

SOUTH AFRICA / JUDGMENT

## Visser and Another v Moore (27676/2014) [2019] ZAGPPHC 426 (30 August 2019)

[2019] ZAGPPHC 426

COURT

North Gauteng High Court, Pretoria

BEFORE

Potterill

CASE / FILE NUMBER

27676/2014

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

(1)

REPORTABLE: YES / NO.

(2)

OF INTEREST TO OTHER JUDGES: YES / NO.

(3)

REVISED

Case

Number: 27676/2014

In

the matter between:

GERHARD

VISSER

First

Plaintiff

ESTATE

OF THE LATE JOHAN VISSER

Second

Plaintiff

and

MOORE, WR t/a GOODWILL

SOLUTIONS Defendant

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JUDGMENT

POTTERILL J

The common cause facts setting out the background to this action

- [1] The first plaintiff, Daniël Gerhardus Visser, (“Visser”) and his deceased brother, Johan Visser, (“the deceased”) represented herein by the executor of his estate, leased a premise from the defendant, W.R. Moore trading as Goodwill Solutions (“Moore”) for business purposes.
- [2] It is common cause that Visser signed the contract of lease and paid rent for December 2010 and January 2011, but that the leased premises was only ready for occupation in middle February 2011.
- [3] The purpose of the lease was that Visser and the deceased would use the leased premises for joint business ventures. The deceased would run a goldsmith business and Visser a carpentry and restoration of furniture business. Visser and his ex-fiancé bought furniture from pawn shops and elsewhere, mostly vintage and antique furniture to restore, if necessary, and sell at flea markets like for instance Uncle Tim’s, Irene’s flea market and the De Deur flea market in Vereeniging. Visser also kept stock on the premises and material to use for the restoration, for example, extra wood. He also made furniture from scratch and Moore himself had bought from Visser a cupboard that was pre-manufactured (came in a box) which Visser assembled for Moore and Moore paid him the amount of R1 770.00. Moore had bought this cupboard after he had seen

a similar cupboard in the leased premises. Visser also had model planes and some costume jewellery as stock, which he also tried to pedal at these flea markets. This stock was unrelated to his carpentry business.

- [4] Visser had sold his Volkswagen Scirocco and used some of the proceeds to start the business. Visser started operating middle February 2011 and already generated income in that month. He had an assistant, one Joe Nel, who assisted him with the physical work.
- [5] He also kept the tools necessary to conduct the restoration of the vintage and antique furniture on the leased premises. The parties had agreed that the value of the tools was R46 000. Visser did his buying and selling during the day and did the restoration mostly after hours at the premises due to the fact that he was out and about during the day, but also due to the fact that the machines made a noise.
- [6] Visser was on 8 April 2011 evicted from the leased premises.
- [7] On 11 December 2016 by agreement between the parties, a court order was issued wherein Moore was found to have unlawfully repudiated the lease agreement and had unlawfully disposed of the assets that were kept at the leased premises.

- [8] Visser discovered a document with the heading "Motivation on loss of income". In this document the following was recorded:

*"The completed restored furniture was moved to my house no 4 Impala w/s Palm ave Kempton Park where I sold most of the goods to the public. After I was evicted from the premises, 15 Mopani Street, Birchleigh, place of trade, I did make a R15 000 sale with the few items that I had saved from restoration in order to make a income for myself. The amount in volume was the same then [sic] the furniture that was taken and sold by Mr Will R Moore, there for I think that I would have made easily a income of R20 000 p/m in order to urn [sic] a income to cover all cost, mainly the rent and all other expenses and not just spending from my life savings ABSA account. There for I would all sow [sic] like to claim a lost of benefits."*

And further on:

*"In the month of March 2011, I purchased pine wood and materials (as per attached invoices), to manufacture new furniture as well as antique damaged furniture. I have managed to complete restoring and building some of these whereby I have made a profit of R4800-00 only over one given weekend 11/04/2011 at Uncle Tims Ninety percent (90%) of the antique & second hand furniture which I have bought needed little or no attention. I have sold these of at a very good profit in the period of after the 8th of April 2011 to the month of May."*

In the meantime, I have restored and removed many items and kept it in my personal garage at home due to lack of space, which I have also sold at and value of R15 000-00 including the amount of R4800 shortly after doing minor repairs to it on the given date above."

- [9] The balance of Visser's testimony is summarised under the heading quantum of damages.
- [10] Visser called Mr. Wessel Wessels ("Wessels"), an industrial psychologist, who testified to a report which he compiled with the purpose to determine the extent and impact of the eviction on the plaintiff's earning capacity. He testified that he did not have access to any relevant documents, because he was told that they were in a safe on the premises and Visser had no access thereto. He therefore took cognisance of the figure of R8 000 per month which Visser told him he earned at the time of his eviction, but he also relied on other means to determine Visser's income earning potential. To that end he contacted a Mr. Rudi Jacobs ("Jacobs") and Jacobs informed him that Visser's tools were entry level and from that only basic restoration could be done. Jacobs said taking that into account the estimated amount that Visser could earn on a conservative basis as between R5 000 to R10 000 per month. Wessels also could not do a work

visit and speak to anybody there, because there was simply no work environment due to the eviction. Jacobs had adjusted the

earning potential to the conservative amount (R5 000-R10 000) because he himself was in a more affluent market. He testified that the information from Visser was not determinative of his expert findings, but he corroborated same with his investigations via Jacobs. He concluded that the conservative basis of between R5 000 and R10 000 per month was a reasonable figure to use from which to come to a conclusion. In finally assessing a figure he had taken into account that Visser was more semi-skilled

than full trade level and therefore he concluded that an amount of R7 500 per month was a reasonable amount constituting Visser's

earning capacity.

[11] Mr. G. Whittaker ("Whittaker"), an actuary, also testified on behalf of Visser. Just as with Wessels, the expertise and training of the expert was admitted by Moore. Whittaker testified that his calculations were based on the information supplied by Wessels. He used an amount of R7 500 as Visser's income. This amount was the average between R5 000 and R10 000 as per Wessels' report. From this he calculated past loss of income at the amount of R458 297 after a contingency fee deduction of 5 % and at R410 000.00 after a contingency fee deduction of 10 % for future loss of income. Since the report was dated September 2017 the calculations were outdated and the updated calculations would be an amount of R597 142.00 after the contingency fee deduction for past loss and R390 987.00 after contingency deduction for future loss of income.

[12] Moore did not call any witnesses and closed his case.

The pleadings

[13] On behalf of Moore much was made that Visser's claim was based on causes of action that were bad in law. To address these arguments reference to the summons is necessary:

*"8.3 The 1st Plaintiff accepted the defendant's repudiation of the written rental agreement.*

8.4 Accordingly, the written rental agreement was duly cancelled by the 1st Plaintiff.

9.1 The goods that are listed in annexures GV1 and GV2 were in the business premises at the time when the Defendant refused the 1st Plaintiff access thereto.

9.2 Despite demand, the Defendant has refused to return the goods that are listed in annexures GV1 and GV2 to the 1st and 2nd Plaintiffs' respectively.

10.1 In the event that the Defendant has subsequent to repudiating the written rental agreement, disposed of the goods listed in annexures GV1 and GV2.

11.1 In the event that the Defendant disposed of the goods listed in annexures GV1 and GV2 hereto:

11.1.1 the 1st Plaintiff has suffered damage in the sum of R92,530.74, being the total market value of the goods listed in annexure GV1 (which amount is compromised as set out in that annexure);

11.1.2 the 2nd Plaintiff has suffered damage in the sum of R125,318.60, being the total market value of the goods listed in annexure GV2 (which amount is comprised as set out in that annexure).

11.2 In consequence of the defendant refusing to return to the 1st Plaintiff the 1st Plaintiff's goods alternatively the defendant having disposed of the 1st Plaintiff's goods:

11.2.1 the 1st Plaintiff was deprived (and remains deprived) of his tools and equipment which he required (and still requires) to generate income  
as a carpenter;

11.2.2 had he not been deprived of his tools and equipment:

11.2.2.1 the 1st Plaintiff would have continued to operate his business, which comprised inter alia of manufacturing new wooden furniture and restoring antique wooden furniture; and

11.2.2.2 the 1st Plaintiff would have generated income from his business operations and would have earned an income of R90 944.00 per annum as at 1 October 2017.

11.2.3 the 1st Plaintiff has suffered damage in the total sum of R827 297.00 which amount is comprised as follows:

11.2.3.1 Past loss of income

R458 297.00

11.2.3.2 Future loss of income

R369 000.00

Total

R827 297.00"

[14] On behalf of Moore it was submitted that Visser's claim was bad in law, because there was a splitting of the first and second claims. As I understand the argument the reason for this is the claim for the goods was based on the rei vindicatio and the value of the goods was claimed in terms of the actio ad exhibendum. The argument thus went:

*"The question now arises whether the first plaintiff could also found a delictual claim on the loss of the tools, which formed part of the goods which were listed in annexure 'GV1'. It is submitted that the attempt by the first plaintiff to found his second claim, for the loss of income resulting from the disposal of his tools, amounts to the splitting of two claims which is based on the same cause of action."*

[15] This argument is rejected. The summons is clear; the parties concluded an agreement, Moore repudiated the agreement, Visser accepted the repudiation and is pursuant to the repudiation claiming damages flowing from the repudiation. Visser thus has the onus to prove the contract, the repudiation thereof and the acceptance thereof. These facts were common cause. Visser also had to prove that he suffered damage and that the loss is not too

remote. This argument raised on behalf of Moore, is in fact bad in law. The *actio ad exhibendum* is a delictual claim which is instituted as an alternative to the *rei vindicatio*. No averments necessary for a claim of *rei vindicatio* was set out in the particulars of claim. For a plaintiff to be successful on a claim based on the *actio ad exhibendum* a plaintiff must aver and prove that he was the owner of the property that was damaged or destroyed, that the property was in a defendant's possession and that the defendant's loss of possession was *mala fide*. The plaintiff also has to prove that the defendant intentionally disposed of the property or caused its destruction intentionally or negligently. None of these facts are set out in the summons. The summons clearly sets out damages due to the repudiation of the contract and the loss of the goods and the loss of income as consequential damages.

- [16] The order of the separation in terms of Rule 33(4) of the Uniform Rules does not amend the cause of action of Visser. The repudiation was unlawful, i.e. without legal cause and the resultant disposal of Visser's possessions was thus unlawful. This resulted in the loss of income; a loss that is not too remote.
- [17] The submission was also made that a delay of three years before instituting the action should bar Visser's claims. Visser was unlawfully deprived of his tools on 8 April 2011 and only three years later did Visser issue and serve summons. This is so because "a litigant may not benefit from his own misconduct or otherwise careless approach to legal procedures ..."[1]
- [18] The submission that the delay was not explained at all is devoid of all truth. Visser testified that he had consulted an attorney in 2012, one Enslin, he had paid an amount of R8 000 for services to be rendered, but nothing transpired. He had laid a complaint at the Law Society and he also approached the Legal Aid to secure help. It is also common cause that his legal representatives currently is acting *pro bono*. Accordingly nothing is to be made of the delay between being unlawfully deprived of his possessions to summons being issued.
- [19] The reference to the Pangarker matter *supra* has no application in this matter. In that matter the Supreme Court of Appeal found that repeated postponements for legal representation followed by an application for recusal of the presiding officer constituted a transparent and dishonest strategy to obtain a further postponement; a far cry from Visser attempting to obtain legal representation before commencing action.
- [20] The argument also was that Visser, by his own choice, had decided not to purchase new tools to re-establish his carpentry business. Visser only bought new tools in April 2017. This argument is akin to mitigation of one's loss. In law, this submission can only be equated to mitigation of loss, because there is no other basis in law. However, Moore cannot rely on mitigation of damages because this was not pleaded and once again nothing is to be made of this argument.

[21] The court is urged to dismiss Visser's claim on a further delay; his own delay to buy new tools. This delay as basis in law for the dismissal of Visser's claim flows from reliance on *Cassimjee v Minister of Finance* 2014 (3) SA 198 (SCA). This matter has no application herein and does not found a basis in law as to why this delay should lead to dismissal of Visser's claim. The crux of the Cassimjee matter is summarised at paragraph [13] of the judgment as follows:

*"At issue in the appeal is whether the court below had properly exercised its discretion to dismiss the appellant's claim for want of prosecution. This in turn depends on the factual question whether the delay was so unreasonable or inordinate as to constitute an abuse of the process of court."*

The crux in the Cassimjee matter thus was a delay in prosecution of an action when a party brings an action but delays to take it further; this is often equated to an abuse of process. There was no argument that the delay in prosecution of this matter had any role to play.

[22] On behalf of Moore this court was implored to utilise the Apportionment of Damages Act 34 of 1956 ("the Act"). It was argued that Visser was made aware in cross-examination that any damage suffered had resulted from his own fault in that he did not replace the tools and thus could not generate an income.

[23] This argument is bad in law. Claassen J found that:

*"Thus, as I understand the law, a plaintiff's negligent conduct subsequent to the harmful event which caused his damages, cannot be the subject of apportionment in terms of the Apportionment of Damages Act ..."*[2]

And at 1052A-E:

*"A distinction should therefore be drawn between the parties' negligence prior to the harmful event and any relevant negligence after the harmful event. In the case of a plaintiff, his pre-delictual negligence will trigger the application of contributory negligence to reduce his damages. The plaintiff's post-delictual negligence will, however, affect the principles of legal causation (or remoteness) which may reduce his damages. Post delictor, the plaintiff's negligent conduct may be regarded as an actus novus interveniens which breaks the chain of causality sufficiently to absolve the defendants from liability for the plaintiff's damages."* [3]

And on 1051B:

*"It was never the defendant's case at the commencement of these proceedings that the plaintiff's alleged failure in this regard constituted a novus actus interveniens which broke the causal chain between the defendants' negligence and the ultimate psychological breakdown in August 1995. Nor was this defence pleaded."*[4]

[24] On no basis in law can the conduct of Visser reduce the damages because of Visser's conduct after the causation of the damages.

Failure to prove damages

[25] Visser testified from the carpentry business he generated R6 000 for half of the month of February 2011, for March 2011 he generated R8 000 as well as R8 000 in April 2011. He could not provide the court with all his statements and invoices and tax papers as proof of his income, because he never was allowed into the premises again and all his documents were in a safe on these premises, as were his tools. Much was made of a “contradiction” by Visser as to his income. The amount of R22 000 for the period February to April 2011 was contradicted with the statement

referred to as the motivation for loss of income in which the following was stated:

*“After I was evicted from the premises, 15 Mopani Street, Birchleigh, place of trade, I did make a R15 000 sale with the few items that I had saved form restoration in order to make a income for myself.”*

[26] Upon a proper reading of this statement the R15 000 clearly refers to the period after April 2011, i.e. after eviction, which does not constitute a contradiction. However in cross-examination Visser did get confused and did testify that the R15 000 was during the months of occupation of the leased premises. It is undisputed that Visser presented to Wessels as a person with a poor educational background and underdeveloped intellectual capacity. His level of education is a Grade 8. This general observation of Wessels was also observed by the court. The court cannot ignore the contradiction, but taking into account Wessels’ and the court’s observation I find Visser to be a reliable and credible witness.

I am thus satisfied that the amount of between R5 000 and R10 000 per month is not an exaggeration, unreasonable, and

accords with Wessels’ own investigation of what Visser earned.

[27] Visser was also criticised as to the unreliability of his evidence pertaining to his income as he testified that he had only managed to earn about R3 000 per month over the period April to August

2017. Visser gave explicit reasons for this. One, he had nowhere to store furniture as he had moved into his mother’s flat and thus could not proceed with buying to sell. Secondly, he had no tools. No negative inference can be made from the fact that in that period he only earned the amount of R3 000 whereas when he had tools and leased premises from which to operate he made between R5 000 and R10 000 per month.

[28] I am satisfied that Wessels utilised the best evidence available. Moore had unlawfully evicted Visser and there was no workplace environment to investigate. Visser was deprived of his tools. Visser was deprived of his documents that were in a safe in the leased premises to which he was denied access. Wessels took note of the fact that Visser had no previous carpentry experience, but did note that Visser was good with his hands. He took note of his education and intelligence. He took into account the entry level of the tools; thus basic restoration. He calculated in that Visser sold at flea markets. I am satisfied that as the income cannot be assessed with certainty, Visser is entitled to judgment upon production of all the evidence that can reasonably be procured to enable the court to assess the quantum

of the loss. In *De Klerk v Absa Bank Ltd* [2003] 1 All SA 651 (SCA) at paragraph [29] the court found the following:

*“Transposing these dicta to the facts of this case, at the end of the trial De Klerk will have to have proved, on a balance of probability, that he would have invested at least some of the moneys used to make the monthly payments (causation). But if he surmounts that hurdle, then I think that the court may be entitled, in quantifying the amount of his damages to form an estimate of his chances of earning a particular figure. This figure will not have to be proved on a balance of probability but will be a matter of estimation.”*

[29] Counsel for Visser has submitted that the actuary’s calculations, as was initially done, be utilised as a basis to calculate past and future loss of income. This was done on the amount of R7 500 per month. The court would then utilise an extremely high contingency of 50 % on the gross total amount of R892 418.00 for past and future loss of income. This contingency would cater for the fact that Visser now has kidney failure and the fact that this might influence his future income. Contingencies cater for exactly these circumstances. In *Bane v D’Ambrosi* 2010 (2) SA 539 (SCA) at paragraph [12] the court found as follows:

*“Secondly, the fact is that the courts habitually have to grapple with problems of this nature where resort must be had to estimates and speculation in order to arrive at a figure which the court considers to be as fair as possible to both side. This is clear from a well-known and much-quoted dictum by Nicholas JA in Southern Insurance Association Ltd v Bailey NO:[5]*

‘Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future,

without the benefit of crystal balls, soothsayers, augurs or oracles. All that the Court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss.

It has open to it two possible approaches.

One is for the Judge to make a round estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown.

The other is to try to make an assessment, by way of mathematical calculations, on the basis of assumptions resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative.

It is manifest that either approach involves guesswork to a greater or lesser extent. But the Court cannot for this reason adopt a non possumus attitude and make no award.’

This principle applies with equal force to the manner in which a judge is called upon to deal with any aspect of the assessment of the loss of earnings – if it is relevant to the assessment, he or she must make the best of the material before the court, notwithstanding that the results may well be open to criticism.”

- [30] On behalf of Moore Wessels' evidence of the relaying of what Jacobs had told him was also criticised because Jacobs operated in a market catering for the more affluent sector. This argument is to be rejected because Jacobs had informed Wessels hereof, Jacobs and Wessels specifically took into account that Jacobs' income cannot be equated to Visser's income.
- [31] Criticism was levelled at Wessels and Whittaker in that Visser had kidney failure during August 2017 and that the kidney failure prevented Visser from working in his re-established carpentry business. Wessels was not informed hereof and therefore he did not take cognisance of this. Whittaker had correctly conceded that if Visser's income was only R3 000 per month he would have done his actuarial calculation on the R3 000 per month. However, he was informed that the income would be R7 500 per month. The kidney failure and the reduction in income is addressed with the abnormally high contingency I will apply.
- [32] I am satisfied that in these circumstances the amount of R446 209.00 for both past and future loss of income is as fair as possible to both sides. This amount constitutes the initial calculation of Whittaker with applied to it a 50 % contingency.
- [33] I accordingly make the following order:
- 33.1 The defendant must pay to the plaintiff an amount of R446 209.00.
- 33.2 Interest on the amount at the rate of the Prescribed Interest Rate Act a tempore more.
- 33.3 The defendant is ordered to pay the plaintiff's costs, if any incurred.

S. POTTERILL

JUDGE OF THE HIGH COURT

CASE NO: 27676/14

HEARD ON: 20 and 21 May 2019

FOR THE PLAINTIFFS: ADV. V. MABUZA

INSTRUCTED BY: Adams & Adams

FOR THE DEFENDANT: ADV. H.H. COWLEY

INSTRUCTED BY: Lloyd Kieser Inc.

DATE OF JUDGMENT: 30 August 2019

- [1] Magistrate Pangarker v Botha and Another 2015 (1) SA 503 (SCA) 512D
- [2] Gideon v Berkowitz and Another 1996 (4) SA 1029 (WLD) at 1051J-1052A
- [3] Gideon v Berkowitz supra
- [4] Gideon v Berkowitz supra
- [5] 1984 (1) SA 98 (A) at 113G-114A

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