism has been held to be applicable in all aspects of South African Law. (See *SA Eagle Insurance Co Ltd v Hartley* 1990 (4) SA 833). In view of the provisions of the Prescribed Rate of Interest Act, there is a strong case for arguing that the concept also underlies all aspects of Zimbabwean law and that revalorization, or the appreciation of debts to take into account inflation has no place in our law.

Again like in the *Marume* case, I have not been adequately addressed on the issue. I hold the view that the distortions caused by inflation in the economy should not lead to the wholesale distortion of legal principles that have withstood the test of time in a bid to find legal solutions to a problem that is not legal in nature and origin and may prove to be transient. I am yet to be persuaded that revalorization is part of our law of debt collection.

Assuming that I have erred in classifying the plaintiff's claim as one based on inflation, and that properly it is one seeking damages for an alleged breach of contract, then in my view, two other issues arise. Firstly, it has not been proved that the retention of the sum of $3 455 000-00 was wrongful in any way or that it constituted breach of the contract between the parties. In fact, it would appear to me that the parties were not ad idem as the plaintiff requested for a freezer room and the defendant supplied a cold room. The offer and the acceptance did not coincide and the parties never had a contract in my view.

Even if one were to be generous and hold that there was a contract that the defendant breached by supplying the wrong refrigeration unit, the damages suffered by the plaintiff for the alleged breach have not been adequately proved. It cannot be said that the quotation from Commercial refrigeration in any way represents the correct loss of value in money between 2004 and the date of the hearing. It has also not been proved that the quotation by Commercial Refrigeration has any relationship to the quotation given by the defendant in 2003. One was quoting for a cold room of different dimensions and the other was quoting for a freezer room of entirely different dimensions. How the one can be tendered as proof of the value of the other was not argued before me. Despite much effort, I cannot figure out a possible argument on the relationship myself.

For the above reasons, I cannot accede to the prayer for default judgment in the matter in the amount prayed. I have anxiously considered whether I can grant judgment in the sum of $3 455 -00 that was retained by the defendant in 2004 together with interest thereon at the prescribed rate from the date of the retention to date of payment. The amount involved even

with interest is so pitiful in my view as to make a mockery of the justice delivery system where I to order its payment. In m view, the plaintiff is best served by the order that I make below.

In the result, I make the following order:

1. The defendant is granted absolution from the instance.
2. The plaintiff is hereby granted leave, after effecting necessary amendments to his claim, and upon service of such on defendant, to set the matter down for judgment in terms of rule 58 of the High Court Rules 1972.
3. There shall be no order as to costs.

Hungwe & Partners, plaintiff's legal practitioners.