

CBZ BANK LIMITED  
versus  
BUSINESS ENVIRONMENT SERVICES (PVT) LTD

HIGH COURT OF ZIMBABWE  
DUBE J  
HARARE, 27 June 2017, 21 July 2017 & 22 September 2017

### **Civil Continuous Roll**

*N Bvekwa*, for the plaintiff  
*T S Manjengwa*, for the defendant

DUBE J: This matter was placed before me as a special case in terms of Order 29 r 199 of the High Court of Zimbabwe Rules, 1971.

The facts of this case are best summarized by the statement of agreed facts filed by the parties. The plaintiff claims payment of \$33 010.00 in damages being the reasonable repair costs incurred by it to put its premises in good order and repair after the defendant vacated the premises. The defendant counterclaims in the sum of \$119 521.06 for monies overpaid on a court order. For convenience, the parties will be referred to simply as plaintiff (lessor) and defendant (lessee) in both claims.

The following synopsis is common cause. The parties entered into a lease agreement, (lease) in February 1999 for the lease of 101 Five Street, Bulawayo, (the premises), for purposes of running an educational college. The lease was renewed from February 2009 to February 2011. At the commencement of the lease, the plaintiff did not inspect the premises. The agreement provided that the defendant was to maintain the premises and on termination of the lease, return the premises in a same state of good order and repair as they were at the commencement of the lease period.

On 26 January 2011 the plaintiff obtained an order for cancellation of the lease agreement under HC 1955/10 and payment of rentals and operational costs in the sum of \$40 989.58, holding over damages of \$139.603 per day and eviction of the defendant totaling US \$108 698.51. The

plaintiff did not execute the writ of eviction but sought to execute the writ of recovery several times. In May 2011, the parties reached a compromise position. The defendant was to continue in occupation of the premises from 1 May 2011 to 31 December 2011. The defendant vacated the premises on 7 January 2012. During the period 1 March 2010 to date, the defendant paid a total of \$209 253.00 to the plaintiff. The defendant's liability for the period 1 May 2011 to 7 January 2012 is \$119 938.48. A total of \$228 636.99 was due to the plaintiff. At the time that the parties reached the compromise agreement in May 2011 a total of \$134 207.00 had been paid by the defendant. The defendant continued, whenever the defendant fell short in its monthly obligation to request the Sheriff to recover any such amount from the defendant. All amounts paid after May 2011 and January 2012 were paid under threat of execution.

At the time that the plaintiff vacated the premises, there was no formal handover takeover of the premises. The plaintiff repaired the premises and claims \$27 776.95 for the repairs. The plaintiff has acknowledged owing \$13 748.82 and has paid \$4 800.00 of this amount.

The following issues were referred for determination.

1. Whether the defendant is liable for repairs undertaken on the premises by plaintiff.
2. Whether the plaintiff should refund to the defendant any amount representing the difference between the judgment debt and costs in HC 1955/10, and the amount paid between March 2010 and April 2012.

The plaintiff's position is that the defendant must pay the costs for the repairs because it failed to keep the premises in the same condition that it found them in. It failed to advise the lessor of any defects in writing in terms of the agreement and hence the premises are deemed to have been in good order and repair, as at the time of occupation, rendering the defendant liable for the repairs to the premises.

The defendant submitted that the condition of the building at the time of letting was not known. The plaintiff is unable to establish the state of the property on vacation as there was no hand over take over at the time of entry by the defendant and on vacation. The plaintiff has failed to prove the state of the building on signing of the agreement and the plaintiff cannot categorically affirm the state in which the premises were. It argued that the premises were in bad shape but were suitable for its purposes. On vacation, the defendant undertook repairs and returned the premises

to the shape it was when it signed the lease. It contended therefore that it was not necessary to invoke the provisions of clause 7.13 of the lease agreement.

As regards the counterclaim, the defendant has brought a general unjust enrichment claim. The defendant submitted that once the judgment was satisfied, the writ ceased to have any force and effect and became a nullity. Any amounts paid outside the writ were illegally collected. It maintained that the plaintiff was entitled to collect only \$104 800.49 in terms of the writ and has been unjustly enriched. It counterclaims for payment of \$119 521-06 being monies collected over and above the writ.

The plaintiff admits using the writ to collect money which was not covered by the court order and after the order had been satisfied. Further, that the defendant made payment to the plaintiff in error in the belief that it owed the money when it did not. It contended that because there was some legal obligation on the part of the defendant to make payment to the plaintiff in lieu of rentals and other charges accrued after the order, the amounts over claimed are legally due to the plaintiff and there was no unjust enrichment caused to the plaintiff. The plaintiff asserts that the defendant's claim is based on a *conditio indebiti* and that the defendant cannot reclaim such amounts under the *conditio indebiti* because there are operational costs and arrear rentals still due to the plaintiff and that the facts do not create a cause of action under the *conditio indebiti*

### **The Repairs**

The lease agreement entered into provides in part as follows,

#### **Clause 7**

“LESSEE’S DUTIES

The lessee shall.....

7.13 Shall advise the lessor in writing of any defects in the premises within five working days of commandment of this lease and in the event of the lessee not advising of any defects the premises shall be deemed to be in good order and repair.”

7.14 Keep the premises in the same good order and repair as they are of the commencement of the lease period and any extension thereof. Return the premises to the lesser in the same good order and repair.

7.15 Not make any additions or alterations whatsoever to the building without the prior written consent of the lesser, provided should the lessor grant such consent, such additions or alterations shall be effected by the lessee at the lessee’s own cost and expense and shall be carried out subject to the supervision of an architect appointed by the lesser whose fee shall be borne and paid for by the lessee provided further that should the lessor so require at the termination of this lease the lessee shall restore the leased premises to the condition in which they were at the commencement of the lease....”

The lessee was required in terms of clause 7.20, to pay for the replacement of all lighting bulbs and tubes and not alter any locks without prior written consent of the lessor. The lessee was expected on occupation, to inspect the premises and advise the lessor in writing of any defects in the premises within 5 working days of commencement of the lease that would make the property lose its status of being in good order and repair in writing to the landlord.

The general rule of common law is that the lessor impliedly warrants the premises against any such latent defects as would prevent the premises from being used for the purposes for which the premises are meant or contemplated and the lessor impliedly undertakes to maintain the premises in a reasonable state of repair having regard to the condition of the building at the time of letting. See *Pothier: Treatise on the Contract of Lease sections 106 and 109, Paynton v Gran 1910 AD 205*. No responsibility is placed on the lessee to report any defects to the lessor on occupation at common law. Instead of the lessor warranting the premises against latent defects, this lease agreement places that responsibility on the lessee. The provisions of the lease agreement had the effect of altering the common law practice. The roles of the parties were reversed. There is nothing untoward about this, the law permits parties to a lease agreement to agree that an obligation ordinarily ascribed to a lessor at common law, be borne by a lessee.

The lessee did not report any defects to the lessor at the commencement of the lease as required. Good order and repair refers to a state of repair that a tenant is generally satisfied with which will enable him to use the premises for the purposes for which he leases the premises. The term good order and repair is subjective. Whether a premises is in a good state of repair depends on a number of factors such as the age and class of the building, type of property and the purpose for which the premises will be put to use among other considerations. Such a clause places a duty on a lessee to keep the leased property in good condition. A failure to report any defects raises the presumption that the building was in good order and repair. The lessee is expected to handover the premises on vacation in the same good state of good repair and order as when he occupied the premises.

This case is about quantification. In *Aaron's Whale Rock Trust v Murray & Roberts Ltd and Another 1992 (1) SA 652 (C)* at 655H-J the court said the following about quantification of damages,

“Where damages can be assessed with exact mathematical precision, a plaintiff is expected to adduce sufficient evidence to meet this requirement. Where, as is the case here, this cannot be done, the plaintiff must lead such evidence as is available to it (but of adequate sufficiency) so as to enable the Court to quantify his damages and to make an appropriate award in his favor. The Court must not be faced with an exercise in guesswork; what is required of a plaintiff is that he should put before the Court enough evidence from which it can, albeit with difficulty, compensate him with an award of money as a fair approximation of his mathematically unquantifiable loss.”

The onus to prove the cost of repairs is on the landlord. Claims for repairs done to property cannot be based on assumptions. Actual damages caused require to be proved. Where a party seeks damages caused to a building, he must first establish the exact state of the building at the time of occupation and then show the extent of the deterioration of the building. Sometimes it may be necessary to take photographs of the premises when the lessee occupies the premises to avoid disputes in the future. A lessor cannot simply assume that the building was in a good state of repair and hope to succeed in a claim for damages. The onus is on a plaintiff who claims damages for repairs, to state the condition of the building at the commencement of the lease and the state of deterioration at the time of vacation. It must be able to say what the exact condition of the premises was with respect to the features of the house. A lessor who fails to show the exact state of the premises when occupied vis -a-vis the extent of the deterioration of the premises on vacation fails to prove its damages as the court will be focused on actual damages caused.

The plaintiff claims that the defendant left the parquet flooring loose and chirped, carpets torn and loose, ceilings stained and paint peeling off, doors damaged, walls stained and some electrical fittings damaged. The plaintiff does not state the condition of these items at the inception of the lease in its pleadings. There was no inventory or handover takeover of the premises at the time of entry and on vacation of the premises. The plaintiff admitted that the premises were not inspected at the time the lease agreement was signed as well as the time when the defendant re-occupied the premises. It becomes difficult to say what the premises' prior state was. It does not follow that because the lessee was able to use the premises, it found it found the premises in a better condition than it was in on vacation. It is difficult to ascertain whether the defendant failed to keep the premises in the same good order and repair as they were at the commencement of the lease, for the reason that the actual state of the premises on occupation was not established. In the absence of a measurement regarding the actual state of the premises at the time of lease, it is difficult to quantify the damages caused.

Clause 7.20 expressly places the responsibility on the tenant to pay for and replace all fluorescent tubes starters and bulbs and the repair of the interior of the premises including doors, windows and glass plates which are provided for separately in the lease. Once it is shown that these items were not working, not replaced or not in place on vacation, it follows that the defendant is liable to replace them. There is no reference or description of the doors and electrical fittings replaced in neither the declaration nor the stated case. The defendant states in its further particulars that several electrical fittings and various doors were damaged without a precise identification of the doors and electrical fittings damaged or needing replacement. The rooms without electrical fittings and doors or windows damaged were not identified with particularity. The number of doors damaged is not known. A court assessing damages must be equipped to assess the damages requested for. It must not be expected to carry out that function through conjecture. The plaintiff has failed to quantify its claim for repairs.

#### The Counter Claim

Unjust enrichment occurs in a situation where a person obtained an undue benefit and will be required to make restitution. A claimant in an unjust enrichment claim has to show that another person has been enriched at his expense resulting in him being impoverished. The enrichment must be unjustified. The enrichment must not come within the scope of one of the classical enrichment actions. See *Industrial Equity v Walker* 1996 (1) ZLR 259(H). The onus is on a defendant to prove that he has not been enriched. See *African Diamond Exporters (Pty) Ltd v Barclays Bank International* 1978 (30 SA 699 @713G-H. He can only resist the claim if he can show that there is a good reason why recovery must be denied.

The *conditio indebiti* is available to a person who performed when he was under the mistaken belief that the performance was due. A *conditio debiti* falls within the ambit of unjust enrichment, See *Georgios and Anor v ZDB Financial Services Ltd* 2000 (2) ZLR 447 (HC), *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue* 1992 (4) SA 202.

A person who claims that he made an undue payment when he was under the mistaken belief that payment was owed when it was not can bring a claim under the *conditio indebiti*. The requirements of a *conditio indebiti* are as follows,

1. That the payment was made in the bona fide belief that it was owing, see *Iscor Pension Fund v Jerling* 1078 (3) SA 858

2. That the payment must have been made *indebiti* in the widest sense , that is there must have been no legal or natural obligation to make it
3. *Frame v Palmer* 1050 (3) SA 340 ©
4. The error must be a reasonable error See *Rahim v Min of Justice* 11964 (4) SA 630 (A)
5. Where restoration is claimed on the ground that the payment was not made voluntarily, the plaintiff must allege that it was made as a result of unlawful threat , and that payment was made under protest, See *Goldroad (Pty) Ltd v Fidelity Bank (Pty) Ltd* 1996 (4)SA 1151(T).

Unjust enrichment is a general principle of law that allows a plaintiff to recover money paid wrongly which results in the other party being unjustly enriched. The underlying principle of the remedy of unjust enrichment is to prevent a party benefitting from what may not be due to it. A party seeking to rely on unjust enrichment must in addition to proving the requirements of an unjust enrichment claim, show the existence of an unjust factor that gives rise to the unjust enrichment. Examples of unjust factors are mistake of law, duress, mistake of fact, undue influence ect. Possible defenses to unjust enrichment are estoppel, and change of position, *bona fide* purchaser and illegality. The plaintiff has the burden to prove unjust enrichment whilst the onus is on the defendant to prove that it was not unjustly enriched at the expense of the plaintiff. A party who proves that the other party has been enriched at his expense has a *prima facie* right to restitution. Unjust enrichment is an equitable remedy.

A person who relies on a *conditio indebiti* to recover an undue payment must show that he paid the money under the *bona fide* belief that he owed the money and there was no legal or natural obligation to pay the debt. The mistake must be reasonable. Where a claimant claims that he paid some money under protest or duress, he must show that he did not owe and that the payment was not voluntarily made or was made under threats. He must show that he protested payment when he paid the money See *Cir v First National Industrial Bank Ltd*.

In *Bowman, De wet and Du Plessis No v Fidelity Bank*, the court discussed whether a *conditio indebiti* can be used to recover money paid without authority. The court held that the money can be reclaimed on the basis that it did not owe, on the basis of the *conditio indebiti* or *conditio sine causa*. Whether or not a party can rely on a *conditio indebiti* depends on the nature of the unjust

factor relied on. Where a claim is based on the fact that an expired writ was used to collect money and further that threats of continued execution were used to force him to pay, resulting in money not due being paid, a claim for recovery based on a *conditio indebiti* may be made.

In this case, the defendant claims that it was forced to pay monies exceeding the writ through threats of further execution and that it protested the payments. It claims that the money was not covered by a court order. It averred that it labored under the mistaken belief that the money was owed and that this was further complicated by the fact that the Sheriff was never advised the order had been satisfied. This case is distinguishable from the *Bowman case* in that the money collected was due and owing in terms of the lease. Further it was not recoverable in terms of the writ. The unjust factor here is the wrongful collection through use of an expired writ and the duress exerted through use of the writ.

#### Law on Writs

The law requires a litigant to collect what is ascertained and due to it in terms of a writ. See *Hartley v Hartley* 1999 (1) ZLR 431 (S) @ 43 A-B; where the court stated as follows,

“the judgment upon which execution is issued must be a judgment from which there can be gathered what money or thing the judgment debtor must deliver.”

This approach finds expression in r324. Rule 324 provides as follows:

“324. Duration of writ

No writ of execution shall be issued after the judgment has become superannuated, unless the said judgment has first been revived, but a writ of execution once issued shall remain of force until such time as the judgment has been satisfied.”

In

In *Pandari Lodge (Pvt)Ltd v Cabs & Anor* 2014 920 ZLR 993 , the court considered the meaning and effect of this rule and held that a writ once issued remains in force until the order issued by the court has been satisfied.

The law limits amounts that can be collected in terms of a writ to what is due to the creditor in terms of the writ. A writ is valid for as long as its *causa* is still in existence. Once the *causa* is extinguished, it ceases to be a valid and a good writ. The effect of R324 is that a writ of execution remains in force only until the judgment or order has been satisfied. Once the judgment has been satisfied, the writ becomes a nullity and ceases to have any force of law. It may no longer be used to recover any other monies falling outside the court order. The law permits a party to collect only

monies that are ascertainable and due to it in terms of a writ. Money that has not been sued upon cannot be recovered by way of a writ issued in different proceedings. A party whose assets have been attached on the basis of a discharged writ is entitled to recover such assets.

The defendant emphasizes that he paid the money under protest and duress. The protest in a envisaged *conditio indebiti* is where a defendant pays money on the understanding that should the money being proved not to be owing he should be able to claim it back. The protest in this case just accompanies the duress or just follows after the duress and is not the unjust factor in this case. It just serves to explain the circumstances under which the money was paid. There was no actual protest made. Nevertheless, the law is that where money is paid in circumstances of protest and it has been made clear that the claimant is paying the money under protest and that he will subsequently reclaim the money, the money is recoverable.

The defendant has satisfied the requirements of both the general action of unjust enrichment as well as the *conditio indebiti*. The money paid over and above the writ was paid in the *bona fide* belief that it was owed and could be collected under the writ. The mistake seems reasonable to me. The bottom line is that the money was collected under cover of an expired writ. A total of \$119 521.06 was collected by way of writ had not been sued on. The writ expired or was discharged upon full payment of the money claimed under the writ. The payments were not made voluntarily and were made under threats of further execution. The Sheriff continued to recover monies from the defendant, albeit under protest. The defendant was through an unlawful writ pressured to pay monies falling outside the writ and in effect paid the money through duress. The plaintiff was only entitled to recover through use of the writ amounts covered by the order. Once the money covered by the order was recovered, the plaintiff was no longer justified in using the writ to recover any monies which though owing, fell outside the order. The fact that a party is owed money does not entitle it where it is in possession of a writ obtained in other proceedings, to use the writ to recover monies falling outside the judgment or order. Where monies have been paid through employment of a writ that has been discharged, a claimant is entitled to recover the monies so paid.

There was both a legal or natural obligation to pay the arrear rentals in terms of a lease agreement, but the difficulty is that the money was not legally collected. The plaintiff recovered monies that it had not sued for, was not collectable in terms of the writ. The money was paid without proper legal sanction. The plaintiff benefited from wrongful conduct. It was cognizant of the fact

that the money was not being properly collected and was resultantly enriched. The defendant was impoverished whilst the plaintiff was enriched at the expense of the defendant. It was unjustly enriched. The enrichment was unjustified. A claimant in an unjust enrichment claim is generally entitled to recover money it paid without legal sanction.

I have considered whether it is equitable to allow the plaintiff to hold onto the monies paid in excess of the writ on the basis that the plaintiff is owed money. Unjust enrichment is an equitable remedy. In the case of *Industrial Equity v Walker*, the court dealing with unjust enrichment remarked as follows,

“The requirements for liability for this action would have to be present and the courts can further control the ambit of this action by exercising a discretion of circumscribe liability according to the general sense of the justice of the community and the legal convictions of society”

Another case in point is the case of *Trahair v Webb & Co* 1924 WLD 227 @235 Tindall J had this to say,

“...where the plaintiff bases his claim for relief on an equitable doctrine the court must be careful that in a desire to do justice to the plaintiff, an injustice is not done to the defendant.”

What is paramount is that the plaintiff used an expired writ to collect monies not sued on. Once an invalid writ is used to recover money that conduct is prejudicial to the other party and the money ought to be recovered. The plaintiff is required to refund to the defendant amounts representing the difference between the judgment debt, interest in HC 1955/10 and the amount paid between March 2010 and April 2012. The plaintiff cannot hang onto the money illegally collected. Illegal conduct cannot be condoned. The illegal collections ought to be disregarded and the parties restored to their positions before the forced collections. Allowing the defendant to retain the money illegally collected would go against the very notion of r 324 which limits money recoverable through an order to the writ. I have also considered that unjust enrichment is an equitable remedy, however, the plaintiff cannot be allowed to retain monies recovered through use of a discharged or expired writ and contrary to the law. A defendant, who recovers a debt through use of an expired writ, cannot be permitted to dispel a claim for unjust enrichment on the basis of equity because he has dirty hands. The enrichment in this case emanated from an illegal process. The plaintiff is not entitled to retain money it collected through an expired writ. Equity considerations do not apply in the case of a clear breach of the law and where there is a legal remedy available to the defendant. The plaintiff has a remedy which lies in taking correct legal

steps and suing for the outstanding monies owed. It cannot benefit from its wrongful conduct. The court cannot perpetuate an illegality.

In the result it is ordered as follows,

1. The plaintiff's claim for repairs is dismissed with costs
2. The Defendant's counterclaim succeeds.
3. The plaintiff is to pay to the defendant \$119 521.06
4. The plaintiff shall pay the defendant's costs.

*Wintertons*, plaintiff's legal practitioner  
*Bvekwa Legal Practice*, defendant's legal practitioners