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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

22/5/15

Case number: 8/2011

In the matter between:-

MARIUS BLOM AND GC GERMISHUIZEN

INCORPORATED

PLAINTIFF

And:

TSHWANE METROPOLITAN MUNICIPALITY

COUNCIL

DEFENDANT

Heard on 13th May 2015

Delivered on 22nd May 2015

JUDGMENT

NCONGWANE A.J

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED

DATE 22/05/2015

SIGNATURE

1.

INTRODUCTION.

The plaintiff, Marius Blom & Gc Germishuizen Incorporated, is a firm of attorneys conducting its business at [...] D[...] Street (as it then was) Brooklyn, Pretoria ("the property or premises"), sued the defendant for damages arising from the defendant's cutting of power supply to the business premises of the plaintiff. The defendant defended the claim and filed its plea.

2.

The pleadings are in two (2) languages (i.e the particulars of claim and the plea are in Afrikaans and English respectively). The plaintiff's evidence was tendered, presented and argued in English. Plaintiff's witness is fully bilingual in English and Afrikaans and this prompted me to give the judgment in English.

3.

Mr C J Velgemoed appeared for the plaintiff and Mr M.G Mashaba appeared for the defendant.

4.

I was advised by both counsel at the commencement of the trial that the defendant has conceded the issue of liability. Counsel for the defendant qualified his concession, by clarifying that the defendant concedes that it acted illegally by disconnecting the electricity power to the business premises of the plaintiff on the 4th May 2010 and reconnecting the supply on the 5th May 2010. I only have to determine the issue of quantum.

THE ISSUE TO BE DECIDED BY THE COURT.

5.

5.1. *Ex facie* the particulars of claim, paragraph 4 thereof, plaintiff averse

that:

“Op Dinsdag, 4 Mei 2010, het die Verweerder wederegtelik en in verbreking van ‘n diensooreenkoms met die Eiser, die kragtoevoer by die Eiser se persele bekend as Duncanstraat 835, Brooklyn, Pretoria, afgesny, wat tot gevolg, gehad het dat die Eiser geen elektrisiteit beskikbaar gehad het op die persele nie”.

5.2. Paragraph 5 states:

“Op 6 Mei 2010 het die Verweerder weer die kragtoevoer by die persele herstel.”

5.3. And paragraph 6 averse that:

“Die optrede van de Verweerder was onregmatig, in verbreking van die diensooreenkoms tussen die Eiser en die Verweerder en dit het die reputasie en beeld van die Eiser geskend by die Eiser se kliente, as mede die Eiser persoonlik gekrenk in sy waardigheid.”

5.4. The defendant denied all these averments. It is however, as mentioned above, common cause that the supply of electricity to the business premises of the plaintiff was cut as is alleged in paragraph 4 of the particulars of claim.

5.5. It is also common cause that the plaintiff bears onus of establishing the facts upon which it relies for the purpose of persuading the court to order that damages be granted in its favour.

5.6. This judgment seeks to determine quantum of the plaintiff's loss of income and general damages.

ANALYSIS OF EVIDENCE AND APPLICABLE LEGAL PRINCIPLES.

6.

6.1. The only witness who testified before me is Mr Marius Blom

("Blom"), a director of the plaintiff and seems to be the controlling mind of the plaintiff. The defendant called no witnesses.

- 6.2. Blom a senior and a very experienced attorney of this court, has been practising as an attorney since January 1978 and has an extensive knowledge in liquor licence work.
- 6.3. He previously worked for three (3) different firms of attorneys in Pretoria and in 2010 practiced under the name and style of the plaintiff. His co-director is Mr Germishuizen. He is a senior partner of the firm and has ten (10) to fifteen (15) cases that have been reported in the law reports. He considers himself knowledgeable on liquor licence litigation.
- 6.4. Blom purchased the property in 1995 and applied for rezoning for office rights. The rezoning application has not been finalized by the defendant and the property is zoned for residential purposes in terms of the defendant's town planning scheme. In 2007 after coming into operation of the Local Government: Municipal Property Rates Act No 6 of 2004, he received a bill from the defendant that showed a surcharge of about R80 000.00. This amount was in respect of penalty charges imposed by the defendant for "non-permitted use" of the premises.
- 6.5. It seems to me, after perusing the e-mails exchanged on pages 63 to 71 of the trial bundle handed up in concurrence, by the parties and to which I was referred during the trial, that plaintiff received a statement from the defendant in March 2010, which indicated that the property is being used illegally and accordingly that a penalty in the form of increased rates and taxes were imposed retrospectively, resulting in an outstanding amount of more than R80 000.00 imposed by the defendant.
- 6.6. In the e-mail of the 4th May 2010 written by Blom, he *inter alia*,

mentions:

- "1. We Marius Blom and GC Germishuizen Incorporated have a service agreement with the Tshwane Municipality in terms of which electricity and water is supplied to us at [...] D[...] Street, Brooklyn, Pretoria being Portion 1 of Erf [...] Brooklyn.*
- 2. The account is fully paid up.*
- 3. The registered owner is Kawari Bellegings CC.*
- 4. In March 2010 we received a statement which indicated that the municipality is of the opinion that the property is being used illegally and accordingly that a penalty in the form of increased rates and taxes are being imposed, respectively, resulting in the outstanding amount of more than R80 000.00."*

6.7. On page 64 of the trial bundle, the same letter proceeds amongst other things, in the following:

"We cannot see how the Municipality can cut electricity supply in respect of a fully paid up service account.

There is a pending dispute in respect of the charges of rates and taxes which is paid up, up to date, in respect of the rates previously applicable, and we believe still applicable.

As we cannot see how paid up services to one person can be suspended because of an allege claim against another person and seeing alleged arrears are in dispute, we believe that cutting of our power simply is not only unreasonable but also illegally."

The writer called you to inform you that we intend bringing an urgent application against the municipality for spoliation and/or alternative relief but you Mr Nkosi kindly undertook to intervene."

7.

- 7.1. Blom testified that he communicated his displeasure caused by the disconnection of electricity supply to an official of the defendant whose name he could not recall, but, who, from the trial bundle on page 65 appears to be a certain Mr Nkosi ("Nkosi"). Upon intervention by Nkosi, reconnection occurred on the 6th May 2010, thus obviating an urgent court application that had already been intimated by Blom.
- 7.2. Blom further testifies that he was crossed. He has been paying his account for 18 years. His complaint stemming from losing power supply is legendary, in that, computers and telephones were not functioning. His staff was just sitting around and had nothing to do. He also could not do anything and although He is blind, on those two dates he felt that he was as blind as a bat without electricity. He used his office for docex for Pretoria East. This meant that various attorneys came to his office to collect their docexed mail. On average per day, he testifies that 30-40 people came to his office to collect the docexed mail. He had to explain to everybody who came and who could not use the front door which was operated electronically, to go around the back door to receive the mail by gaining access to his office from the back door. He felt embarrassed by this. He gained an impression that the people who came must have thought that he did not pay the electricity account or he could not afford paying it. He testifies that he explained to the people who came about this pending dispute with the defendant.
- 7.3. He testified that he has a reputation to pay his account timeously and he felt embarrassed by this electric power cut. He confirms that same was restored on the 6th May 2010.
- 7.4. It also emerged in the course of his evidence that the dispute with the defendant ended up in the SCA. Although this did not come

from the trial, it appears that the said dispute was subsequently partially resolved by the reported SCA judgment involving the same parties before me in the matter of **City of Tshwane v Marius Blom and GC Germishuizen 2011 (1) SA 341 (SCA)** for purposes of this judgment, I need not to dwell much on the nature of that dispute and its implications on the case before me.

8.

Be that as it may, Blom further testified that his rate per hour for his professional fees is an amount of R1 500 plus VAT. This is the same for his partner Mr Gert Germishuizen. He handles largely litigation on liquor licence disputes and other matters on general litigation and Mr Germishuizen who was admitted as an attorney in 1981 specialises in conveyancing work.

9.

9.1. According to Blom pages 51 and 53 of the trial bundle reflect the management accounts for the plaintiff's business in respect of the months of January, February and March 2010. The accounts were prepared by himself assisted by his son. The first two items of the accounts on both pages 51 and 53 is the figures extracted from Blom's and Germishuizen fee books. He also, on preparing the accounts went through the bank statements and the fees were calculated from the bank statements and compared with those extracted from the fee books. When engaged in this exercise, he was avoiding giving the work to the auditors to save costs for the preliminary arithmetical calculations that could be done by himself and his son. Hence this was the reason the auditors were not called as witnesses. To the best of his knowledge, the figures on both page 51 ad 53 are correct.

9.2. On page 55 of the trial bundle, Blom referred the court to the plaintiff's income statement showing annual gross revenue for fees of

the plaintiff for 2010 in the sum of R4 424 481 without VAT. Under cross-examination, his evidence is that the gross revenue for 2010 is reflected in the income statement was calculated by the auditors on the information furnished by him as reflected from the monthly management accounts. The auditors follow their auditing principles and accounting policies by testing those figures as against the figures appearing in the management accounts. In reply to a question raised by the court, Blom testified that it is unaccepted practice that the staff member has to work for 21.6 in a month excluding weekends. From the management accounts on February 2010, the total gross income of the plaintiff is the sum of R412 000.00 inclusive of VAT and for March 2010 is the sum of R502 465.81 inclusive of VAT. Mr Velgemoed contended that average for the month of February and March is the sum of R457 389.08 and therefore contended that the daily fee written by the plaintiff is the sum of R27 780.94.

- 9.3. He submits that the figure is accurate since is the figure for the months that are just before the cutting of the power to the plaintiff's premises and contends that the actual loss suffered for the 4th May and the 5th May 2010 is the amount of R43 561.38.
- 9.4. He contends that the best evidence rule should be applied.
- 9.5. It is my view that the plaintiff has a duty to lead all the such evidence as would permit the court to properly assess its damages. In this regard, it would have been appropriate for the plaintiff to place before this court the management accounts for the months of April and May 2010 to put the court in a position it can properly assess the damages for the 2 days in May 2010 and establish the reliability of that evidence as well as its probative value. There was no evidence tendered by the plaintiff or any submission made for reasons of its failure to place the management accounts for April and May 2010 before court which reasons would perhaps have justified the compliance with the best evidence rule.

9.6. Failure to produce the production of the management accounts for April and May without furnishing reasons creates evidential problem for the plaintiff and the quantum for the loss of income claimed and due to this, the court is left only with the option of having to consider the average annual gross income as the available evidence in calculating the loss of income for the two days in May 2010.

9.7. In any event, it is even doubtful to me if best evidence rule is applicable in the matter before me. In **Welz and Another v Hall and Others 1996 (4) SA 1073 (C) at 1079 (C-E)** Conradie J described it as: ...

“... a rule which applies nowadays only in the context of documents and then only when the content of a document is directly in issue. It does not apply where the document serves to record a fact capable of being proved outside the document. It provides that the original of a document is the best evidence of its contents. The rule is a very ancient one... Under those circumstances Courts, naturally, insisted upon production of the original document as being the most reliable evidence of its contents. Nowadays, a court can be asked to permit the use of a copy if the original of the document is not available.”

9.8. In **S v Ngisi 1986 (2) SA 244 (E)** on page 246, after referring to **Mabena v Braakpan Municipality (1) SA 176 T at 180H to 181 D** and **R v Zungu 1953 (4) SA 660 N() at 6618- 6628**. In both cases the court held *“the best evidence rule is reiterated, which rule is to the effect that the best evidence of the contents of the document is the document itself and that secondary evidence as to the contents thereof, may only be adduced if it is established that the document itself cannot be produced for some such reason as its loss or destruction”*.

10.

In this matter, quite clearly, it is not the best evidence that was placed before court in the form of the management accounts for only February and March in order to prove loss of income for the month of May 2010.

11.

During argument, Mr Velgemoed submits that plaintiff pursues also a claim for general damages caused by defamation by the defendant by disconnecting electricity supply to the premises of the plaintiff, so the argument went, the conduct injured the reputation of the plaintiff.

12.

12.1. This claim was not properly pleaded in the particulars of claim. Mr Mashaba contended that plaintiff has failed to set out the exact words or statement used as proof of such defamatory conduct by the defendant, Mr Mashaba contends that the plaintiff has failed to establish its case for defamation. I agree with the contention but more importantly, this issue falls to be dealt with as part of the merits of the claim. At the commencement of trial, I was not informed whether defendant has conceded the merits for defamation as well. It is quite evident from Mr Mashaba submission that he was bewildered that the plaintiff introduces this claim in the hearing for quantum. In any event, it has not been proved to me that the plaintiff has met the test that is to be applied in whether an ordinary reasonable man having an average intelligence and knowledge, would have found the defendant's conduct to have been defamatory under the circumstances. Accordingly, I am not satisfied that plaintiff has discharged its onus in this regard and I find that a claim for defamation has no merits. At the very least, the defendant was

ambushed by the approach to have a claim for defamation heard at the quantum stage of proceedings.

- 12.2. Turning to the issue of loss of income it was contended on behalf of the defendant that the supply of electricity power was cut from reaching the premises belonging to a third party, Kawari Bellegings CC and not to the premises belonging to the plaintiff. Mr Mashaba's contention seems to be along the lines that the plaintiff's loss of income, is not recoverable from the defendant either contractually or delictually. This argument defies the inescapable actual position that the plaintiff is in occupation of the premises and the cutting of electricity, effectively affected the plaintiff and not Kawari Bellegings CC.

13.

- 13.1. The SCA held in **Transnet Lts v Sechaba Photoscan (Pty) Ltd 2005 (1) SA 299 (SCA) at 304- 305 para 16, Howie P:**

"the idea that loss of profit is not recoverably in delict is not historically founded. Indeed, the converse is the case. Moreover it is commonly the subject of an award of damages for loss of earning capacity in personal injury cases. Why should it matter that the injury is not physical but economic, as long as the loss is one of earning capacity?

Take the example of the owner of a taxi that is negligently damaged. He has a claim for the profit lost while the vehicle is out of action. Can it make any difference if, subject quantification, the delict is committed where he has just bought the vehicle, before commencing business? I think not. No can it matter if the loss were caused by fraudulent conduct, nor negligence. Clearly, the loss would impair his earning capacity and that is part of his patrimony. The claimant in the present case is a company. Once again, that can make no difference. Its patrimony has been impaired by having the bargain that it was on the point of acquiring dishonestly snatched away."

- 13.2. Before me, there is absolutely nothing in principle which bars

recovery of damages by plaintiff, for loss of income. It is therefore consequential that the submission made on behalf of the defendant has to fail. The plaintiff is entitled to be placed in the position in which it was, but for the unlawful conduct, depriving plaintiff's benefit of the supply of electricity.

CONCLUSION.

14.

14.1. In respect of the aforementioned, the supply of the electricity to the premises of the third party referred to above, generally renders the owner as well as the occupier or consumer liable in terms of the by-laws for non-compliance with the obligations or other requirements imposed upon them under and in terms of the by-laws of the defendant.

14.2. In this regard, Blom's evidence was largely not challenged under cross-examination and there is no argument having been advanced to attack the facts emanating from his evidence. I am therefore satisfied that it is justified in awarding damages in favour of the plaintiff on the average amount per month as per plaintiff's financial statement for 2010. I find plaintiff to have suffered loss for the 4th May 2010 and 5th May 2010 as calculated hereunder:

Annual income as per I/S	<u>R4 424 481.00</u>
	12
=	<u>R368 706.85</u>
	21 days
=	R17 557. 46 (daily fees lost)

The summons was issued for the amount of R150 000 for damages from this court, with interest. There is no claim for VAT from the particulars of claim. And there was no evidence as to whether I should grant the amount claimed with V AT and I was not addressed

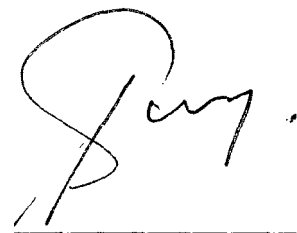
on the legal basis for entitling plaintiff to claim VAT over and above the amount of the award. The figures submitted during trial were not inclusive of VAT I conclude that plaintiff has not made out a case why it must succeed on payment of VAT.

- 14.3. It has not been shown to me by way of cogent reasons why plaintiff instituted an action in the High Court where the monetary value clearly fell within the jurisdiction of the Magistrate Court. In an absence of such cogent reasons, I shall grant costs in favour of the plaintiff as if the matter was dealt with in the Magistrate Court.

15.

Accordingly I make the following order:

- 15.1. That the defendant is ordered to pay the plaintiff a sum of R35 114.92.
- 15.2. Interest on the said amount on the applicable rate from date of this order.
- 15.3. That the plaintiff's claim for general damages arising from defamation is dismissed.
- 15.4. That the defendant pays the plaintiff's costs on the Magistrates' Court scale of party and party.

A handwritten signature in black ink, appearing to read 'Ncongwane', written over a horizontal line.

NCONGWANE AJ

ACTING JUDGE OF THE HIGH COURT

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