

SOUTH AFRICA / JUDGMENT

Rowan Tree 1169 CC v Cowsta Bellegings (Pty) Ltd (3637/2007) [2014] ZAECPHC 41 (19 June 2014) [2014] ZAECPHC 41

COURT

Eastern Cape High Court, Port Elizabeth

BEFORE

Goosen

CASE / FILE NUMBER

3637/2007

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH

CASE NO: 3637/2007

Dates heard: 11, 12 & 13 June 2014

Date delivered: 19 June 2014

In the matter between

ROWAN TREE 1169 CC

Plaintiff

and

COWSTA BELLEGINGS (PTY) LTD

Defendant

JUDGMENT

GOOSEN, J.

- [1] The plaintiff claims damages for the defendant's breach of a warranty against eviction contained in a sublease agreement entered into by the parties in respect of premises situated at the Humerail shopping centre. The defendant's liability to compensate the plaintiff for such damages as it may prove was determined by Dambuza J[1]. The judgment of the trial court was confirmed on appeal by the full bench of this division.[2] This court was accordingly called upon to determine the quantum of damages, if any, suffered by the

plaintiff.

- [2] The plaintiff's damages, as claimed, comprised an amount of R803 861.00 for building costs incurred by the plaintiff in

renovating the business premises prior to its eviction therefrom. The plaintiff also claimed an amount of R15 752.00 in respect of the retrenchment costs payable by the plaintiff in respect of staff retrenched consequent upon the breach of the agreement. It also claimed an amount of R3 426 800.00 for loss of profits over the five-year period for which the lease agreement had been concluded.

- [3] I was informed at the outset of the trial that the claim for the building expenses had been settled as had a portion of the plaintiff's claim relating to the retrenchment costs.[3] What was in issue therefore was the plaintiff's claims in respect of the retrenchment costs payable in respect of the retrenchment of Mr. Noyle the sole member of the plaintiff who was employed as its manager and its claim for loss of profits. At the commencement of the trial, the plaintiff moved for an amendment of its particulars of claim to incorporate a claim for payment of an amount of R240,000 in respect of the liability incurred by the plaintiff to repay certain sponsorship monies received by the plaintiff prior to it taking occupation of the leased premises. This amendment was provisionally allowed, subject to the defendant's entitlement to object thereto during the course of trial. During the course of the trial, the amount claimed in respect of this amended claim was reduced to an amount of R150 000. The defendant did not pursue an objection to the amendment, choosing instead to address the merits of the claim in its evidence. Ultimately the plaintiff abandoned this claim and did not pursue the amendment.

- [4] The background giving rise to the breach of the agreement by the defendant is set out in detail in the judgment of Dambuza J, as well as in the appeal judgment of Chetty J. For present purposes it is necessary only to record the salient facts insofar as they bear upon the determination of the quantum of the plaintiff's claim. Those are that the plaintiff operated a pub/restaurant business under the name Tapas al Sol at the Brookes Hill Pavilion centre for a number of years prior to concluding the lease agreement for the premises at the Humerail centre. As a result of particular problems experienced at the Brookes Hill Pavilion centre, which will be dealt with more fully hereunder, the plaintiff, during 2008 sought new premises. This resulted in the conclusion of a sublease agreement with the defendant, which would allow the plaintiff to relocate its business to the Humerail centre. Extensive refurbishment work was undertaken at the expense of the plaintiff after it took beneficial occupation of the premises in January 2009. For reasons which need not be repeated in this judgment the agreement of lease was declared invalid[4] and as a result thereof, the plaintiff was evicted from the premises and was accordingly unable to commence trade in April 2009.

Consequent upon this development. The plaintiff was unable to secure premises and was unable to trade after that date. As a result of this action was instituted claiming the damages, set out above, arising from the defendant's breach. The plaintiff contended that it had suffered the losses

referred to above, whereas the defendant contended that the plaintiff had suffered no loss of profits. The essential disputes between the parties related to the basis upon which the plaintiff calculated its loss of profits, in particular in respect of the gross profit margin applied to the projected earnings of the plaintiff.

- [5] The plaintiff tendered the evidence of Mr. Noyle who is the sole member of the plaintiff corporation and who conducted the business of the plaintiff. It also led the evidence of a qualified chartered accountant, Mr. Hall, who was responsible for the financial reporting of the plaintiff and who had undertaken an analysis of the financial affairs of the plaintiff. It also led the evidence of Mr. Helm, a qualified independent auditor who had reviewed the findings of Mr. Hall. The defendant in turn presented the evidence of Mr. Killian, a qualified chartered accountant who had analysed the financial affairs of the plaintiff prior to the breach.
- [6] The evidence of Mr. Noyle was that he had worked in the business of the plaintiff for some 15 years, initially as a barman and after some time as a junior manager and then ultimately the manager of the business. In 2004 Mr. Noyle purchased the business and thereafter conducted it as the sole member of the plaintiff. During this time the plaintiff's business was conducted from the Brookes Hill Pavilion centre. Mr. Noyle explained that the plaintiff's business comprised an entertainment venue where food and drinks were served to customers. After taking over of the business Mr. Noyle had introduced live music at the venue hosting a number of artists both locally and nationally. He described the business as a very good business and that the venue was a popular and busy venture which functioned seven days of the week. He explained, however, that over time, the plaintiff began to experience difficulties with the management of the Brookes Hill Pavilion. These difficulties had arisen in part because of some uncertainty about the future development of that centre. As a result of this uncertainty the centre experienced a loss of tenants. Over this period there were also significant problems associated with parking, cleaning and security at the venue. The result of these difficulties was that the centre became rundown and an increasingly unsavoury element came to be attracted to the centre. It was these problems which caused him to begin looking for alternative premises for his business. These difficulties culminated in the 2008/ 2009 financial year, which he described as being disastrous. During that year he was the only tenant in the upstairs portion of the centre and this fact culminated in a general decline in the foot traffic, which visited the centre. He however continued to trade whilst trying to find an alternative venue. This he eventually managed to do and as a result he concluded an agreement of lease with the defendant in respect of the premises at the Humerrail centre. The centre was ideally suited to the nature of the plaintiff's business. It would afford a view of the sea from a deck area at the front of the premises and would allow for the kitchen and bar areas to be integrated to a greater extent than existed at the Brookes Hill Pavilion. After concluding the agreement. The plaintiff undertook a range of renovations to refurbish the premises and to ensure that they were suitable for the plaintiff's purpose. This included the construction of a large deck area at the front of the premises as well as the erection of covered awnings over the deck area for

the convenience of patrons.

- [7] The plaintiff explained also that, apart from the external factors which were adversely affecting the business of the plaintiff at the Brookes Hill Pavilion centre it was also experiencing internal challenges. These included outdated management systems to ensure the effective management of takings in the business and to avoid losses due to shrinkage of stock and theft. The plaintiff for this reason investigated the commissioning of a sophisticated point of sale computerised system to enable it to exercise greater control over its stock and its daily takings. Notwithstanding the challenges faced by the plaintiff, whilst operating at the Brookes Hill Pavilion centre, Mr. Noyle explained that the plaintiff's business was very highly regarded by the principal suppliers in the industry. As a result of this he enjoyed a range of sponsorships in the form of either direct cash injections into the business or discounts on merchandising from South Africa Breweries, British American Tobacco, a major distributor of cigarettes, as well as other suppliers of alcohol. In the process of preparing for the relocation to the Humerail centre the plaintiff negotiated and secured significant sponsorship deals with SAB, Pernod Ricard, Philip Morris, a competitor of BAT, and other suppliers. These included contributions toward the relocation costs as well. As the branding of the new venue.
- [8] Mr. Hall testified that he is a qualified chartered accountant, with many years' experience as a financial director of various companies. He, after he had retired, provided accounting services to the previous owner of Tapas al Sol. After Mr. Noyle purchased the business. He continued to provide those services to him, this involved the monthly accounting and bookkeeping services and financial and management accounting services. He considered that the business was a very successful business, but that there were undoubtedly opportunities to improve the business. Because of his involvement. He had a direct understanding of the nature of the business and the particular challenges faced by it. He explained that during 2008, the business experienced particular challenges in as much as the centre where it was then located had deteriorated significantly and its tenancy was uncertain. The parking area which provided parking for patrons to the centre had deteriorated to such an extent that there was only limited parking facilities available. The security at the centre was lacking and the landlord had stopped providing cleaning services for the common areas. There was at the time some uncertainty as to the future development of the centre. As a result of these difficulties, and in particular the problems caused by these difficulties in the business of the plaintiff, Mr. Noyle began looking for alternative business premises. He eventually secured a lease agreement to move the business to the Humerail centre. The move to the new centre presented an opportunity to address some of the challenges experienced by the plaintiff. These included the fact that the food preparation and storage area that was not integrated and part of the business premises at the Brookes Hill Pavilion centre. This lack of integration and the physical separation of the food preparation the centre the meant that the plaintiff was experiencing very significant losses as a result of stock shrinkage and a lack of integration in the billing system. At that time the plaintiff was operating a manual cash register and they was no means of the accounting for

stock against sales. These were problems that they had discussed on a number of occasions and there had, for that reason, and taken investigations to acquire a sophisticated point-of-sale system to be introduced in the business at the new premises.

- [9] He explained that the 2009 financial year was “a disaster”, primarily because the plaintiff was trading in very adverse circumstances and because it was not a full trading year. For these reasons he did not take into account the 2009 financial results in seeking to make a projection into the 2010 financial year and beyond. He accordingly based his calculations on the 2008 financial year. Using the sales forecast for 2008 he escalated those sales by 10% for the year 2009 and 2010 and then based his calculation on 90% of that figure. He explained that he considered that this was a realistic and conservative projection of what the plaintiff would have been able to achieve in the new premises. This approach was endorsed by the defendant’s expert witness, Mr. Killian. It was also not in dispute that utilising the 2008 financial results of the plaintiff was a more realistic year to utilise.
- [10] In respect of the overhead expenses there was also, at trial, at least, no dispute. The defendant accordingly accepted the figures used by Mr. Hall and the basis of the calculation utilised by him to estimate those overhead expenses.
- [11] What was at issue therefore, in relation to Mr. Hall, was the basis for the calculation of the estimated gross profit margin to be achieved by the plaintiff. Mr. Hall testified that he estimated the plaintiff’s gross profit margin for the forecast 2010 year to be 53%. He explained that he had considered this estimate to be conservative in the light of the profit margins achievable in the industry. In this regard it was the common cause that profit margins for similar businesses in the industry of approximately 60% are readily achievable. Mr. Hall explained that in the years preceding the plaintiff’s intended move to the Humerrail Centre it had achieved a gross profit of approximately 48.6% per annum. This was low and was a matter that he had taken up in discussion with Mr. Noyle. He attributed the relatively low gross profit margin to the particular challenges that the business faced in the Brookes Hill Pavilion centre. He considered that the move to the new centre would greatly enhance the opportunities for the plaintiff. In this regard the intended structure would facilitate integration of the food preparation area with the rest of the facilities offered to patrons which would substantially enhance the plaintiff’s business. He also explained that the introduction of a point-of-sale system would facilitate management of the stock and management of the staff by being able to control their stock and takings reconciliation at the end of each shift handover. He conceded in his evidence that a point-of-sale system is merely a system which provides a management tool to the business manager. He was however firm in his view that the introduction of such a system would significantly change the management of the plaintiff’s business. It was his opinion that when all of the factors are taken into account the plaintiff would have been able to achieve an increase in the gross profit margin to 53%. Mr. Hall explained that he and Mr. Noyle had consulted the suppliers of the point-of-sale system and that they had represented to them that use of the system was facilitating achievement of gross profit margins that in excess of 57% in local businesses in

the area. In this regard Mr. Noyle testified that he was presently the operations manager of the Bridge Street Brewery and he was utilising exactly the same system which it was intended would have been installed in the plaintiff's business. He indicated that the Bridge Street Brewery is presently attaining a gross profit of 60%. The nature of that business, he explained, is not significantly different to the business of the plaintiff.

[12] Mr. Hall also included in his forecast for the 2010 year, the production of other income in the business made up of sponsorships

received from major liquor distributors and cigarette distributors as well as income derived from "out of venue" functions.

There was much debate during the course of the evidence presented by Mr. Hall about the basis upon which this other income was to be included in the plaintiff's forecast for the 2010 financial year. During the course of the evidence of the defendant's

expert Mr. Killian that dispute resolved itself. The defendant's expert ultimately conceded that that allowance ought to be made for the inclusion in the projected income of income derived from sponsorships as well as income generated by the plaintiff from "out of venue functions" managed by the plaintiff.

[13] Based upon the projected income and the admitted overhead expenses are to be used in the calculation. The effect of the calculation was an annual projected profit of R685 360. In arriving at the estimated loss of profits for the period of the lease agreement, namely five years, that Mr. Hall multiplied the forecast profit for the year 2010 x 5 and arrived at a total figure of R3 426 800, which is the amount claimed in the plaintiff's amended particulars of claim.

[14] The plaintiff also claimed, separately, an amount in respect of the retrenchment costs of staff in consequence of the plaintiff's

business being unable to trade from the new premises. It was common cause that the plaintiff did not trade in the 2010 financial year at all. It is also common cause that in consequence of this the plaintiff had to retrench its staff. The claim for retrenchment

costs, included that a claim in respect of the retrenchment of Mr. Noyle. The defendant admitted liability for payment of the retrenchment costs in respect of other staff and tendered payment of an amount of approximately R20 000 in respect of the

retrenchment costs borne by the plaintiff in respect of Mr. Noyle.

[15] As already indicated the plaintiff also led the evidence of Mr. Helm. He was not directly involved in the affairs of the plaintiff. He presented evidence as an independent auditor who had evaluated the projections undertaken by Mr. Hall. He expressed the opinion that that he considered Mr. Hall's calculation is to be a conservative and fair and reasonable in the circumstances.

[16] The defendant's expert, Mr. Killian, accepted the use of the 2008 financial year as the base year and the approach of Mr. Hall to establish a reasonable forecast for the 2010 financial year. As already indicated he did not dispute the figure derived for the projected income for 2010, nor was the calculation of the overhead expenses placed in dispute. It was his testimony that a gross profit margin of only 48.6% is justified in the circumstances. He indicated that in arriving at this estimate he based his calculations on the historic results of the plaintiff's business. He contended that when valuing a business, it is necessary to examine the historical results and in this instance those results indicate that the plaintiff had consistently achieved only a 48% gross profit margin. In his view the move to the new premises and introduction of a point-of-sale system would not "guarantee" an improvement in the gross profit margin. For this reason he could not support the conclusions arrived at by Mr. Hall.

[17] I have already indicated that the defendant's expert witness conceded that the plaintiff would have received income from

sponsorships and that those would have contributed to the income generated over a period of time. It was also conceded that the

plaintiff would accrue income from "out-of-venue" functions. Those concessions, as will become apparent in the discussion that follows, were hard won concessions. Nevertheless, for present purposes is unnecessary to set out the evidence of that Mr. Killian in this regard.

[18] The plaintiff's claim is for loss of profits which would have accrued to it had the defendant not breached the terms of the lease agreement concluded between the parties. It is also for payment of the building expenses incurred by it and for liabilities accrued by reason of the retrenchment of staff. The plaintiff's claim also included a VAT component. It was pointed out during argument that the parties had reached agreement in relation to the vexed question of the defendant's liability for the payment of value added tax in relation to the plaintiff's claim for loss of profits. The agreement was incorporated into a Rule 37 minute and I was requested to frame an appropriate order in that regard.

[19] It is trite that the plaintiff bears the onus to prove the quantum of its loss, if any, on a balance of probabilities. The plaintiff is accordingly required to demonstrate, by acceptable and reliable evidence, that the probabilities favour a conclusion that it would have suffered a particular loss. It must also establish the quantum of that loss having regard to the probabilities.

[20] As already indicated the issues in dispute narrowed considerably as the trial progressed. Ultimately the disputes came down to the question whether a projected gross profit margin of 53% is reasonable and whether the plaintiff would, on the probabilities, have achieved such a rate.

- [21] In support of such a finding the plaintiff tendered the evidence of two highly experienced accountants whose qualifications and expertise were not placed in issue and whose independence was also not challenged. In relation to the gross profit margin it was also not disputed that Mr. Noyle is presently achieving a gross profit margin of 60% in a business similar to that of the plaintiff. It was also, significantly, not placed in dispute that the plaintiff's business experienced very particular challenges whilst operating at the Brookes Hill Pavilion centre. Thus, it was not contested that the problems with the management of the centre, including a lack of cleaning lack of security and in adequate parking all contributed to a general decline in the centre which negatively and adversely affected the business of the plaintiff. It was also not controverted that as the centre declined the tenancy reduced and that this had the effect of reducing the number of potential patrons to the centre. Also not contested was the assertion that during the earlier years there were a number of similar competing businesses in the same centre, all vying for the same custom. Mr. Noyle had explained that during 2008 and 2009 he had to employ a range of techniques in order to encourage business, including the holding specials and running an increased number of music events and other functions in order to attract customers. He was aware of the gross profit margin and was not satisfied with it. It was indeed these factors which contributed to him seeking an alternative business venue as well as mechanisms by which to improve the running of the business.
- [22] Where evidence is not controverted or challenged in any way in cross-examination it must, properly considered, be accepted (see in this regard *President of the Republic of South Africa and others v South African Rugby Football Union and others* 2000 (1) SA 1 (CC) at par 61).
- [23] It was both Mr. Noyle's and Mr. Hall's evidence that the move to the new premises presented a unique opportunity to revitalise the business and to improve its management efficiency. They had identified the necessity for the introduction of a point-of-sale system and they had identified steps that needed to be taken in order to improve the gross profit margin under which it was then operating. The new premises allowed for an opportunity to promote the business, to rebrand it and to generate a greater interest and awareness of the business and thereby improve its attractiveness to customers. These business improvement measures were in place and were to be introduced when the business reopened in April 2009. Hall specifically considered these factors in making his projection. It was his evidence that a conservative projection of 53% gross profit was reasonable.
- [24] Against this evidence must be weighed the evidence of Mr. Killian. It is appropriate at the outset to mention that the role of an expert witness is to provide non-partisan assistance to the court in coming to the conclusion on matters relevant to the determination of the issues between the parties. The function of an expert witness is to guide and assist the court in an unbiased an independent manner by considering all material facts relevant to the formulation of his or her opinion (cf. *National Justice Compania Naviera S.A v Prudential Insurance Co. Ltd ("The Ikarian Reefer")* 1993(2) Lloyds Reports 68 81 as quoted in Zeffert &

Paizes *The South African Law of Evidence* 5th ed p.330).

[25] Mr. Ford argued that the witness Mr. Killian was a wholly unsatisfactory witness in as much as he was not prepared to accept

the logical consequences of facts presented to him and was unwavering in his support for the defendant's proposition that the plaintiff would not have achieved anything other than its historic gross profit. Mr. Ford argued that he was demonstrably not prepared to take into consideration relevant facts, including the circumstances in which the plaintiff had traded previously and the measures that the plaintiff intended to take in respect of the new business venture in the new premises.

[26] The criticism of Mr. Killian is justified. He demonstrated little or no appreciation of his role in the proceedings. He was quite unprepared to make the necessary concessions justified by the facts. When he did make concessions he was palpably reluctant to do so, despite it being reasonable in the circumstances. It was his own evidence that a business manager faced with a 48% gross profit ought to take steps to improve that gross profit margin. Such steps would include the use of management tools and the improvement of operating systems within the business and looking for other business opportunities even including a move of premises. Yet he was unprepared to accept that that was precisely what the plaintiff had done. Nor was he prepared to accept that, logically, upon his own evidence an improvement in the gross profit margin could be expected if those steps were taken. He made the telling comment during cross-examination that if he accepted even a 1% improvement in the gross profit margin he would possibly have to even accept a 10% improvement. This he plainly was not prepared to do.

[27] Mr. Ford argued that aspects of Mr. Killian's evidence indicated a measure of dishonesty in as much as he had accepted a gross profit margin of 53% when in meetings with the plaintiff's experts but had reverted to a 48% gross profit margin when he came to testify. I need not make any finding in that regard. It suffices in evaluating the evidence to conclude that Mr. Killian was an unimpressive witness and, for the reasons already indicated, did not demonstrate impartiality in the conclusions which he sought to persuade this court to accept. In my view his evidence, where it is in conflict with that of Mr. Hall and Mr. Helm must be disregarded. I accordingly find, having regard to the expert evidence as well as the evidence of Mr. Noyle, that the plaintiff has established that it would have achieved a gross profit margin of 53% in its trading operations for the projected year 2010.

[28] As indicated the dispute regarding other income sources which were included in the projected income for the plaintiff resolved itself during cross examination of the defendant's expert. It was conceded that provision ought to be made for such "other

income". Mr. Hall based his assessment of income to be derived from sponsorships on the actual sponsorship agreements concluded by the plaintiff for the 2010 financial year. He accepted that, on the probabilities, such sponsorship arrangements could be expected to continue on an annual basis. In coming to this conclusion he considered the previous history of sponsorships, the fact

that the plaintiff had achieved singular success as a distributor of SAB Miller products and was the single largest retailer by volume in the country. Mr. Kilian had initially adopted the view that a 50 % contingency should be applied to such income because of the

uncertainty attached to such sponsorships. He however abandoned this position. In regard to “out of venue” income it was Mr. Noyle’s evidence that because of the good relationship he enjoyed with many suppliers and distributors, he had increasingly

come to be requested to run “out of venue” bars at major events in the Eastern Cape. The plaintiff was paid a management fee for this service. During the 2008 and 2009 period these functions represented a sizeable income for the plaintiff and it was an area of the business that was growing. Mr. Hall projected an income of R210 000 per annum from this source. In doing so he utilised the 2008 and 2009 financial year figures. He explained that it was appropriate to look at the 2009 figure because this represented a development in the business and because it was clear that there was a significant upward trend in the income generated from this source. His estimate was however substantially less than the amount earned in the 2009 year. Mr. Kilian was unable to dispute the basis upon Mr. Hall based his estimates and he, albeit reluctantly, accepted that the “out of venue” business was an established trend that would, on all of the probabilities, have continued as a feature of the plaintiff’s business.

[29] I have already indicated that I accept the evidence of Mr. Hall for the reasons I have set out. As a consequence the calculation of the projected loss of profit made by Mr. Hall is to be accepted. That, as the figures set out in exhibit C.6 indicate, is a projected annual profit of R685 360.

[30] Insofar as VAT payable on this amount is concerned the parties reached an agreement as to the terms of an appropriate order to be made. As far as interest is concerned the parties similarly reached agreement as to the basis upon which interest on whatever amount is awarded ought to be calculated. It was agreed that interest would run from 1 March 2010 on the projected annual loss of profit and annually escalated loss for each successive year for the period of five years for which the lease was concluded.

[31] What remains is the claim for plaintiff’s liability for retrenchment package payable in respect of Mr. Noyle. Included in the agreed amount of R85 000 for retrenchment costs was an amount in respect of Mr. Noyle, based on the salary paid to him as reflected in the 2009 financial statements.

[32] The evidence was that Mr. Noyle drew a monthly salary which was modest but that that he made drawings during the course of the year. At the end of the year these drawings would be treated as salary earned by him as the plaintiff’s managing director. It was argued that it would be appropriate to take into account the total amount of remuneration paid to Mr. Noyle in the 2008 year, an amount in excess of R300 000, in order to determine the plaintiff’s liability for retrenchment in September 2009 when Mr. Noyle finally left the employ of the plaintiff. In contrast the defendant argued that the retrenchment liability should be determined on the basis of the actual salary drawn in the 2009 financial year which was an

amount of R63 000.00. It was common cause that the plaintiff's statutory liability for retrenchment was to be calculated on the formula of one-week's salary per completed year of service.[5]

[33] Section 35 of the Basic Conditions of Employment Act provides a basis for the calculation of remuneration in circumstances where the employee's wage or remuneration fluctuates significantly. It requires that reference be had to the remuneration during the period of thirteen weeks preceding the severance.[6] This does not assist since it is common cause that Mr. Noyle received no remuneration for some months after the plaintiff was unable to commence its operations in the Humerail centre.

[34] In my view the defendant's liability to compensate the plaintiff for its retrenchment of staff must be determined with

reference to the plaintiff's liability at the time of retrenchment. Plaintiff's liability can only be assessed on the

basis of its actual liability and not a projected liability. That being so the amounts recorded as salary paid during the 2009

financial year must be taken into account in calculating the retrenchment costs for which the defendant is now liable. Since the

liability so calculated is included in the admitted amount it follows that plaintiff is not entitled to the balance claimed by it.

[35] Save in respect of the balance of the retrenchment costs claim, I am satisfied that the plaintiff has proved its claims for the losses suffered by it for which the defendant is liable.

[36] I therefore make the following order:

The defendant is ordered to pay to the plaintiff:

- (1) The sum of R1 257 615.00 which amount is the sum of the agreed building costs and admitted retrenchment costs inclusive of interest calculated to 12 June 2014;
- (2) Interest on the aforesaid sum at the legal rate of 15.5% from 13 June 2014 to date of payment payable only in the event that the defendant has not already made payment of the said amount in accordance with the agreement to do so on 12 June 2014;
- (3) The sum of R3 426 800.00 in respect of loss of profits;
- (4) Interest on the amount set out in paragraph 3 above calculated as

follows:

- (a) On the amount of R685 360 at the legal rate of 15.5% from 1 March 2010 to date of payment thereof; and

- (b) On the further amount of R685 360 at the legal rate of 15.5% from 1 March 2011 to date of payment thereof; and
 - (c) On the further amount of R685 360 at the legal rate of 15.5% from 1 March 2012 to date of payment thereof; and
 - (d) On the further amount of R685 360 at the legal rate of 15.5% from 1 March 2013 to date of payment thereof; and
 - (e) On the further amount of R685 360 at the legal rate of 15.5% from 1 March 2014 to date of payment thereof.
- (5) By agreement between the parties it recorded that in the event that the South African Revenue Service requires the plaintiff to pay VAT on any amounts awarded above, then:
- (a) the defendant shall be liable to reimburse the plaintiff in full for the actual amount the South African Revenue Service requires as payment; and
 - (b) the plaintiff shall furnish the defendant with a Tax Invoice to enable the defendant to claim as input the VAT so paid.
- (6) Costs of suit, such costs to include the qualifying expenses of the plaintiff's experts Mr. Hall and Mr. Helm.

G. GOOSEN

JUDGE OF THE HIGH COURT

Appearances For the Plaintiff

Mr. E. A. S. Ford SC

Instructed by Padgens Incorporated

For the Defendant

Mr. G. Friedman

Friedman Scheckter Incorporated

- [1] Judgment was delivered on 24 April 2012.
- [2] Per Judgment of Chetty J (Roberson and Beshe JJ concurring) delivered on 28 August 2013.
- [3] During the course of the trial I was furnished with a calculation which reflects the defendant's admitted liability in relation to the building and retrenchment costs inclusive of interest. I was also informed that the parties were agreed that an order be made directing the defendant to make payment in this amount notwithstanding that the defendant had agreed to make the payment on 12 June 2014. The schedule records the following: 1. Agreed building costs

670 147.00 2. Less building costs not yet paid (R150 988 less R113 934)

37 064.00 3. Amount on which interest admitted from 1/5/09 to 12/6/14 633 083.00 4. Interest on R633 083.00 from 1/5/09 to 12/6/14 (1869 days) @ 15.5% p.a.

502 468.42 1 135 551.42 5. Add back R37 064.00

37 064.00 1 172 615.42 6. Add admitted retrenchment Costs 85

000.00 1 257 615.42 (Therefore) R1 257 615 paid on 12/6/14

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5. Add back R37 064.00

37 064.00

1 172 615.42

6. Add admitted retrenchment

Costs 85

000.00

1 257 615.42

(Therefore) R1 257 615 paid on 12/6/14

[4] Per order of Van der Bijl AJ

[5] See s 41(2) of the Basic Conditions of Employment Act, Act 75 of 1997.

[6] s35(4)

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