

SOUTH AFRICA / JUDGMENT

Italtile Ceramics Ltd v Dhayalan Chockanathan Chetty and Another (34660/2009) [2011] ZAGPPHC 126 (13 July 2011)

[2011] ZAGPPHC 126

COURT

North Gauteng High Court, Pretoria

BEFORE

Makgoka

CASE / FILE NUMBER

34660/2009

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REPORTABLE

IN

THE HIGH COURT OF SOUTH AFRICA

NORTH

GAUTENG, PRETORIA)

CASE

NO: 34660/2009

DATE:13/07/2011

In

the matter between:

ITALTILE
CERAMICS
LTDPlaintiff
and
DHAYALAN
CHOCKANATHAN
CHETTY.....First
Defendant
3AM
CERAMICS
CC.....Second
Defendant

JUDGMENT

MAKGOKA, J:

[1] This is an action based on *condictio furtiva*. The plaintiff originally instituted two claims respectively against the defendants: a sum of R1,447,081.00 under the *condictio furtiva* against the first defendant, and a sum of R196,955.97 against both defendants, jointly and severally, based on an oral loan agreement. The latter claim was withdrawn before the commencement of the trial. The trial accordingly proceeded against the first defendant only. During the course of the trial, the plaintiff applied for, and I granted, an amendment to its particulars of claim in terms of which the claim amount against the first defendant was amended from R1,447,000.00 to R568,374.30, alternatively R1 168 340.60, I will deal with this aspect later. For the sake of

convenience I refer to the first defendant simply as 'the defendant'. Where it is necessary to refer to the second defendant, the

designation would be 'Ceramics'.

[2] The plaintiff, as the name suggests, is a retailer in ceramics. It supplies ceramic floor and wall tiles, materials and accessories

utilised in the setting of ceramic tiles and marble, bathroom accessories including cabinets, baths, toilets, basins and related

sanitary ware. It has its principal place of business in Bryanston, Johannesburg. It has 80 branches and franchises throughout the country, trading under its flagship name 'CTM'. For upper market clientele the plaintiff owns and operates a number of 'Italtile'stores.

[3] The first defendant is a former employee of the plaintiff, who rose through the ranks and ultimately became a joint venture partner through Ceramics. (For convenience I refer to the defendant as a joint venture partner, although the partnership was concluded between the plaintiff and Ceramics). The dispute between the parties arises from the period during which the defendant was a joint venture partner and manager of the plaintiff's store in Gezina, Pretoria. I refer to this store variably as "CTM Gezina," "the store" or "Gezina store".

[4] The plaintiff's claim against the defendant arises from a written joint venture franchise agreement (the JVFA) concluded between the plaintiff and Ceramics (represented by the defendant) and the defendant (acting personally) at Johannesburg on 8 June 2006. In terms of the agreement, the second defendant was granted the right and license to operate the plaintiff's Gezina store for 5 years subject to the conditional right of renewal and to the following material terms:

The business would continue to be owned by the plaintiff. The right and obligation to operate and manage the business and receive profits in lieu of operating obligations would be awarded to Ceramics in exchange for the capital value to be paid to the plaintiff; The parties would share the profit in accordance with the share profit agreement in terms of which Ceramics would be entitled to monthly drawings and remuneration, of which drawings would be debited to the Ceramics' account. At the end of the first financial year, Ceramics' share of the profits (where applicable) would be credited to its capital account; The parties would decide the profit or losses according to their capital contributions to the business and which capital contributions would be expressed as a percentage; Ceramics retained the right to participate in dividends declared from the operation of the business bi-annually provided that any loan and/or interest to Ceramics had been paid in full and subject to other stated conditions.

[5] The JVFA has the following twelve incidental agreements as annexures, which the parties agreed formed integral parts of the JVFA:

Annexure "A" - Capital value schedule

Annexure "B" - Schedule of particulars

Annexure "C" - The franchise agreement

Annexure "D" - The joint venture disclosure agreement

Annexure "E" - Loan agreement

Annexure "F" - Calculation of the sum of the deposit

Annexure "G" - Performance standards

Annexure "H" - Performance targets

Annexure "J" - Profit sharing agreement

Annexure "K" - Schedule of monthly drawings

Annexure "L" - Guarantee-Joint Venture- Italtile Ceramics Limited.

[6] In its particulars of claim, the plaintiff alleges that:

6.1 subsequent to the conclusion of the JVFA, the plaintiff procured that the store was kept stocked with the products it required for its retailing and trading operations;

the defendant in his capacity as the sole member of Ceramics, among others controlled Ceramics in all material aspects pertaining to the warehousing and control of the stock of the business; during or about the period February 2008 to October 2008, and with the intention to steal, the defendant directed and/or procured and/or caused the unlawful removal of certain items of stock from the premises ("the missing stock"); The missing stock was not removed from the premises in the course of the management and operation of the business and/or in the ordinary course of the business and /or for the benefit of the business; the plaintiff at all material times was (and

remains) the owner of the missing stock; the defendant has failed to return the missing stock and is unable to do so.

[7] In his plea, the defendant pleads that the warehousing and control of stock were conducted within the context of existing logistics,

procedures and systems installed, implemented and prescribed by the plaintiff. He further admits that the stock referred to by the plaintiff, has gone missing, and the remainder thereof was in possession of the plaintiff on the premises when it terminated the agreement on 17 October 2008. The defendant denies that he was ever in possession of the stock removed from the premises. At a procedural level, Chetty avers that the plaintiff summarily terminated the agreement on 17 October 2008, without complying with the provisions of the JVFA, which required written notice to him to remedy the breach within 7{seven} days, before termination.

Common cause issues

[8] The following issues are common cause between the parties: that the stock held at CTM Gezina remained the property of the plaintiff and that the defendant was throughout in control of the business; that the business of the plaintiff through its CTM division is conducted on a cash and carry basis, with no credit afforded to customers, save through only under certain controlled circumstances; despite this the defendant introduced a so-called book delivery system granting credit to some customers; that during 2008 there were considerable stock losses at the CTM Gezina, with the store consistently failing to achieve its sales targets; that the business used an SAP software system, which the defendant used to post false entries in respect of missing stock; and that the JVFA was terminated on 17 October 2008 at the instance of the plaintiff.

The evidence

[9] Four witnesses testified in the plaintiff's case, namely Ms. Thilagam Govender (Govender), Mr. Barend Van der Berg (Van der Berg), Ms. Mpolokeng Rajake (Rajake) and Mr. Kenneth Archer. The defendant testified in his own defence and called no further witnesses. The factual and documentary evidence are largely common cause. As a result what would follow is a brief exposition of the salient

features of the evidence.

Govender

[10] She is based at the plaintiff's head office, responsible for the internal audit and risk management unit. In September 2008 she was commissioned by the plaintiff's Group Chairman Mr. Ravazotti to perform a mini-audit at CTM Gezina and report to him as he was not happy with the performance of that store. On 18 September 2008 she visited the store unannounced. She met with the defendant and requested cash and stock management reports to be printed. She immediately picked up a problem on the stock management report where the stock reservation report did not tally with the physical presence of such

stock in the store. The reservation stock consists of merchandize reserved for a customer pending confirmation of an electronic fund transfer (EFT). Once the funds were cleared the customer would be entitled to collect the stock. Until then, the goods would be stored in a designated place for "reserved stock".

- [11] She printed out the stock reservation report in the presence of the defendant. The stock reservation was an extensive list and she asked the defendant to assist her in checking whether what appeared on the report corresponded with physical presence of the stock in the store. She found that the reserved stock was not at the demarcated area, or in the store at all. The defendant's explanation was that he used a manual delivery book system in terms of which stock would be given to a customer without payment, and he would do a reconciliation when the customer ultimately pays. The defendant further explained to her how he operated the manual delivery book system: he would sign a quotation and hand it to dispatch section where the manual books were kept. Despatch section would give the goods to the customer. When the customer paid at the end of the month a tax invoice would be attached to the delivery note book.
- [12] Govender further testified that this was the first time she heard of this system, but it was definitely not the plaintiff's policy to extend credit to customers except through an entity known as Cladding Finance where customers who required credit would complete credit guarantees. The defendant was a cash-and-carry business and generally, customers would have to pay for the stock to enable them to remove goods from the store - the customer would have to exhibit proof of payment to take delivery of goods. The defendant's manual delivery book system, as explained above, was against the plaintiff's policy, which the defendant acknowledged when she confronted him about it. The defendant however, requested her not to disclose the operation of this system to Ravazotti. The defendant showed her one of the delivery books (exhibit "A") reflecting entries between August - September 2008. She found the second one (exhibit "B") in October 2008 when the defendant was effectively ordered to leave the business premises. That second delivery book pertains to the period September to early October 2008.
- [13] She also conducted a "variance stock count", to determine the difference between what was physically in the store and what appeared in the SAP system. A random sample of about ten items revealed that only four items were correct, meaning stock items were missing. The plaintiff's loss allowance policy was 0.5 percent of sales generated by a store monthly. At Gezina the variance was at about 30 percent, which was quite high. She reported to Ravazzotti about the mini-audit, in her report, she made the following conclusions:

Generally the leadership of the store Is lacking in operational input and drive. Opportunities to maximize sales by serving customers both directly and indirectly are being lost daily. There is no question about the volume of customers available to be served but regrettably the quality of the environment, staff attitude and management aptitude is (sic) sadly lacking. Reducing losses both

in breakages and pilferage by way of Management Systems, Methods and Procedures are (sic) not existent. General house and shopkeeping standards are practically non-existent, leaving the store in an appalling state of existence. Poor maintenance of discipline has no doubt directed (sic) this once profitable business, into a bad example of a CTM Branch. 'Untidy' accounting or administrative practices are being utilized to achieve various goals which cannot be tolerated in this business under any circumstances.

[14] On 20 September 2008, in the presence of the plaintiff's external auditor and herself, the defendant met Ravazzotti at the plaintiff's Montana store, during which the defendant informed Ravazzotti about the delivery book system. The explanation was "unacceptable"

to Ravazzotti, who was very upset about that. After the meeting, a Mr. Mark Prior was commissioned to do a full stock count at the store. She was present during Prior's stock count, it was during this stock count that the plaintiff discovered what came to be referred to during the trial as "rolling of stock" by the defendant. In short, the stock rolling scheme involved this: during the course of a month the defendant would falsely write off stock items to a breakages account, thereby removing record of the existence of the stock on the plaintiff's SAP system. On the last day of the month, the defendant would briefly return the stock items to the system from the breakages account i.e the stock temporarily became broken (and therefore not fit for sale) at the beginning of a month, and became "unbroken" on the last day of the month, only to again be written off to breakages account in the following month. Govender further testified that when the stock count was done, the missing rolled stock was not physically present.

[15] Just a few examples of these false entries: on 5 August 2008 stock to be value of R99 175.78 was written off as breakages but on 31 August it was written back into stock account. In other instances, loss would be written off to customer claims and later reserved, meaning a stock item was given to a client because of a complaint, and later "rolled" back into stock and written off as breakages and later brought back. In August 2008 the defendant had variances of at least R350 00 which counted as a stock loss; he hid these variances on the 31 August with the result that the following day, 1 September 2008 the net income of the business was overstated by the amount of the variances.

[16] After Prior had made a report, Ravazzotti requested her to do a further investigation at the store. This was approximately

mid-October 2008. She then perused the income statements and management reports for the period January to 16 October 2008. The

total of variances for the period 1 July - 31 October 2008 was R1 026 105.92, the bulk of which occurred in October. However, in the management report for September the defendant reported to the plaintiff's head office that the total of variances was only R21 250.08. Initially the defendant had told her the variances could be attributed to his manual delivery book system.

- [17] Govender further testified that she also found that the stock count procedures were not adhered to. The variances in stock were not posted properly. During her first visit to the store, only 70 percent of the stock had been counted. The defendant's explanation was that he had given the stock count sheets to merchandise captains who had failed to do the posting. Only after the defendant had left, she established that the defendant himself was responsible for the posting, and not the stock merchandise captains.
- [18] After the defendant's departure left she perused the two delivery books and noted that not all items therein corresponded with the records of payment, and in some instances there were no tax invoices. She followed up two of those customers the defendant had indicated would pay at the end of the month. One of the customers was Pilditch Construction. The defendant had told her that a stock reconciliation for the stock given to Pilditch would have been done by month end of September and submitted to Pilditch. She could however, find no such reconciliation. During a subsequent meeting with the owner of Pilditch, one Lopez, the latter admitted to taking stock but could not remember the quantity thereof. She went to Lopez's house where she found the plaintiff's stock items and removed them. Ultimately an agreement was reached with Lopez regarding the amount she would pay for the stock. With regard to another client, LIC Flooring, there was no uncertainty as to the amount owed to the plaintiff and the owner paid it.

Van den Berg

- [19] During the relevant period, he was employed at Gezina CTM in the dispatch section, responsible for handing out stock for which

customers had paid. Ordinarily, before a customer could retrieve goods, he would exhibit a tax invoice. When the defendant was in charge, this system was not followed. Often stock items went out on quotation signed by the defendant or his wife. The defendant insisted that as long as his or his wife's signature appeared on the quotation, stock could be removed from the store. There were

corporate clients who were beneficiaries of this system, e.g LiC Flooring. When deliveries were made to that particular customer, the owner thereof told them that they were not allowed to wear the plaintiff's branded clothing as it was not to be known that stock was from CTM. Since the departure of the defendant there has not been stock delivered on quotation.

Rajake

- [20] Ms Rajake was employed at CTM Gezina in December 2006. In March 2007 she moved from credit applications section to decor section, where she was also responsible for stock counting. In the ordinary course, after processing a variance report, she would give it to the defendant, who had a discretion to post it. At some stage she noted that a week after identifying certain items as not being physically present in the store, such items were reflected in the system on the stock evaluation report. Such items, however, would not be physically present on the shelves. She took this up with the defendant, whose first reaction

was that it was her responsibility to know about stock movement. She made her own investigation, which led her to the delivery books and the quotations which appeared in the system. When she confronted the defendant about this, he blamed her for loss of stock. Their relationship soured as a result.

Archer

- [21] He was, and still is, the Operations Manager of the plaintiff, based at its head office. His responsibilities include negotiations with the suppliers regarding pricing, delivery, as well as retail prices. He is responsible for overall logistics. He is also responsible for setting the retail prices, which once set, are communicated to all the stores via e-mail and logged onto the SAP system.
- [22] Archer's evidence mainly concerned the so-called Pegasus problem that arose in 2007. What had happened was that the supplier of the Pegasus tiles had changed all 43 x 43 packaging from 2m² to 2, 4 m² without communicating the change to the plaintiff, which could potentially, result in stock losses. The supposition on behalf of the defendant had been, during cross-examination of Govender, that the said change contributed to loss of stock. According to Archer, once the change was detected it took merely a month (December 2007) for the problem to be resolved and codes were changed throughout the month. For those stores who did not comply with the request to change over to new codes, they were to take the losses and in the end, it would affect profitability of stock. The change was communicated via email to all the stores instructing them to capture the products under the new product codes. When the problem was detected, some stores had already sold stock on the old codes, and this would have resulted in losses for those stores, and they had to write off the losses. Archer's evidence concluded the plaintiff's case.

The defendant

- [23] The defendant then took the stand in his own defence and called no further witnesses. He testified that during 2007 there were extensive renovations at CTM Gezina which affected sales and customers did not want to shop at what was virtually a "construction site". He experienced acute losses in stock. He suspected his assistant store manager for the theft of stock. He and other employees took a polygraph test. The assistant manager who failed the test later moved on to alternative employment. He, the defendant, passed the test.
- [24] He confirmed that he gave stock to some customers using the delivery book system, in terms of which customers were given stock without immediate payment, and for payment to be made at the end of the month. He had built up a very good relationship with major customers to whom he gave stock on quotation and at the end of the month, the stock would be invoiced upon receipt of payment. He learned the system at CTM Montana when he was under training. He knew that Ravazzotti would not have approved of the system.

- [25] The defendant also testified about the so-called Pegasus problem, which, in his view, contributed significantly to the loss. He never received the e-mail wherein stores were instructed to capture the product under the new code. The losses therefore affected the profitability of the store and of the partnership. In his view, this was not his problem but one between the plaintiff and the supplier, which had not been resolved by the time he left.
- [26] He further acknowledged the rolling of stock by himself as described in the evidence of Govender. He also conceded that although merchandise category captains also had access to secret code to move stock on the system, they did not make the false entries and reversals, which he did himself. I will revert to some other important aspects of the defendant's evidence, which arose during cross-examination.
- [27] The central question, in my view, is two-fold: first, whether the defendant's delivery book system resulted in loss for the stock for which no payment was received by the plaintiff; secondly, whether the defendant's stock-rolling resulted in stock loss, and by implication, patrimonial loss for the plaintiff. To determine the two legs of the enquiry, one has to consider (a) the position of the defendant in the context of the JVFA, as a joint venture partner and manager, and (b) the defendant's conduct in handling the plaintiff's stock.
- [28] As a JV partner and a manager, the defendant bore a duty to ensure that the store was operated on the basis of the agreement and generally, on the ethos and business practices of the plaintiff. He had to ensure that all control measures were in place to sustain profitability of the store. In this role, the defendant adopted a "hands-off" approach. During cross-examination, he conceded that he gave unauthorized people access to the manager's password menu - right down to the delivery man. All in all, 20 employees had the password - he could not tell whether he personally gave it to each one of them; he did not know how many and who else gave the password further to others. On the contrary he did not instruct them not to give the menu to others; even after noticing stock losses, which he attributed to suspected theft. He took no steps to ensure that the password was changed, dispute acknowledging that stock could be manipulated through the password. His so-called investigation into stock losses amounted to no more than perfunctory.
- [29] With regard to the defendant's handling of stock, the following should be kept in mind: fully aware that the plaintiff was a cash and carry business, the defendant gave out stock on credit to his selected customers without verifying among others, their turnover. He did not request their balance sheets, or demand any security whatsoever. He took no steps to ensure creditworthiness of such entities. All these he made without the approval of the plaintiff, because he knew that such would have been decidedly disapproved. Had Govender not made a visit to the store, this delivery book system would not have been discovered.

[30] When it comes to the rolling of stock, it should be kept in mind that Govender testified that there were various accounts available to a store manager to utilise when stock variances arose. The nature of these accounts is described in the plaintiff's internal systems and accounts guideline document. The defendant allocated stock variances largely to the breakages account. In the accounts guideline, the breakages account was designated for the following purpose (which the defendant acknowledged during cross-examination):

"Articles are to be written off to breakages if the articles are broken or damaged and they therefore cannot be sold".

[31] The defendant's rationale for false entries and reversal thereof remain unsatisfactorily explained. Throughout the trial, the

defendant failed to furnish any comprehensible and cogent reason why he did that. During cross-examination the defendant was hard-pressed

to concede that his decision in this regard was arbitrary. However, the real reason is not difficult to fathom. As Mr. Rome, for the plaintiff, correctly pointed out, unless he reversed the breakage entries back into the system, his take-home pay (dependent on the net income achieved for the store) would decline. He had to create an illusion in the plaintiff's system and in the financial records submitted to the plaintiff that all was well with regard to stock and the profitability of the store. For, without physical stock count, there was no way for the plaintiff would have been able to establish the nature and extent of the problem at the store. The mere posting of missing stock items to breakages account while knowing the items were not broken, was in itself, dishonest.

[32] Mr. Rome, for the plaintiff, contended that the defendant abused and manipulated the SAP system by writing off missing stock to breakages account. The defendant's conduct in this regard, so goes the argument, amounted to fraud perpetrated by the defendant on the plaintiff, as the monthly income statement of the store would reflect a totally different state of affairs than what it actually was. He also criticized the defendant's evidence, contending that it was generalized and vague. Mr. Du Toit, for the defendant, on the other hand, argued that there was no evidence that the defendant "stole" the missing stock. This was the thrust of Mr. Du Toit's argument.

[33] Before I consider the contentions on behalf of the parties, I must have regard to the applicable legal principles. The plaintiff's cause of action is *condictio furtiva*, which is a delictual action for the recovery of patrimonial loss as a result of theft. The remedy is available to an owner or anyone who has an interest in the stolen thing, against a thief of his heirs: See *Lawsa 2ed*, vol 27 para 387; *Cliford v Farinha* 1988 (4) SA 315 (W) at 322G - 323F; *Crots v Pretorius* 2010 (6) SA 514 (SCA) para 3.

[34] From the totality of the evidence, I must determine whether the plaintiff has discharged the onus of proving, on a balance of probabilities, that the defendant's conduct, amounted to theft in civil law. There is no direct evidence in that regard. I must

therefore draw an inference, consistent with the proved facts, applying the principles enunciated in *R v Blom* 1939 AD 188 at 202 - 3 (modified for civil cases) as follows: the inference to be preferred must be the most plausible and appropriate one to be drawn from all the proved facts. See *Ocean Accident and Guarantee Corporation Ltd v Kock* 1963 (4) SA 147 (A) at 159C-D; *AA v De Beer* 1982 (2) SA 603 (A) at 614G - 615A; *Parents' Committee of Namibia and Others v Nujoma and Others* 1990 (1) SA 873 (SWA) at 887 C - D; *Santam v Potgieter* 1997

(3) SA 415 (O) at 423A-D; *McLeod v Rens* 1997 (3) 1039 (E) at 1049A-C ; *Cooper and Another NNO v Merchant Trade Finance Ltd* 2000 (3) SA 1009 (SCA) at 1027E - 1028A; *Triptomania Twee (Pty) Ltd and Another v Connolly and Another* 2003 (3) SA 558 (C) at 570C - E.

[35] Back to Mr. Du Toit's contention (that the plaintiff had failed to prove its case as it has not established *animus furandi* on the part of the defendant). He placed reliance on the dictum of *Kondiie J* in *First National Bank v East Coast Design CC1* where the learned Judge said, in the context of *condictio furtive*, that "... one other element required for the crime of theft is *animus furandi*. In the absence of *animus furandi*, the defendant's conduct does not constitute theft". With respect, the learned Judge seems to conflate the criminal and civil characterisations of theft. *Silberberg & Schoeman The Law of Property*, 5ed, at 266, para 11.2.1.5 state:

"The criminal law definition of theft does not apply to the *condictio furtiva*, but rather the (wider) definition thereof, applied in the Roman and Roman-Dutch law of delict. In the *Digesta* 47 2 1 3, for example, it is defined as 'the fraudulent handling of anything with the intention of profiting by it; which applies to the article itself or to its use or possession'. In the light of this definition of theft the condition *furtiva* will also lie in the case where a person merely wrongfully withdraws a thing from the possession of another and uses it while intending to restore possession after the sue thereof.

[36] An illustration of the point made by the learned authors appears in *Clifford v Farinha*, above, where the facts were the following: the defendant was the former sister-in-law of the plaintiff; she, one evening, chose to drive a BMW which the plaintiff had acquired under a lease agreement to a restaurant; the plaintiff at the time was on holiday; the sister-in-law was staying, apparently with the plaintiff's consent, at his house; she, however, drove the BMW without his permission; whilst she and her companion were having

their meal the car was stolen. The sister-in-law argued, among others, that because she had no criminal intention to steal the

vehicle, she could not be held liable. *Cilliers AJ* court rejected the notion that because the sister in law did not intend to criminally

steal the vehicle she was not liable to the plaintiff for its loss. Accordingly, despite the fact that the sister-in-law at all times intended to merely for a short time use the plaintiff's motor vehicle and thereafter return it to him, she was nonetheless held liable for the value of the vehicle.

[37] It is therefore clear from the authorities that theft in the criminal sense is not a requirement for *condictio furtiva*. The learned Judge's dictum is, with respect, at odds with the authorities, and therefore clearly wrong.

should be recalled that the defendant conceded in cross-examination that only he was able to effect false entries in the SAP system, and not other employees, although they had pin code to access the manager's menu. As far as the so-called Pegasus problem is concerned, I accept the evidence of Archer that the problem was resolved swiftly in a space of a month. It is more than probable that the defendant also received the e-mail directing stores to switch to the new codes. In any event, the defendant was unable to testify as to what percentage of the missing stock could be attributed to the theft by employees or the Pegasus problem. On the totality of the evidence, I am satisfied that neither of the two aspects contributed significantly to loss of stock. My view in this regard is fortified by the fact that almost all the stock rolled by the defendant went missing and was never recovered.

[39] In my view, the proved facts can be summed as follows:

the plaintiff was the owner of the stock at CTM Gezina store; large quantities of such stock went missing during the period the defendant was in charge of the store as a joint venture partner and manager; the defendant, contrary to the plaintiff's policy, extended credit to his select* customers through his delivery service book; the defendant rolled stock by making false entries in the plaintiff's account's system; almost all the stock which the defendant caused to be rolled cannot be found the defendant has not furnished a coherent, plausible reason why he rolled stock; the defendant misrepresented the true state of affairs to the plaintiff;

[40] The inference which I am required to draw, namely that the defendant's delivery book system and his false write-offs and reversals of missing stock resulted in the plaintiff suffering patrimonial loss, is, in my view, consistent with the proved facts, and even if it is not the only inference, I am satisfied, on the probabilities, it is certainly the more plausible or acceptable inference. In the result I come to the conclusion that the plaintiff has discharged its onus in respect of the missing stock.

[41] I turn now to consider at which value of the missing stock judgment should be granted - retail or cost price? In its amended particulars of claim, the plaintiff claims an amount of R568 374.30, being the cost value of the missing stock, alternatively R1 168 340.26 being the retail value of the stock. It seems to me the law in this regard allows for the highest value of the item to be recovered. Mr. Rome, very correctly brought to my attention Visser, Reed & Zimmerman

(2004) *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa*, at 488 para. 2, where Blackie & Farlam state the following:

"The taker is required to pay the owner in respect of in {sic} item that has ceased to exist the fruit and /or extended profits and the value of the item assessed at the highest value that it had at the time of the taking or any time thereafter...."

- [42] In the present case the retail value is the highest value of the two. The plaintiff is therefore entitled to judgment in the amount equivalent to the retail value of the missing stock.
- [43] There remains the issue of costs. The plaintiff has requested costs against the defendant on a punitive scale, contending that the defendant's conduct is such that the court should mark its disapproval by ordering the defendant to pay costs on an attorney and client scale. I have given the request a careful consideration, and after mature reflection, I am not disposed thereto.
- [44] In closing, I must express my gratitude to both counsel, Mr. Rome and Mr. Du Toit SC, for their assistance in the matter. Both submitted very succinct and helpful written arguments. That I have not referred extensively to their arguments in the judgment, is no indication of not having had regard thereto. I did and those arguments have assisted me greatly, for which I am grateful to counsel.
- [45] In the result the first defendant is ordered to pay to the plaintiff:

ThesumofR1 168 340.26; Interest on the said amount at 15.5% calculated from 6 June 2009 to date of payment; Costs of the suit.

TM MAKGOKA

JUDGE OF THE HIGH COURT

DATES OF HEARING: 23, 24, 25, 26 NOVEMBER 2010,

: 12, 13 & 14 JANUARY 2011 JUDGMENT DELIVERED : 13 JULY 2011

FOR THE PLAINTIFF : ADV GB ROME

INSTRUCTED BY : EDWARD NATHAN SONNENBERGS,

: JOHANNESBURG, AND : EDELSTEIN- BOS MAN INC, PRETORIA

FOR THE DEFENDANT : ADV F DU TOIT SC

INSTRUCTED BY : RON LIPPI ATTORNEYS, PRETORIA

- [5] The JVFA has the following twelve incidental agreements as annexures, which the parties agreed formed integral parts of the

JVFA: Annexure "A" - Capital value schedule Annexure "B" - Schedule of particulars Annexure "C" - The franchise agreement Annexure "D" - The joint venture disclosure agreement Annexure "E" - Loan agreement Annexure "F" - Calculation of the sum of the deposit Annexure "G" - Performance standards Annexure "H" - Performance targets Annexure "J" - Profit sharing agreement Annexure "K" - Schedule of monthly drawings Annexure "L" - Guarantee-Joint Venture- Italile Ceramics Limited. [6] In its particulars of claim, the plaintiff alleges that: 6.1 subsequent to the conclusion of the JVFA, the plaintiff procured that the store was kept stocked with the products it required for its retailing and trading operations; the defendant in his capacity

as the sole member of Ceramics, among others controlled Ceramics in all material aspects pertaining to the warehousing and control of the stock of the business; during or about the period February 2008 to October 2008, and with the intention to steal, the defendant directed and/or procured and/or caused the unlawful removal of certain items of stock from the premises ("the missing stock"); The missing stock was not removed from the premises in the course of the management and operation of the business and/or in the ordinary course of the business and /or for the benefit of the business; the plaintiff at all material times was (and remains) the owner of the missing stock; the defendant has failed to return the missing stock and is unable to do so. [7] In his plea, the defendant pleads that the warehousing and control of stock were conducted within the context of existing logistics, procedures and systems installed, implemented and prescribed by the plaintiff. He further admits that the stock referred to by the plaintiff, has gone missing, and the remainder thereof was in possession of the plaintiff on the premises when it terminated the agreement on 17 October 2008. The defendant denies that he was ever in possession of the stock removed from the premises. At a procedural level, Chetty avers that the plaintiff summarily terminated the agreement on 17 October 2008, without complying with the provisions of the JVFA, which required written notice to him to remedy the breach within 7{seven} days, before termination. Common cause issues [8] The following issues are common cause between the parties: that the stock held at CTM Gezina remained the property of the plaintiff and that the defendant was throughout in control of the business; that the business of the plaintiff through its CTM division is conducted on a cash and carry basis, with no credit afforded to customers, save through only under certain controlled circumstances; despite this the defendant introduced a so-called book delivery system granting credit to some customers; that during 2008 there were considerable stock losses at the CTM Gezina, with the store consistently failing to achieve its sales targets; that the business used an SAP software system, which the defendant used to post false entries in respect of missing stock; and that the JVFA was terminated on 17 October 2008 at the instance of the plaintiff. The evidence [9] Four witnesses testified in the plaintiff's case, namely Ms. Thilagam Govender (Govender), Mr. Barend Van der Berg (Van der Berg), Ms. Mpolokeng Rajake (Rajake) and Mr. Kenneth Archer. The defendant testified in his own defence and called no further

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trial as "rolling of stock" by the defendant. In short, the stock rolling scheme involved this: during the course of a month the defendant would falsely write off stock items to a breakages account, thereby removing record of the existence of the stock on the plaintiff's SAP system. On the last day of the month, the defendant would briefly return the stock items to the system from the breakages account i.e the stock temporarily became broken (and therefore not fit for sale) at the beginning of a month, and became "unbroken" on the last day of the month, only to again be written off to breakages account in the following month. Govender further testified that when the stock count was done, the missing rolled stock was not physically present. [15] Just a few examples of these false entries: on 5 August 2008 stock to be value of R99 175.78 was written off as breakages but on 31 August it was written back into stock account. In other instances, loss would be written off to customer claims and later reserved, meaning a stock item was given to a client because of a complaint, and later "rolled" back into stock and written off as breakages and later brought back. In August 2008 the defendant had variances of at least R350 00 which counted as a stock loss; he hid these variances on the 31 August with the result that the following day, 1 September 2008 the net income of the business was overstated by the amount of the variances. [16] After Prior had made a report, Ravazzotti requested her to do a further investigation at the store. This was approximately

mid-October 2008. She then perused the income statements and management reports for the period January to 16 October 2008. The

total of variances for the period 1 July - 31 October 2008 was R1 026 105.92, the bulk of which occurred in October. However, in the management report for September the defendant reported to the plaintiff's head office that the total of variances was only R21 250.08. Initially the defendant had told her the variances could be attributed to his manual delivery book system. [17] Govender further testified that she also found that the stock count procedures were not adhered to. The variances in stock were not posted properly. During her first visit to the store, only 70% of the stock had been counted. The defendant's explanation was that he had given the stock count sheets to merchandise captains who had failed to do the posting. Only after the defendant had left, she established that the defendant himself was responsible for the posting, and not the stock merchandise captains. [18] After the defendant's departure left she perused the two delivery books and noted that not all items therein corresponded with the records of payment, and in some instances there were no tax invoices. She followed up two of those customers the defendant had indicated would pay at the end of the month. One of the customers was Pilditch Construction. The defendant had told her that a stock reconciliation for the stock given to Pilditch would have been done by month end of September and submitted to Pilditch. She could however, find no such reconciliation. During a subsequent meeting with the owner of Pilditch, one Lopez, the latter admitted to taking stock but could not remember the quantity thereof. She went to Lopez's house where she found the plaintiff's stock items and removed them. Ultimately an agreement was reached with Lopez regarding the amount she would pay for the stock. With regard to another client, LIC Flooring, there was no uncertainty as to the amount owed to the plaintiff and the owner paid it. Van den Berg [19] During the relevant period, he was employed at Gezina CTM in the dispatch section, responsible for handing out stock for which customers had

paid. Ordinarily, before a customer could retrieve goods, he would exhibit a tax invoice. When the defendant was in charge, this system was not followed. Often stock items went out on quotation signed by the defendant or his wife. The defendant insisted that as long as his or his wife's signature appeared on the quotation, stock could be removed from the store. There were corporate clients who were beneficiaries of this system, e.g LiC Flooring. When deliveries were made to that particular customer, the owner thereof told them that they were not allowed to wear the plaintiff's branded clothing as it was not to be known that stock was from CTM. Since the departure of the defendant there has not been stock delivered on quotation. Rajake [20] Ms Rajake was employed at CTM Gezina in December 2006. In March 2007 she moved from credit applications section to decor section, where she was also responsible for stock counting. In the ordinary course, after processing a variance report, she would give it to the defendant, who had a discretion to post it. At some stage she noted that a week after identifying certain items as not being physically present in the store, such items were reflected in the system on the stock evaluation report. Such items, however, would not be physically present on the shelves. She took this up with the defendant, whose first reaction was that it was her responsibility to know about stock movement. She made her own investigation, which led her to the delivery books and the quotations which appeared in the system. When she confronted the defendant about this, he blamed her for loss of stock. Their relationship soured as a result. Archer [21] He was, and still is, the Operations Manager of the plaintiff, based at its head office. His responsibilities include negotiations with the suppliers regarding pricing, delivery, as well as retail prices. He is responsible for overall logistics. He is also responsible for setting the retail prices, which once set, are communicated to all the stores via e-mail and logged onto the SAP system. [22] Archer's evidence mainly concerned the so-called Pegasus problem that arose in 2007. What had happened was that the supplier of the Pegasus tiles had changed all 43 x 43 packaging from 2m2 to 2, 4 m2 without communicating the change to the plaintiff, which could potentially, result in stock losses. The supposition on behalf of the defendant had been, during cross-examination of Govender, that the said change contributed to loss of stock. According to Archer, once the change was detected it took merely a month (December 2007) for the problem to be resolved and codes were changed throughout the month. For those stores who did not comply with the request to change over to new codes, they were to take the losses and in the end, it would affect profitability of stock. The change was communicated via email to all the stores instructing them to capture the products under the new product codes. When the problem was detected, some stores had already sold stock on the old codes, and this would have resulted in losses for those stores, and they had to write off the losses. Archer's evidence concluded the plaintiff's case. The defendant [23] The defendant then took the stand in his own defence and called no further witnesses. He testified that during 2007 there were extensive renovations at CTM Gezina which affected sales and customers did not want to shop at what was virtually a "construction site". He experienced acute losses in stock. He suspected his assistant store manager for the theft of stock. He and other

employees took a polygraph test. The assistant manager who failed the test later moved on to alternative employment. He, the

defendant, passed the test. [24] He confirmed that he gave stock to some customers using the delivery book system, in terms of which customers were given stock without immediate payment, and for payment to be made at the end of the month. He had built up a very good relationship with major customers to whom he gave stock on quotation and at the end of the month, the stock would be invoiced upon receipt of payment. He learned the system at CTM Montana when he was under training. He knew that Ravazzotti would not have approved of the system. [25] The defendant also testified about the so-called Pegasus problem, which, in his view, contributed significantly to the loss. He never received the e-mail wherein stores were instructed to capture the product under the new code. The losses therefore affected the profitability of the store and of the partnership. In his view, this was not his problem but one between the plaintiff and the supplier, which had not been resolved by the time he left. [26] He further acknowledged the rolling of stock by himself as described in the evidence of Govender. He also conceded that although

merchandise category captains also had access to secret code to move stock on the system, they did not make the false entries and reversals, which he did himself. I will revert to some other important aspects of the defendant's evidence, which arose during

cross-examination. [27] The central question, in my view, is two-fold: first, whether the defendant's delivery book system resulted in loss for the stock for which no payment was received by the plaintiff; secondly, whether the defendant's stock-rolling resulted in stock loss, and by implication, patrimonial loss for the plaintiff. To determine the two legs of the enquiry, one has to consider (a) the position of the defendant in the context of the JVFA, as a joint venture partner and manager, and (b) the defendant's conduct in handling the plaintiff's stock. [28] As a JV partner and a manager, the defendant bore a duty to ensure that the store was operated on the basis of the agreement and generally, on the ethos and business practices of the plaintiff. He had to ensure that all control measures were in place to sustain profitability of the store. In this role, the defendant adopted a "hands-off" approach. During cross-examination, he conceded that he gave unauthorized people access to the manager's password menu - right down to the delivery man. All in all, 20 employees had the password - he could not tell whether he personally gave it to each one of them; he did not know how many and who else gave the password further to others. On the contrary he did not instruct them not to give the menu to others; even after noticing stock losses, which he attributed to suspected theft. He took no steps to ensure that the password was changed, dispute acknowledging that stock could be manipulated through the password. His so-called investigation into stock losses amounted to no more than perfunctory. [29] With regard to the defendant's handling of stock, the following should be kept in mind: fully aware that the plaintiff was a cash and carry business, the defendant gave out stock on credit to his selected customers without verifying among others, their turnover. He did not request their balance sheets, or demand any security whatsoever. He took no steps to ensure creditworthiness of such entities. All these he made without the approval of the plaintiff, because he knew that such would

have been decidedly disapproved. Had Govender not made a visit to the store, this delivery book system would not have been discovered. [30] When it comes to the rolling of stock, it should be kept in mind that Govender testified that there were various accounts available to a store manager to utilise when stock variances arose. The nature of these accounts is described in the plaintiff's internal systems and accounts guideline document. The defendant allocated stock variances largely to the breakages account. In the accounts guideline, the breakages account was designated for the following purpose (which the defendant acknowledged during cross-examination): "Articles are to be written off to breakages if the articles are broken or damaged and they therefore cannot be sold". [31] The defendant's rationale for false entries and reversal thereof remain unsatisfactorily explained. Throughout the trial, the defendant failed to furnish any comprehensible and cogent reason why he did that. During cross-examination the defendant was hard-pressed to concede that his decision in this regard was arbitrary. However, the real reason is not difficult to fathom. As Mr. Rome, for the plaintiff, correctly pointed out, unless he reversed the breakage entries back into the system, his take-home pay (dependent on the net income achieved for the store) would decline. He had to create an illusion in the plaintiff's system and in the financial records submitted to the plaintiff that all was well with regard to stock and the profitability of the store. For, without physical stock count, there was no way for the plaintiff would have been able to establish the nature and extent of the problem at the store. The mere posting of missing stock items to breakages account while knowing the items were not broken, was in itself, dishonest. [32] Mr. Rome, for the plaintiff, contended that the defendant abused and manipulated the SAP system by writing off missing stock to breakages account. The defendant's conduct in this regard, so goes the argument, amounted to fraud perpetrated by the defendant on the plaintiff, as the monthly income statement of the store would reflect a totally different state of affairs than what it actually was. He also criticized the defendant's evidence, contending that it was generalized and vague. Mr. Du Toit, for the defendant, on the other hand, argued that there was no evidence that the defendant "stole" the missing stock. This was the thrust of Mr. Du Toit's argument. [33] Before I consider the contentions on behalf of the parties, I must have regard to the applicable legal principles. The plaintiff's

cause of action is *condictio furtiva*, which is a delictual action for the recovery of patrimonial loss as a result of theft. The remedy is available to an owner or anyone who has an interest in the stolen thing, against a thief or his heirs: See *Lawsa 2ed*, vol 27 para 387; *Cliford v Farinha* 1988 (4) SA 315 (W) at 322G - 323F; *Crots v Pretorius* 2010 (6) SA 514 (SCA) para 3. [34] From the totality of the evidence, I must determine whether the plaintiff has discharged the onus of proving, on a balance of probabilities, that the defendant's conduct, amounted to theft in civil law. There is no direct evidence in that regard. I must therefore draw an inference, consistent with the proved facts, applying the principles enunciated in *R v Blom* 1939 AD 188 at 202 - 3 (modified for civil cases) as follows: the inference to be preferred must be the most plausible and appropriate one to be drawn from all the proved facts. See *Ocean Accident and Guarantee Corporation Ltd v Kock* 1963 (4) SA 147 (A) at 159C-D; *AA v De Beer* 1982 (2) SA 603 (A) at 614G - 615A; *Parents' Committee of Namibia and Others v Nujoma and Others* 1990 (1) SA 873 (SWA) at 887 C - D; *Santam v Potgieter* 1997 (3) SA 415 (O) at 423A-D; *McLeod v Rens* 1997

- (3) 1039 (E) at 1049A-C ; Cooper and Another NNO v Merchant Trade Finance Ltd 2000 (3) SA 1009 (SCA) at 1027E - 1028A; Triptomania Twee (Pty) Ltd and Another v Connolly and Another 2003 (3) SA 558 (C) at 570C - E. [35] Back to Mr. Du Toit's contention (that the plaintiff had failed to prove its case as it has not established *animus furandi* on the part of the defendant). He placed reliance on the dictum of Kondiie J in *First National Bank v East Coast Design CC1* where the learned Judge said, in the context of *condictio furtive*, that "... one other element required for the crime of theft is *animus furandi*. In the absence of *animus furandi*, the defendant's conduct does not constitute theft". With respect, the learned Judge seems to conflate the criminal and civil characterisations of theft. Silberberg & Schoeman *The Law of Property*, 5ed, at 266, para 11.2.1.5 state: "The criminal law definition of theft does not apply to the *condictio furtiva*, but rather the (wider) definition thereof, applied in the Roman and Roman-Dutch law of delict. In the *Digesta* 47 2 1 3, for example, it is defined as 'the fraudulent handling of anything with the intention of profiting by it; which applies to the article itself or to its use or possession'. In the light of this definition of theft the condition *furtiva* will also lie in the case where a person merely wrongfully withdraws a thing from the possession of another and uses it while intending to restore possession after the sue thereof. [36] An illustration of the point made by the learned authors appears in *Clifford v Farinha*, above, where the facts were the following: the defendant was the former sister-in-law of the plaintiff; she, one evening, chose to drive a BMW which the plaintiff had acquired under a lease agreement to a restaurant; the plaintiff at the time was on holiday; the sister-in-law was staying, apparently with the plaintiff's consent, at his house; she, however, drove the BMW without his permission; whilst she and her companion were having their meal the car was stolen. The sister-in-law argued, among others, that because she had no criminal intention to steal the vehicle, she could not be held liable. Cilliers AJ court rejected the notion that because the sister in law did not intent to criminally steal the vehicle she was not liable to the plaintiff for its loss. Accordingly, despite the fact that the sister-in-law at all times intended to merely for a short time use the plaintiff's motor vehicle and thereafter return it to him, she was nonetheless held liable for the value of the vehicle. [37] It is therefore clear from the authorities that theft in the criminal sense is not a requirement for *condictio furtiva*. The

learned Judge's dictum is, with respect, at odds with the authorities, and therefore clearly wrong. should be recalled that the defendant conceded in cross-examination that only he was able to effect false entries in the SAP system, and not other employees, although they had pin code to access the manager's menu. As far as the so-called Pegasus problem is concerned, I accept the evidence of Archer that the problem was resolved swiftly in a space of a month. It is more than probable that the defendant also received the e-mail directing stores to switch to the new codes. In any event, the defendant was unable to testify as to what percentage of the missing stock could be attributed to the theft by employees or the Pegasus problem. On the totality of the evidence, I am satisfied that neither of the two aspects contributed significantly to loss of stock. My view in this regard is fortified by the fact that almost all the stock rolled by the defendant went missing and was never recovered. [39] In my view, the proved facts can be summed as follows: the

plaintiff was the owner of the stock at CTM Gezina store; large quantities of such stock went missing during the period the defendant was in charge of the store as a joint venture partner and manager; the defendant, contrary to the plaintiff's policy, extended credit to his selected* customers through his delivery service book; the defendant rolled stock by making false entries in the plaintiff's accounting system; almost all the stock which the defendant caused to be rolled cannot be found the defendant has not furnished a coherent, plausible reason why he rolled stock; the defendant misrepresented the true state of affairs to the plaintiff; [40] The inference which I am required to draw, namely that the defendant's delivery book system and his false write-offs and

reversals of missing stock resulted in the plaintiff suffering patrimonial loss, is, in my view, consistent with the proved facts,

and even if it is not the only inference, I am satisfied, on the probabilities, it is certainly the more plausible or acceptable

inference. In the result I come to the conclusion that the plaintiff has discharged its onus in respect of the missing stock. [41] I turn now to consider at which value of the missing stock judgment should be granted - retail or cost price? In its amended particulars of claim, the plaintiff claims an amount of R568 374.30, being the cost value of the missing stock, alternatively R1 168 340.26 being the retail value of the stock. It seems to me the law in this regard allows for the highest value of the item to be recovered. Mr. Rome, very correctly brought to my attention Visser, Reed & Zimmerman

(2004) Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa, at 488 para. 2, where Blackie & Farlam state the following: "The taker is required to pay the owner in respect of in {sic} item that has ceased to exist the fruit and / or extended profits and the value of the item assessed at the highest value that it had at the time of the taking or any time thereafter..." [42] In the present case the retail value is the highest value of the two. The plaintiff is therefore entitled to judgment in the amount equivalent to the retail value of the missing stock. [43] There remains the issue of costs. The plaintiff has requested costs against the defendant on a punitive scale, contending that the defendant's conduct is such that the court should mark its disapproval by ordering the defendant to pay costs on an attorney and client scale. I have given the request a careful consideration, and after mature reflection, I am not disposed thereto. [44] In closing, I must express my gratitude to both counsel, Mr. Rome and Mr. Du Toit SC, for their assistance in the matter. Both submitted very succinct and helpful written arguments. That I have not referred extensively to their arguments in the judgment, is no indication of not having had regard thereto. I did and those arguments have assisted me greatly, for which I am grateful to counsel. [45] In the result the first defendant is ordered to pay to the plaintiff: The sum of R1 168 340.26; Interest on the said amount at 15.5% calculated from 6 June 2009 to date of payment; Costs of the suit. TM MAKGOKA JUDGE OF THE HIGH COURT DATES OF HEARING: 23, 24, 25, 26 NOVEMBER 2010, : 12, 13 & 14 JANUARY 2011 JUDGMENT DELIVERED : 13 JULY 2011 FOR THE PLAINTIFF : ADV GB

ROME INSTRUCTED BY : EDWARD NATHAN SONNENBERGS, :JOHANNESBURG, AND :
EDELSTEIN- BOS MAN INC, PRETORIA FOR THE DEFENDANT : ADV F DU TOIT SC
INSTRUCTED BY : RON LIPPI ATTORNEYS, PRETORIA

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[6] In its particulars of claim, the plaintiff alleges that:

6.1 subsequent to the conclusion of the JVFA, the plaintiff procured that the store was kept stocked with the products it required for its retailing and trading operations;

the defendant in his capacity as the sole member of Ceramics, among others controlled Ceramics in all material aspects pertaining to the warehousing and control of the stock of the business; during or about the period February 2008 to October 2008, and with the intention to steal, the defendant directed and/or procured and/or caused the unlawful removal of certain items of stock from the premises ("the missing stock"); The missing stock was not removed from the premises in the course of the management and operation of the business and/or in the ordinary course of the business and /or for the benefit of the business; the plaintiff at all material times was (and remains) the owner of the missing stock; the defendant has failed to return the missing stock and is unable to do so.

[7] In his plea, the defendant pleads that the warehousing and control of stock were conducted within the context of existing logistics, procedures and systems installed, implemented and prescribed by the plaintiff. He further admits that the stock referred to by the plaintiff, has gone missing, and the remainder thereof was in possession of the plaintiff on the premises when it terminated the agreement on 17 October 2008. The defendant denies that he was

ever in possession of the stock removed from the premises. At a procedural level, Chetty avers that the plaintiff summarily terminated the agreement on 17 October 2008, without complying with the provisions of the JVFA, which required written notice to him to remedy the breach within 7{seven) days, before termination.

Common cause issues

- [8] The following issues are common cause between the parties: that the stock held at CTM Gezina remained the property of the plaintiff and that the defendant was throughout in control of the business; that the business of the plaintiff through its CTM division is conducted on a cash and carry basis, with no credit afforded to customers, save through only under certain controlled circumstances; despite this the defendant introduced a so-called book delivery system granting credit to some customers; that during 2008 there were considerable stock losses at the CTM Gezina, with the store consistently failing to achieve its sales targets; that the business used an SAP software system, which the defendant used to post false entries in respect of missing stock; and that the JVFA was terminated on 17 October 2008 at the instance of the plaintiff.

The evidence

- [9] Four witnesses testified in the plaintiff's case, namely Ms. Thilagam Govender (Govender), Mr. Barend Van der Berg (Van der

Berg), Ms. Mpolokeng Rajake (Rajake) and Mr. Kenneth Archer. The defendant testified in his own defence and called no further

witnesses. The factual and documentary evidence are largely common cause. As a result what would follow is a brief exposition of the salient features of the evidence.

- [10] She is based at the plaintiff's head office, responsible for the internal audit and risk management unit. In September 2008 she was commissioned by the plaintiff's Group Chairman Mr. Ravazotti to perform a mini-audit at CTM Gezina and report to him as he was not happy with the performance of that store. On 18 September 2008 she visited the store unannounced. She met with the defendant and requested cash and stock management reports to be printed. She immediately picked up a problem on the stock management report where the stock reservation report did not tally with the physical presence of such stock in the store. The reservation stock consists of merchandize reserved for a customer pending confirmation of an electronic fund transfer (EFT). Once the funds were cleared the customer would be entitled to collect the stock. Until then, the goods would be stored in a designated place for "reserved stock".
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- [12] Govender further testified that this was the first time she heard of this system, but it was definitely not the plaintiff's policy to extend credit to customers except through an entity known as Cladding Finance where customers who required credit would complete credit guarantees. The defendant was a cash-and-carry business and generally, customers would have to pay for the stock to enable them to remove goods from the store - the customer would have to exhibit proof of payment to take delivery of goods. The defendant's manual delivery book system, as explained above, was against the plaintiff's policy, which the defendant acknowledged when she confronted him about it. The defendant however, requested her not to disclose the operation of this system to Ravazotti. The defendant showed her one of the delivery books (exhibit "A") reflecting entries between August - September 2008. She found the second one (exhibit "B") in October 2008 when the defendant was effectively ordered to leave the business premises. That second delivery book pertains to the period September to early October 2008.
- [13] She also conducted a "variance stock count", to determine the difference between what was physically in the store and what appeared in the SAP system. A random sample of about ten items revealed that only four items were correct, meaning stock items were missing. The plaintiff's loss allowance policy was 0.5% of sales generated by a store monthly. At Gezina the variance was at about 30%, which was quite high. She reported to Ravazzotti about the mini-audit, in her report, she made the following conclusions:

Generally the leadership of the store Is lacking in operational input and drive. Opportunities to maximize sales by serving customers both directly and indirectly are being lost daily. There is no question about the volume of customers available to be served but regrettably the quality of the environment, staff attitude and management aptitude is (sic) sadly lacking. Reducing losses both in breakages and pilferage by way of Management Systems, Methods and Procedures are (sic) not existent. General house and shopkeeping standards are practically non-existent, leaving the store in an appalling state of existence. Poor maintenance of discipline has no doubt directed (sic) this once profitable business, into a bad example of a CTM Branch. 'Untidy' accounting or administrative practices are being utilized to achieve various goals which cannot be tolerated in this business under any circumstances.

- [14] On 20 September 2008, in the presence of the plaintiff's external auditor and herself, the defendant met Ravazzotti at the plaintiff's Montana store, during which the defendant informed Ravazzotti about the delivery book system. The explanation was "unacceptable" to Ravazzotti, who was very upset about that. After the meeting, a Mr. Mark Prior was commissioned to do a full stock count at the store. She was present during Prior's stock

count, it was during this stock count that the plaintiff discovered what came to be referred to during the trial as "rolling of stock" by the defendant. In short, the stock rolling scheme involved this: during the course of a month the defendant would falsely write off stock items to a breakages account, thereby removing record of the existence of the stock on the plaintiff's SAP system. On the last day of the month, the defendant would briefly return the stock items to the system from the breakages account i.e the stock temporarily became broken (and therefore not fit for sale) at the beginning of a month, and became "unbroken" on the last day of the month, only to again be written off to breakages account in the following month. Govender further testified that when the stock count was done, the missing rolled stock was not physically present.

[15] Just a few examples of these false entries: on 5 August 2008 stock to be value of R99 175.78 was written off as breakages but on 31 August it was written back into stock account. In other instances, loss would be written off to customer claims and later reserved, meaning a stock item was given to a client because of a complaint, and later "rolled" back into stock and written off as breakages and later brought back. In August 2008 the defendant had variances of at least R350 00 which counted as a stock loss; he hid these variances on the 31 August with the result that the following day, 1 September 2008 the net income of the business was overstated by the amount of the variances.

[16] After Prior had made a report, Ravazzotti requested her to do a further investigation at the store. This was approximately

mid-October 2008. She then perused the income statements and management reports for the period January to 16 October 2008. The

total of variances for the period 1 July - 31 October 2008 was R1 026 105.92, the bulk of which occurred in October. However, in the management report for September the defendant reported to the plaintiff's head office that the total of variances was only R21 250.08. Initially the defendant had told her the variances could be attributed to his manual delivery book system.

[17] Govender further testified that she also found that the stock count procedures were not adhered to. The variances in stock were not posted properly. During her first visit to the store, only 70% of the stock had been counted. The defendant's explanation was that he had given the stock count sheets to merchandise captains who had failed to do the posting. Only after the defendant had left, she established that the defendant himself was responsible for the posting, and not the stock merchandise captains.

[18] After the defendant's departure left she perused the two delivery books and noted that not all items therein corresponded with the records of payment, and in some instances there were no tax invoices. She followed up two of those customers the defendant had indicated would pay at the end of the month. One of the customers was Pilditch Construction. The defendant had told her that a stock reconciliation for the stock given to Pilditch would have been done by month end of September and submitted to Pilditch. She could however, find no such reconciliation. During a subsequent meeting with the owner of Pilditch, one Lopez, the

latter admitted to taking stock but could not remember the quantity thereof. She went to Lopez's house where she found the plaintiff's stock items and removed them. Ultimately an agreement was reached with Lopez regarding the amount she would pay for the stock. With regard to another client, LIC Flooring, there was no uncertainty as to the amount owed to the plaintiff and the owner paid it.

Van den Berg

- [19] During the relevant period, he was employed at Gezina CTM in the dispatch section, responsible for handing out stock for which customers had paid. Ordinarily, before a customer could retrieve goods, he would exhibit a tax invoice. When the defendant was in charge, this system was not followed. Often stock items went out on quotation signed by the defendant or his wife. The defendant insisted that as long as his or his wife's signature appeared on the quotation, stock could be removed from the store. There were corporate clients who were beneficiaries of this system, e.g LiC Flooring. When deliveries were made to that particular customer, the owner thereof told them that they were not allowed to wear the plaintiff's branded clothing as it was not to be known that stock was from CTM. Since the departure of the defendant there has not been stock delivered on quotation.
- [20] Ms Rajake was employed at CTM Gezina in December 2006. In March 2007 she moved from credit applications section to decor section, where she was also responsible for stock counting. In the ordinary course, after processing a variance report, she would give it to the defendant, who had a discretion to post it. At some stage she noted that a week after identifying certain items as not being physically present in the store, such items were reflected in the system on the stock evaluation report. Such items, however, would not be physically present on the shelves. She took this up with the defendant, whose first reaction was that it was her responsibility to know about stock movement. She made her own investigation, which led her to the delivery books and the quotations which appeared in the system. When she confronted the defendant about this, he blamed her for loss of stock. Their relationship soured as a result.
- [21] He was, and still is, the Operations Manager of the plaintiff, based at its head office. His responsibilities include negotiations with the suppliers regarding pricing, delivery, as well as retail prices. He is responsible for overall logistics. He is also responsible for setting the retail prices, which once set, are communicated to all the stores via e-mail and logged onto the SAP system.
- [22] Archer's evidence mainly concerned the so-called Pegasus problem that arose in 2007. What had happened was that the supplier of the Pegasus tiles had changed all 43 x 43 packaging from 2m² to 2, 4 m² without communicating the change to the plaintiff, which could potentially, result in stock losses. The supposition on behalf of the defendant had been, during cross-examination of Govender, that the said change contributed to loss of stock. According to Archer, once the change was detected it took merely a month (December 2007) for the problem to be resolved and codes were changed throughout the month. For those

stores who did not comply with the request to change over to new codes, they were to take the losses and in the end, it would affect profitability of stock. The change was communicated via email to all the stores instructing them to capture the products under the new product codes. When the problem was detected, some stores had already sold stock on the old codes, and this would have resulted in losses for those stores, and they had to write off the losses. Acher's evidence concluded the plaintiff's case.

The defendant

[23] The defendant then took the stand in his own defence and called no further witnesses. He testified that during 2007 there were extensive renovations at CTM Gezina which affected sales and customers did not want to shop at what was virtually a "construction

site". He experienced acute losses in stock. He suspected his assistant store manager for the theft of stock. He and other

employees took a polygraph test. The assistant manager who failed the test later moved on to alternative employment. He, the

defendant, passed the test.

[24] He confirmed that he gave stock to some customers using the delivery book system, in terms of which customers were given stock without immediate payment, and for payment to be made at the end of the month. He had built up a very good relationship with major customers to whom he gave stock on quotation and at the end of the month, the stock would be invoiced upon receipt of payment. He learned the system at CTM Montana when he was under training. He knew that Ravazzotti would not have approved of the system.

[25] The defendant also testified about the so-called Pegasus problem, which, in his view, contributed significantly to the loss. He never received the e-mail wherein stores were instructed to capture the product under the new code. The losses therefore affected the profitability of the store and of the partnership. In his view, this was not his problem but one between the plaintiff and the supplier, which had not been resolved by the time he left.

[26] He further acknowledged the rolling of stock by himself as described in the evidence of Govender. He also conceded that although

merchandise category captains also had access to secret code to move stock on the system, they did not make the false entries and reversals, which he did himself. I will revert to some other important aspects of the defendant's evidence, which arose during cross-examination.

- [27] The central question, in my view, is two-fold: first, whether the defendant's delivery book system resulted in loss for the stock for which no payment was received by the plaintiff; secondly, whether the defendant's stock-rolling resulted in stock loss, and by implication, patrimonial loss for the plaintiff. To determine the two legs of the enquiry, one has to consider (a) the position of the defendant in the context of the JVFA, as a joint venture partner and manager, and (b) the defendant's conduct in handling the plaintiff's stock.
- [28] As a JV partner and a manager, the defendant bore a duty to ensure that the store was operated on the basis of the agreement and generally, on the ethos and business practices of the plaintiff. He had to ensure that all control measures were in place to sustain profitability of the store. In this role, the defendant adopted a "hands-off" approach. During cross-examination, he conceded that he gave unauthorized people access to the manager's password menu - right down to the delivery man. All in all, 20 employees had the password - he could not tell whether he personally gave it to each one of them; he did not know how many and who else gave the password further to others. On the contrary he did not instruct them not to give the menu to others; even after noticing stock losses, which he attributed to suspected theft. He took no steps to ensure that the password was changed, dispute acknowledging that stock could be manipulated through the password. His so-called investigation into stock losses amounted to no more than perfunctory.
- [29] With regard to the defendant's handling of stock, the following should be kept in mind: fully aware that the plaintiff was a cash and carry business, the defendant gave out stock on credit to his selected customers without verifying among others, their turnover. He did not request their balance sheets, or demand any security whatsoever. He took no steps to ensure creditworthiness of such entities. All these he made without the approval of the plaintiff, because he knew that such would have been decidedly disapproved. Had Govender not made a visit to the store, this delivery book system would not have been discovered.
- [30] When it comes to the rolling of stock, it should be kept in mind that Govender testified that there were various accounts available to a store manager to utilise when stock variances arose. The nature of these accounts is described in the plaintiff's internal systems and accounts guideline document. The defendant allocated stock variances largely to the breakages account. In the accounts guideline, the breakages account was designated for the following purpose (which the defendant acknowledged during cross-examination):
- "Articles are to be written off to breakages if the articles are broken or damaged and they therefore cannot be sold".
- [31] The defendant's rationale for false entries and reversal thereof remain unsatisfactorily explained. Throughout the trial, the defendant failed to furnish any comprehensible and cogent reason why he did that. During cross-examination the defendant was hard-pressed to concede that his decision in this regard was arbitrary. However, the real reason is not difficult to fathom. As Mr. Rome, for the plaintiff, correctly pointed out, unless he reversed the breakage entries back into the system, his take-home pay (dependent on the net income

achieved for the store) would decline. He had to create an illusion in the plaintiff's system and in the financial records submitted to the plaintiff that all was well with regard to stock and the profitability of the store. For, without physical stock count, there was no way for the plaintiff would have been able to establish the nature and extent of the problem at the store. The mere posting of missing stock items to breakages account while knowing the items were not broken, was in itself, dishonest.

[32] Mr. Rome, for the plaintiff, contended that the defendant abused and manipulated the SAP system by writing off missing stock to breakages account. The defendant's conduct in this regard, so goes the argument, amounted to fraud perpetrated by the defendant on the plaintiff, as the monthly income statement of the store would reflect a totally different state of affairs than what it actually was. He also criticized the defendant's evidence, contending that it was generalized and vague. Mr. Du Toit, for the defendant, on the other hand, argued that there was no evidence that the defendant "stole" the missing stock. This was the thrust of Mr. Du Toit's argument.

[33] Before I consider the contentions on behalf of the parties, I must have regard to the applicable legal principles. The plaintiff's

cause of action is *condictio furtiva*, which is a delictual action for the recovery of patrimonial loss as a result of theft. The remedy is available to an owner or anyone who has an interest in the stolen thing, against a thief of his heirs: See *Lawsa 2ed*, vol 27 para 387; *Cliford v Farinha* 1988 (4) SA 315 (W) at 322G - 323F; *Crots v Pretorius* 2010 (6) SA 514 (SCA) para 3.

[34] From the totality of the evidence, I must determine whether the plaintiff has discharged the onus of proving, on a balance of probabilities, that the defendant's conduct, amounted to theft in civil law. There is no direct evidence in that regard. I must therefore draw an inference, consistent with the proved facts, applying the principles enunciated in *R v Blom* 1939 AD 188 at 202 - 3 (modified for civil cases) as follows: the inference to be preferred must be the most plausible and appropriate one to be drawn from all the proved facts. See *Ocean Accident and Guarantee Corporation Ltd v Kock* 1963 (4) SA 147 (A) at 159C-D; *AA v De Beer* 1982 (2) SA 603 (A) at 614G - 615A; *Parents' Committee of Namibia and Others v Nujoma and Others* 1990 (1) SA 873 (SWA) at 887 C - D; *Santam v Potgieter* 1997 (3) SA 415 (O) at 423A-D; *Mcleod v Rens* 1997

(3) 1039 (E) at 1049A-C ; *Cooper and Another NNO v Merchant Trade Finance Ltd* 2000 (3) SA 1009 (SCA) at 1027E - 1028A; *Triptomania Twee (Pty) Ltd and Another v Connolly and Another* 2003 (3) SA 558 (C) at 570C - E.

[35] Back to Mr. Du Toit's contention (that the plaintiff had failed to prove its case as it has not established *animus furandi* on the part of the defendant). He placed reliance on the dictum of *Kondie J* in *First National Bank v East Coast Design CC1* where the learned Judge said, in the context of *condictio furtive*, that "... one other element required for the crime of theft is *animus furandi*. In the absence of *animus furandi*, the defendant's conduct does not constitute theft". With respect, the learned Judge seems to conflate the criminal and civil

characterisations of theft. Silberberg & Schoeman *The Law of Property*, 5ed, at 266, para 11.2.1.5 state:

"The criminal law definition of theft does not apply to the *condictio furtiva*, but rather the (wider) definition thereof, applied in the Roman and Roman-Dutch law of delict. In the *Digesta* 47 2 1 3, for example, it is defined as 'the fraudulent handling of anything with the intention of profiting by it; which applies to the article itself or to its use or possession'. In the light of this definition of theft the condition *furtiva* will also lie in the case where a person merely wrongfully withdraws a thing from the possession of another and uses it while intending to restore possession after the sue thereof.

[36] An illustration of the point made by the learned authors appears in *Clifford v Farinha*, above, where the facts were the following: the defendant was the former sister-in-law of the plaintiff; she, one evening, chose to drive a BMW which the plaintiff had acquired under a lease agreement to a restaurant; the plaintiff at the time was on holiday; the sister-in-law was staying, apparently with the plaintiff's consent, at his house; she, however, drove the BMW without his permission; whilst she and her companion were having their meal the car was stolen. The sister-in-law argued, among others, that because she had no criminal intention to steal the vehicle, she could not be held liable. Cilliers AJ court rejected the notion that because the sister in law did not intent to criminally steal the vehicle she was not liable to the plaintiff for its loss. Accordingly, despite the fact that the sister-in-law at all times intended to merely for a short time use the plaintiff's motor vehicle and thereafter return it to him, she was nonetheless held liable for the value of the vehicle.

[37] It is therefore clear from the authorities that theft in the criminal sense is not a requirement for *condictio furtiva*. The

learned Judge's dictum is, with respect, at odds with the authorities, and therefore clearly wrong.

should be recalled that the defendant conceded in cross-examination that only he was able to effect false entries in the SAP system, and not other employees, although they had pin code to access the manager's menu. As far as the so-called Pegasus problem is concerned, I accept the evidence of Archer that the problem was resolved swiftly in a space of a month. It is more than probable that the defendant also received the e-mail directing stores to switch to the new codes. In any event, the defendant was unable to testify as to what percentage of the missing stock could be attributed to the theft by employees or the Pegasus problem. On the totality of the evidence, I am satisfied that neither of the two aspects contributed significantly to loss of stock. My view in this regard is fortified by the fact that almost all the stock rolled by the defendant went missing and was never recovered.

[39] In my view, the proved facts can be summed as follows:

the plaintiff was the owner of the stock at CTM Gezina store; large quantities of such stock went missing during the period the defendant was in charge of the store as a joint venture partner and manager; the defendant, contrary to the plaintiff's policy, extended credit to his selecte*

customers through his delivery service book; the defendant rolled stock by making false entries in the plaintiff's account's system; almost all the stock which the defendant caused to be rolled cannot be found the defendant has not furnished a coherent, plausible reason why he rolled stock; the defendant misrepresented the true state of affairs to the plaintiff;

[40] The inference which I am required to draw, namely that the defendant's delivery book system and his false write-offs and

reversals of missing stock resulted in the plaintiff suffering patrimonial loss, is, in my view, consistent with the proved facts,

and even if it is not the only inference, I am satisfied, on the probabilities, it is certainly the more plausible or acceptable

inference. In the result I come to the conclusion that the plaintiff has discharged its onus in respect of the missing stock.

[41] I turn now to consider at which value of the missing stock judgment should be granted - retail or cost price? In its amended particulars of claim, the plaintiff claims an amount of R568 374.30, being the cost value of the missing stock, alternatively R1 168 340.26 being the retail value of the stock. It seems to me the law in this regard allows for the highest value of the item to be recovered. Mr. Rome, very correctly brought to my attention Visser, Reed & Zimmerman

(2004) *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa*, at 488 para. 2, where Blackie & Farlam state the following:

"The taker is required to pay the owner in respect of in {sic} item that has ceased to exist the fruit and /or extended profits and the value of the item assessed at the highest value that it had at the time of the taking or any time thereafter...."

[42] In the present case the retail value is the highest value of the two. The plaintiff is therefore entitled to judgment in the amount equivalent to the retail value of the missing stock.

[43] There remains the issue of costs. The plaintiff has requested costs against the defendant on a punitive scale, contending that the defendant's conduct is such that the court should mark its disapproval by ordering the defendant to pay costs on an attorney and client scale. I have given the request a careful consideration, and after mature reflection, I am not disposed thereto.

[44] In closing, I must express my gratitude to both counsel, Mr. Rome and Mr. Du Toit SC, for their assistance in the matter. Both submitted very succinct and helpful written arguments. That I have not referred extensively to their arguments in the judgment, is no indication of not having had regard thereto. I did and those arguments have assisted me greatly, for which I am grateful to counsel.

[45] In the result the first defendant is ordered to pay to the plaintiff:

The sum of R168 340.26; Interest on the said amount at 15.5% calculated from 6 June 2009 to date of payment; Costs of the suit.

TM MAKGOKA

JUDGE OF THE HIGH COURT

DATES OF HEARING: 23, 24, 25, 26 NOVEMBER 2010,

: 12, 13 & 14 JANUARY 2011 JUDGMENT DELIVERED : 13 JULY 2011

FOR THE PLAINTIFF : ADV GB ROME

INSTRUCTED BY : EDWARD NATHAN SONNENBERGS,

: JOHANNESBURG, AND : EDELSTEIN- BOS MAN INC, PRETORIA

FOR THE DEFENDANT : ADV F DU TOIT SC

INSTRUCTED BY : RON LIPPI ATTORNEYS, PRETORIA

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