

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 29053/2013

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED.

25 APRIL 2022

In the matter between:

BENMAR VERSPREIDERS CC

First Plaintiff

ANTHONY STARKE

Second Plaintiff

JOHAN ACKERMAN

Third Plaintiff

and

MINISTER OF POLICE

First Defendant

MARK JACOBS

Second Defendant

DATE OF JUDGMENT: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time of hand-down is deemed to be 10h00 on **25 APRIL 2022**.

JUDGMENT

KHASHANE MANAMELA, AJ

Introduction

[1] Benmar Verspreiders CC, the first plaintiff, is wholesale distributor and retailer of merchandise, mainly cigarettes, operating from Vryburg, North West Province. On 15 May 2010, Mr Mark Jacobs, the second defendant, and a group of other persons robbed the first plaintiff of cash and stock, and assaulted Mr Anthony Starke, the second plaintiff, and Mr Johan Ackerman, the third plaintiff, whilst effecting the robbery at the first plaintiff's premises. It later became known that Mr Jacobs was a policeman stationed in Mondeor police station in Johannesburg; a member of the South African Police Service (SAPS), and therefore an employee of the first defendant, the Minister of Police.

[2] Together with Mr Starke and Mr Johan Ackerman, the first plaintiff caused summons to be issued against the first defendant and Mr Jacobs on 13 May 2013. The first defendant was sued on the basis of vicarious liability in respect of the unlawful conduct or deeds of Mr Jacobs. Effectively, no relief was sought against Mr Jacobs in the summons. The first defendant defended the claims and denied liability, including on the basis that the Mr Jacobs or the other possible policemen involved were not acting within the course and scope of their employment with the first defendant. But in the course of time the issues relating to liability or merits were settled, including the claims exclusively relating to Mr Starke and Mr Johan Ackerman. What remains outstanding is the *quantum* of the first plaintiff's loss (i.e. the quantity of the stock and cash stolen). Therefore, the remaining protagonists in this matter is the first plaintiff and the first defendant. Henceforth, I shall, for convenience, refer to the first plaintiff simply as the Plaintiff and the first defendant simply as the Defendant, unless the reappearance of the other cited parties calls for another distinguishing reference. I am actually emulating counsel in this regard.

[3] The trial or hearing in this matter took place through a virtual link on 22, 23 and 25 November 2021. Mr W Dreyer appeared for the Plaintiff, and Mr MS Phaswane appeared for the Defendant. This judgment was reserved after listening to counsel's closing argument on the third day of trial, 25 November 2021. I had also directed, after both parties had closed their respective cases, that counsel file written argument or submissions prior to making an appearance for supplementary oral

submissions or argument on the third day. I am grateful to both counsel for the helpful material filed. Below, I will, firstly, reflect the common cause facts (according to my assessment) under background; then, secondly, deal with the respective parties' cases in terms of the evidence adduced at the trial; thirdly, reflect the summaries of the submissions by counsel, and, fourthly, discuss the evidence and submissions against the applicable legal principles. Naturally, there will be interlinkages between these subheadings, which are utilised merely for convenience.

Brief background facts

General

[4] Under this part, the common cause facts or those facts not effectively disputed (as I have them) by the other party are reflected. There may be more of such facts appearing elsewhere in this judgment.

[5] The Plaintiff appears to have been incorporated as a close corporation in 1996. Initially the equity membership interest of the Plaintiff was respectively held by the late Mr Jan Ackerman and, his spouse, Ms M Ackerman at 70% and 30%, respectively. Following the demise of Mr Ben Ackerman, Ms Ackermann is currently the sole member of the Plaintiff holding 100% equity membership interest of the Plaintiff.

[6] The Plaintiff conducts business activities, primarily, relating to the wholesale distribution of cigarettes and related products. The Plaintiff's business premises are located at 59 Stella Street, Vryburg, North West Province. At all material times hereto, the Plaintiff maintained a current business account at the Market Street branch of ABSA Bank in Vryheid, under account number [....].

[7] On 15 May 2010, an armed gang pretending to be police officers, ostensibly led by Mr Jacobs, and to be investigating an attempted burglary which occurred at the Plaintiff's premises two weeks prior to the robbery entered the premises of the Plaintiff in Vryburg and robbed the Plaintiff of stock and cash on hand. The bulk of the stolen or robbed stock was in the form of cigarettes. Mr Jacobs who was one of the robbers was clad in police uniform and identified himself as a policeman. He was also in possession of a police docket and had brought a handcuffed person

purporting to be a suspect in an attempted burglary. The investigation revealed that Mr Jacobs was a former member of the SAPS. He had been dismissed from the SAPS in 2003, but he was still in possession of his SAPS appointment card and uniform. The gang members were charged and prosecuted for armed robbery in Vryburg Regional Court.

[8] As already indicated above, the summons was issued on 13 May 2013. The particulars of claim to the summons comprised three claims, each is in respect of each of the plaintiffs against the defendants. Claim 1 concerns the robbery of stock, as well as cash amount of R250 000 or R300 000, on 15 May 2010 from the Plaintiff's business premises in Vryburg by Mr Jacobs and his accomplices. Claims 2 and 3 (each in the amount of R121 000) related to the incidents of assault by Mr Jacobs in his accomplices of Mr Starke and Mr Johan Ackerman on the same day as the robbery. The incidents involved the pointing of a firearm or firearms at Mr Starke and Mr Johan Ackerman, as well as the violent forcing of both the victims to lay face down on the floor for more than an hour, which led to both of them sustaining injuries.

[9] The Plaintiffs, jointly, alleged that the unlawful conduct (i.e. the robbery and assault) was perpetrated by Mr Jacobs and his accomplices whilst acting within their course and scope of the employment with the Defendant. They sued the Defendant on the basis of vicarious liability in the total amount of R542 000.

[10] The Defendant filed a notice of intention to defend the claims. It appears that Mr Jacobs chose not to participate in the proceedings from the beginning. The Defendant initially denied liability including on the basis that the policemen involved were not acting in the course and scope of their employment with the Defendant, but in the furtherance of their own private interests.

[11] As indicated, the issues relating to the merits were fully dealt with and conceded in favour of the Plaintiffs and an order was granted in this regard on 25 April 2017 by Ranchod, J of this Division. This was after the issues relating to the merits were separated from those relating to *quantum* in terms Uniform Rule 33(4). The matter, as also indicated, came before me for trial on 22 November 2021.

Evidence was led over a period of two days on 22 and 23 November 2021, with the first day of trial stretched by agreement between the parties and leave of the Court to around 18h00. The matter was then postponed to 25 November 2021 for counsel to file written heads of argument before appearing in the afternoon for supplementary verbal argument.

Plaintiff's case (evidence and submissions)

General

[12] As indicated above, what remains for determination is the *quantum* of claim 1 the robbery of stock and cash amount. Initially the claim was in the amount of R250 000 or R300 000, which to the Plaintiff's credit, was stated as a "broad amount".

[13] Through an amendment initiated in May 2019 but only finalised during the trial, the claim amount increased to R1 442 000. The increment was based on the report compiled by the forensic accountants, Mr Edouard Jeat Jacot Guillarmod and Ms Linda MacPhail dated 5 April 2019. Mr Guillarmod was the third witness to testify on behalf of the Plaintiff.

[14] The impugned claim is essentially a damages claim for compensation in respect of the loss suffered by the Plaintiff arising from the robbery of the stock and cash from its business premises. As indicated, the liability of the Defendant to the Plaintiff for the loss has been finalised and therefore the Defendant will be held 100% liable for the proven damages suffered by the Plaintiff.

[15] Three witnesses were called to testify on behalf of the Plaintiff. The first witness was Ms Martha Johanna Ackerman, the spouse of the late Mr Ben Ackerman, but now the sole member of the Plaintiff. The second witness was Mr Esther Putter, an external bookkeeper. And the third witness was Mr Edouard Jeat Jacot Guillarmod, a forensic and chartered accountant.

Ms Martha Johanna Ackerman

[16] Ms Ackerman's testimony can be summarised in the material respect as appearing below. She mentioned that she was not at the premises when the incident

took place on 15 May 2010. The same applies to her late husband. She described the type of business of the Plaintiff as the wholesale cigarette distributor. Although cigarettes constitute a major part of the business, the Plaintiff also sells matches, lighters and other over-the-counter stuff.

[17] Her late husband, Mr Ben Ackerman, dealt with stock-taking and stock orders whilst she dealt with accounts, administration, financial statements, banking and internal bookkeeping. Their son also assisted in the business when either herself or her husband were not available. She was involved in the day-to-day administration of the business and was even aware of the letter sent by her late husband on behalf of the Plaintiff to the Plaintiff's attorneys of record dated 21 April 2017 regarding the stolen items.

[18] She further testified that the Plaintiff supplied cigarettes and other merchandise to certain clients. The typical clients included Pick n Pay, OK and ordinary supermarkets. They also supply out-of-town customers on a delivery basis in places such as Kuruman, about 150 km from Vryburg, and walk-in customers.

Stolen cash

[19] Two deposits made into the Plaintiff's ABSA bank account in the amounts of R 142 290 on 29 April 2010¹ and R 200 000 on 04 May 2010² were material to the dispute in this matter.

[20] Ms Ackerman's testimony in this regard include the following. As far as payments are concerned, most of the customers pay monies directly into the bank account of the Plaintiff due to the danger inherent in the transportation or the handling of cash. All deposits are made into the Plaintiff's bank account held at the branch of ABSA bank at Market Street in Vryburg. Proof of payment by these clients would be in terms the Plaintiff's bank statements. The Plaintiff's delivery vehicle has delivery or receipt books and the transactions will be recorded in the customers' accounts. This is with regard to out-of-own clients. Cash at hand at the Plaintiff's premises is recorded on the system and placed in the safe. The daily average

¹ CaseLines 0002-171; 0014-171.

² CaseLines 0002-175; 0014-175.

amount done by the business depends on the route of the deliveries done on the particular day, but ranges from R100 000 to R200 000. Cash received may be utilised internally.

[21] When the Plaintiff receives cash, a cash declaration is done. A “cash declaration” is drafted manually or by hand for everyday business of the Plaintiff and record cash received (i.e. coins and bank notes according to denominations); cheques received; exchanges of cash to clients; petty cash drawings; cash advances to employees, and cash earmarked to be deposited into the Plaintiff’s ABSA bank account. Cash received, for example on Monday will be balanced on Tuesday. The witness confirmed or identified as a cash declaration a document dated 29 April 2010.³ This particular cash declaration is not in her handwriting, but she had personally generated the cash declarations, those in her handwriting.⁴ She confirmed that the cash declaration dated 29 April 2010 was done prior to the robbery. What appears on the document is cash, cheques, cash loan by a member of the staff of the Plaintiff (i.e. “400- 00 for H Morem”); cash used in the administration (i.e. “500-00 wissel in Ackermann”) and cash in respect of people who exchange money by the business (i.e. “15000 00 wissel” and “20000 00 wissel”). The latter people would deposit cheques into the Plaintiff’s bank account to subsequently collect the equivalent in cash from the premises of the Plaintiff. They would come with proof of deposit, either by cheque or EFT, and ask to be given cash. They have to make arrangements with the Plaintiff when money is transferred and advise of when they would be coming for collection of the cash. It is important to know how much cash the Plaintiff has or is to have. This means that the Plaintiff would have to record the “ins and outs” of the money from the safe.

[22] Ms Ackerman adduced evidence on other cash declarations,⁵ including the case declaration of 12 May 2010.⁶ This was for the Wednesday prior to the robbery on Saturday, 15 May 2010. This was to be later identified by Ms Ackerman as a typical cash-up or declaration.⁷ She testified regarding this cash declaration about a

³ CaseLines: 0014 – 181.

⁴ For example, the cash declaration on CaseLines: 0014 – 187.

⁵ CaseLines: 0014 – 187, cash declaration of 3 May 2010.

⁶ CaseLines 0014 – 206, cash declaration of 12 May 2010.

⁷ CaseLines: 0014 – 206, a cash declaration of 12 May 2010.

payment made by a remote client by way of EFT or direct deposit. She explained that the cheques deposited by external people would have to balance out with the cash. Also that, the cash declarations of Thursday and Friday (i.e. 13 and 14 May 2010) and other documents were also stolen during robbery. But the register was not lost in the robbery.

[23] The witness also testified about the documents referred to during the trial as “cash registers”, which are generated through a computer system.⁸ These are generated from the Plaintiff’s computerised sales control system, the Ultisale. These documents are computerised summaries or a daily printouts indicating cash received, cheque payments and VAT payments.⁹ She explained that there is a relationship between documents labelled “cash declaration” and those labelled “cash register”. The cash-up is done the next morning and a document is generated through the computer system. The cash declaration involves a manual or physical counting of the cash. She is the author of the cash declarations, but not all of them. The Plaintiff’s personnel also assist in this regard. Also that, the bookkeeping system has been in use since 1996. She preferred the handwritten system or approach.

[24] Further, the witness denied that that money was deposited in the bank on the same day of receipt. This means that there would be cash on hand and in the safe at all times. Under cross-examination by counsel for the Defendant, Ms Ackerman was steadfast in her testimony regarding the frequency of the depositing of money or cash. She told the Court that the Plaintiff receives cash every day. For example, money received on a Monday will be taken to the bank on Tuesday or Wednesday. There was no specific time limit. There was no proper call as to when the deposit was to be made. She denied that her husband was the decider of this fact. They decided together. They normally help people with cash for wages, for supplies or whatever. Banking would be done when there is enough money to go to the bank. As to what constitute enough money, Ms Ackerman reverted to her statement that they have people who exchange money, some of it very high. These people would ask, for example, on Monday that they require money on Thursday of about R200 000.

⁸ See, for example, CaseLines: 0014 -180 to 0014-182, a printout generated through a computer system.

⁹ CaseLines: 0002-180, 182, 184, 186,188, 191, 193, 197, 199, 201, 203, 205, 208, 209 and 210.

Then the Plaintiff would have to pile up the cash for them and then go to the bank for the rest.

[25] Ms Ackerman spent a considerable amount of time testifying, be it under examination-in-chief or cross examination, on the document labelled “KONTANT OP HANDE OPSOMMING” (Afrikaans for “CASH ON HAND SUMMARY”).¹⁰ This document, in my view, occupies a very central and vital place in this litigation. At the risk of maybe deviating from the relevant judicial protocol I deem it necessary to paste it below, for ease of reference.

Table 25.1: “Kontant op hande opsomming” (Cash on hand summary)

<u>3ENMAR VERSPREIDERS BK</u> <u>KONTANT OP HANDE OPSOMMING</u>						
<u>Datum</u>	<u>Kontant per</u> <u>kasregister</u>	<u>Kontant</u> <u>uitbetaal</u>	<u>Kontant</u> <u>na kleinkas</u>	<u>Tiek gewissel/</u> <u>Gebank</u>	<u>Deposito</u> <u>per bankstaat</u>	<u>Balans</u>
						78,395.15
4/5/2010	Balans oorgebring					49,832.59
29/4/2010	78,937.44	(22,400.00)	56,537.44	(85,100.00)	(142,290.00)	12,832.59
29/4/2011	-	-	-	(37,000.00)		21,444.48
30/4/2010	133,394.77	(22,112.90)	111,281.87	(102,670.00)		21,380.55
1/5/2010	17,666.09		17,666.09	(17,730.00)		80,088.38
3/5/2010	98,117.83	(6,410.00)	91,707.83	(33,000.00)		115,300.67
4/5/2010	52,464.84	(7,642.55)	44,812.29	(9,600.00)	(200,000.00)	174,546.62
5/5/2010	79,795.95	(20,550.00)	59,245.95			191,658.50
6/5/2010	86,744.65	(69,632.77)	17,111.88			293,076.45
7/5/2010	108,761.20	(7,343.25)	101,417.95			307,920.29
8/5/2010	15,843.84	(1,000.00)	14,843.84			388,171.59
10/5/2010	103,281.30	(23,030.00)	80,251.30			107,159.45
11/5/2010	34,191.16	(203.30)	33,987.86	(315,000.00)		149,956.97
12/5/2010	78,438.02	(15,640.50)	62,797.52	(20,000.00)		43,229.64
13/05/2010	33,272.67		33,272.67	(140,000.00)		187,813.16
14/05/2010	158,989.77	(4,406.25)	154,583.52	(10,000.00)		211,733.38
15/05/2010	23,920.22		23,920.22			
						<u>211,733.38</u>

[26] The document represented by the table 25.1 appearing above is a recalculated summary of the cash on hand and/or in the safe. According to Ms Ackerman, following the robbery, on Monday, 17 May 2010, a summary of the cash on hand was drafted with reference to the daily cash declarations available, the cash registers generated from the Ultisale computer printouts and the ABSA bank

¹⁰ CaseLines: 0014-170, a document labelled “KONTANT OP HANDE OPSOMMING”.

statements for the period 28 April to 15 May 2010. The summary, as appearing in the table above, indicated the amount of the cash stolen during the robbery was R211 733. 38.

[27] Ms Ackerman explained that the calculations or transactions include a balance brought forward (i.e. “Balans oorgebring” in Afrikaans) to 28 April 2010. Further, she explained that “*kontant uitbetaal*” refers to creditors or people who received cash in exchange for the cheques deposited into the Plaintiff’s bank account. Regarding “Tjek gewissel/Gebank” (i.e. cheque exchange or banked) Ms Ackerman explained that it referred to cash earmarked to be banked. It has nothing to do with the cheques, but the money given for the cheques by the business. The cheque would appear on the bank statement. The document on page 170, appearing in table 25.1 above, is only about cash and the reference to cheques is due to the fact that “we get cheques and we give money”, the witness explained. Also, that “Deposito per bankstaat” (i.e. deposit per bank statement) refers to the amount paid into the Plaintiff’s bank account or earmarked to be paid into the Plaintiff’s bank account. She emphasised that this does not mean the deposits were made on the same day.

[28] When asked by counsel to explain what is meant by “cash pickups”, Ms Ackerman responded that it is the money exchanged by people, the total of the money. She also confirmed regarding the cash declaration that of 3 May 2010 that the inscriptions “Pretorius” and “ShopRite” were expenses. She explained that the amount of R33 000 was included in the R200 000 referred to on page 175. Counsel then asked where do we find the R33 000 and the witness asked Counsel to look at page 170. She explained that if you add the column of the cheques exchanged or banked it equates to the amount of R 200 000. The R200 000 was only cash and it included the amount of R33 000. The transactions of page 170 (i.e. table 25.1 above) comprises only cash and no cheques are included.

[29] Regarding the opening balance of R78 395.15 or R78 937.44 (on page 170, Ms Ackerman stated that it was decided upon because the Plaintiff did not know how far back to go. We could have gone back weeks and months, but we decided to start in April, the witness testified. The computer system was acquired in 1996 so they

could have gone back up to 20 years. Regarding whether there was a document confirming this opening balance, the witness answered in the affirmative but explained that if they had gone back to the end of March 2010, they would have an amount from February 2010. When counsel persisted in the availability of the document confirming the opening balance, Ms Ackerman said that she did not have the documents “now”. But she confirmed that she was aware of the amendment to the pleadings regarding the R78 000. Under re-examination she mentioned that the documents of prior to 28 April 2010 were available upon request.

[30] Ms Ackerman also testified about the deposit of coins by the Plaintiff. This was in respect of the deposit reflected on the cash declaration for 12 May 2010 in the amount of R2 800 described as “Silwer Bank”.¹¹ She didn’t know who made the deposit, but she speculated that it must be coins. She didn’t know if the amount was deposited as R2 814 as she did not know why the deposit did not include the R14. But coins were not deposited on a regular basis as they were mostly used as cashier floats in the business. Counsel for the Plaintiff explained that the word “Silwer” is a typical description of coins in the Afrikaans language.

[31] Taken back to the document on page 170 or table 25.1, Ms Ackerman told the Court that there was no deposit on 13 May 2010, but there was cash as represented by the EFT amounts of R40 000; R20 000 and R10 000. Ms Ackerman explained that if there was money on 13 May 2010 it would have been used to deal with the people who were there for the exchange. When counsel for the Defendant pointed out that the R20 000 and R10 000 she referred to were on other dates, she responded that people have to pay, for example R140 000 into the Plaintiff’s bank account before money is given out to them. Before cash is given there ought to be, first, payment made into the Plaintiff’s bank account, which is a cheque to be exchanged (i.e. “wissel”) for cash.¹² Also, when the witness was explaining the amount of R142 290 appearing on the Plaintiff’s ABSA bank statement she confirmed that it was a cash deposit and that not all deposits were in R100s.¹³

¹¹ CaseLines: 0014-206.

¹² CaseLines: 0014-178, a statement from Absa for the Plaintiff’s bank account.

¹³ CaseLines: 0014-171, a statement from Absa for the Plaintiff’s bank account from 28 April onwards.

[32] Then the witness's testimony was concentrated on the Plaintiff's Absa bank statement of 28 April 2010 onwards.¹⁴ She testified that sometimes her late husband, Mr Ben Ackerman, would transfer money in order to support the business and would later file a claim. Regarding another bank statement,¹⁵ in explanation of an EFT, the witness stated that (including with regard to the inscriptions in manuscript) these referred to the customers who drew money after making deposits into the bank account of the Plaintiff.

[33] Ms Ackerman initially testified that the Plaintiff was not insured against theft, but later confirmed that there was some insurance. The Plaintiff received from the insurance company the amount of plus minus R36 000, she postulated. This was compensation for the loss of computers and the camera system. However, there was completely no insurance for the loss of stock as the insurance companies viewed the Plaintiff's industry as high risk and, therefore, the insurance premiums were expensive.

Stolen stock or cigarettes

[34] Ms Ackerman confirmed that the Plaintiff is a dealer in cigarettes. The profit or mark-up margins on cigarettes averages between 4.5 to 4.7%, she told the Court.

[35] The policy on stock control, Ms Ackerman explained, was or is that, they need to be specific about stock control, due to the low profit margins. Stock control is done once a week. During the material times, stock-take was done by her late husband with the help from the personnel. She further explained that the stock take was done by a computer generated list and comparing with the items on hand. They would go into the computer system (i.e. Ultisale") and would also physically count the stock on the shelves to ensure that it correlates. If there is no correlation, they would correct with profit and loss entries. They would also check the invoice or the stock list. This was done on a weekly basis.

[36] The witness was then examined on the document relating to stock-on-hand as constituted by columns for stock before the robbery; after the robbery and stock in

¹⁴ CaseLines: 0014 – 171, Absa bank statement from 28 April 2010 onwards.

¹⁵ CaseLines: 0014 – 176, Absa statement from 7 May 2010 onwards.

terms of the invoice.¹⁶ Ms Ackerman explained that the material for column 1 is computer generated after the robbery following the physical count of the stock. The list in column 3 is the difference before the stock was robbed and after the robbery. She corrected the figure of 61 which she stated that it should actually be 51. She explained that she made the mistake which was later picked up by the expert witnesses and rectified. Column 3 of the document relates to an invoice prepared by the late Mr Ben Ackerman numbered: 117346, but Ms Ackerman confirmed that she confirms the correctness thereof.

[37] Invoice number 117346 is a tax invoice of the stock stolen.¹⁷ The tax invoice was computed and issued by the late Mr Ben Ackerman. It was not issued to any person but it was opened and named “diefstal”. It is not a supplier’s invoice for the stock purchased by the Plaintiff, but is a record of the stock stolen during the robbery.

[38] Ms Ackerman confirmed that one of the cigarette suppliers of the Plaintiff is British American Tobacco South Africa or BATSA. The stock was ordered in terms of different invoices from BATSA. She mentioned initially that she saw the delivery note, but later mentioned that they do not give out delivery notes. The business signs on the original and that the original is kept by the supplier and the business keeps a copy. The delivery note of 13 May 2010 might have been signed for by the late Mr Ackerman or one of the members of the personnel. But she did not see the document when it was signed for, although she knows how much stock was delivered and she provided a figure of R857 400.69. She pointed out that the Plaintiff does not only order stock from BATSA, but has a few other suppliers. Therefore, the stock stolen is not constituted by stock only acquired from the BATSA. There was R1,6 million worth of stock in the shop when the robbery occurred. The Plaintiff orders stock on a weekly basis, Ms Ackerman testified.

Ms Esther Putter

[39] The second witness to testify on behalf of the Plaintiff was Ms Esther Putter. She mentioned that she is an external bookkeeper and a chartered accountant by

¹⁶ CaseLines: 0014-213 to 0014-217.

¹⁷ CaseLines: 0014-218.

qualification. Her relationship with the Plaintiff is that of accounting officer since March 1998. She has been involved, among others, in financial statements; bookkeeping systems; monthly VAT, and the Pastel system.

[40] Mr Ben Ackerman, whom she described as meticulous and an “old school” type of person, to whom figures were important, asked her to assist after the robbery. Mr Ackerman wanted to know how to calculate the loss on the system. He called her on the Monday, 17 May 2010, but she went to the next day business, on Tuesday. It was important for Mr Ackerman to determine the value of the loss. He calculated the loss on a monthly basis. She advised him on the invoice he generated for the loss. But she later mentioned that Mr Ackerman knew the system by heart.

[41] Ms Putter also testified that she is satisfied that the information appearing on the cash summary on page 170 or table 25.1 above was arrived at by following proper procedures. She also confirmed being familiar with the document on page 213 or 218 (the invoice). It was prepared by Mr Ackerman. It was compiled on 17 May 2010, two days after the robbery to establish the value of the stolen stock. She did not recalculate the loss by going through each and every item. She checked some of the quantities appearing on the document, but not all of them. She did not see the reason to do otherwise. She knew Mr Ackerman was precise, meticulous and paid attention to details.

[42] Regarding the invoice prepared by Mr Ackerman, Ms Putter mentioned that it is not retail values used in the invoice but average stock values from the system. She explained that an average stock value is constituted the value of stocks from two or more different periods of delivery. The value of an earlier stock and a later stock are used to arrive at an average value.

[43] She has been familiar with the system since she started assisting the business of the Plaintiff. Also, she reiterated the evidence by Ms Ackerman that documents for the period prior to 28 April 2010 are available. Further, Ms Putter confirmed that she compiled the Plaintiff’s statements from 2008 to 2016 in the bundle, as an accounting officer.

[44] Regarding the tax invoice in the amount of R857 400.67 Ms Putter explained that the figures used were cost values and the total is the cost value.¹⁸ The recalculated value is the amount paid (i.e. cost price).

[45] With regard to the opening balance or the amount brought forward of R78 000 odd, Ms Putter confirmed that she assisted in compiling the document. They had to start somewhere, she said. She also explained that everything appearing on page 170 or table 25.1 above was compiled from source documents. Nothing was thumb-sucked, she added. The document was compiled after the robbery when they had to recalculate the stock lost in the robbery. She somewhat mentioned that the amount of the document could have been more, but denied that the document is incorrect. She said that the amount seems high but it is possible in the nature of the business.

Mr Edouard Jeat Jacot Guillarmod

[46] Mr Edouard Jeat Jacot Guillarmod, a chartered accountant by profession was the third witness on behalf of Plaintiff. He was requested to assist in preparing or calculating the loss of cash and loss of stock suffered by the Plaintiff as a result of the robbery. He had prepared a report together with Ms Linda MacPhail, also a chartered and forensic accountant. They were supplied with the relevant documents by the late Mr Ben Ackerman and consulted with Mr and Ms Ackerman in order to determine the loss. He calculated the cash loss to an amount of R142 820.28 and the value of stolen stock (at cost price) to be R 883 870-42 (VAT inclusive).

[47] He corrected the contents of his report where he referred to the stolen stock items as reflecting the values at selling or retail prices. He explained that the references to the retail or selling prices is actually to the cost prices. He confirmed under cross-examination that there is a vast difference between retail value or price and cost value or price. Cost price is what it would cost you and the retail price is what you sell it for, he explained. One of the ways to prove a cost is to produce an invoice. To prove a cost price you do not need a recalculation because the price is on the invoice. Under cross examination he denied that the alteration of his report to substitute cost price for the retail or selling price affects the figures in the report.

¹⁸ CaseLines: 0002-256 to 257.

[48] He testified regarding the information in the cash summary on page 170 or table 25.1 above that he did not find something out of the ordinary, save for a few corrections. The summary of cash on hand was used as point of departure. They (i.e. Ms MacPhail and the witness) did not know what cash was taken. They had to recalculate the average. He pointed out that the Plaintiff made an error of 61 which had to be changed to 51 units of Embassy Kings cigarettes brand. He did not see any other error. The rest was correct. He considered the entries in his report to be fair and equitable.

[49] Mr Guillardmod explained that they summarised three years of financial statements and arrived at the average of 4.2% against 2.9% in 2011. The income and financial statements of the Plaintiff for three years prior to the financial year of the robbery and five years after the financial year of the robbery (i.e. 2008 to 2016) were utilised in these calculations. The Plaintiff's financial year ends at the end of February of each year. The robbery occurred in the 2010/11 financial year. The calculation also included the tax returns of the Plaintiff. As indicted above, the gross profit margin during the two years prior to the robbery was approximately 4%, dropping to 2.9% in the year of the robbery and, thereafter, increasing to around 4.5%. The average financial loss of profit, represented by a decrease in gross profit margin is R787 993 closely correlating with the loss of stock of R775 324. (VAT exclusive).

[50] The witness also referred to the joint minute compiled between him and his counterpart for the Defendant. He explained that at the end there was an agreement as indicated. Nowhere did the Defendant's experts state that they have a problem with the opening balance. They agreed to the conclusion, he testified.

[51] Mr Guillardmod testified that he had seen the report prepared by the Defendant's experts, but he did not pay attention to same as when he looked at the report it did not make sense. It is a coincidence that they came out close to the actual figure, he added. He had no idea why the calculations by the Defendant's experts end includes a negative balance.

Defendant's case (evidence and submissions)

General

[52] One witness testified on behalf of the Defendant, namely Mr Oupa Sithole, an external chartered accountant. He prepared a report for the Defendant together with Mr Ndivhuwo Netshirembe regarding the Plaintiff's estimated loss based on available source documents.¹⁹ They got the information from what was sent to them and from the report of Mr Guillarmod. They were refused access to the documentation. He was also a participant in the joint minute.

[53] Further, Mr Sithole testified that there was no register kept for the amount in the safe. They had to test the reconciliation of the money in the safe done by their counterpart, which arrived at a figure of R211 734. 18. He considered the reconciliation flawed. There is no way you can have a negative in the safe. They did not support the figure of R211 734.18 arrived at by the Plaintiff's experts because they (i.e. the Defendant's experts) wanted the documentation to support the daily cash movements and they were not there. They had to rely on the reconciliation, but they could not support that there was cash on hand because they had a negative balance.

[54] Further, the witness testified that if they accepted what Mr Guillarmod said is true we would have a zero balance. They listened to Mr Guillarmod to arrive at a negative balance. The logic does not hold water.

[55] To compile the part dealing with the stock stolen,²⁰ they relied on the stock register, the expert report and the reconciliation done. This was meant to explain what the balance or the amount of stock was stolen. They were not aware of what procedures were followed by the Plaintiff or the Plaintiff's experts and they had to state that because it is a limitation. He and his fellow expert for the Defendant could not go to check the computer, the operating system and how the operating system worked. They had to state this as a limitation. They picked up the discrepancy of 51 units versus the 61. Overall, they were happy with the formulae used, but unhappy with the use of the retail values.

¹⁹ CaseLines: 002-238.

²⁰ CaseLines: 002-241.

[56] Mr Sithole further testified that Mr Guillarmod dealt with the retail price. They met with Mr Guillarmod subsequent to the report and he showed them an invoice. They also raised in the initial report the issue of VAT.

[57] Also, Mr Sithole confirmed that they signed the joint minute. He was the one who came up with the first draft of what was agreed upon.

[58] Under cross examination Mr Sithole when referred to the cash summary on page 170 or table 25.1 above and he was asked what opening balance he would have started with to which he responded that he would start with a zero opening balance. He agreed that in principle he would have an opening balance, but insisted that he cannot make an assumption that there was an opening balance as he needed to rely on factual information. He agreed with counsel for the Plaintiff that the balance ought to have come from somewhere by saying “probably yes”. He denied that they had agreed in terms of the joint minute that there was an agreement on the opening balance. The witness mentioned that Mr Guillarmod had said that if I am to give an opening balance I will go to the beginning of time.

[59] When asked how they arrived at an R206 000 for the cash loss, Mr Sithole responded that they used the logic. He disagreed with counsel and insisted that Mr Guillarmod told them that the Plaintiff makes the bank deposits in R100s.

[60] Regarding the use of the gross profit margins in the financial statements to determine the Plaintiff’s loss for the stolen stock, for example that the margin for 2011 (being the year of the robbery) was down by 29%, the witness commented that for them to rely on the numbers referred to in the financial statements they have do a lot of work cost (i.e. their charges as experts) of which would be more than the entire claim amount. He summed up that one cannot conclude that the drop in gross profit margin was due to the theft of the stock.

Submission on behalf of the Plaintiff

[61] Mr Dreyer for the Plaintiff made the following submissions including those that appearing above.

[62] He submitted that, save for the denial by counsel for the Defendant, the amount of the stolen cash was correctly calculated, the evidence adduced by the witnesses on behalf of the Plaintiff remained uncontested including during the cross-examination of Ms Ackerman.

[63] Further, counsel for the Plaintiff submitted that several of the Plaintiff's clients made either cash or cheque deposits into the Plaintiff's bank account at other branches of ABSA, such as Kuruman. These other payments by clients are clearly distinguishable from cash or cheque deposits made by the Plaintiff itself at the Market Street branch of ABSA in Vryburg by a mere reference to the transactions recorded in the Plaintiff's bank statements.

[64] Mr Dreyer submitted that Ms Ackerman maintained herself as an honest witness, not exaggerating or attempting to circumvent questions.

[65] Regarding the testimony of Mr Guillardmod, counsel for the Plaintiff described his approach to the calculation of the value of the stolen stock as professional, especially given that he included alternative calculations based on actual financial figures. Further that there is no way the Plaintiff would have had the "foresight of the robbery that occurred in 2010" earlier during its 2008/9 and 2009/10 financial years. The figures could not have been manipulated by the Plaintiff for some undue benefit in the subsequent calculation of its loss due to the robbery, counsel pointed out.

[66] Mr Dreyer further submitted that the joint minute of the experts was arrived at after the expert had met and it was signed by both experts. The joint minute, signed by experts, reflects the agreement that the experts agree on the method of calculation (VAT to be included) and the total value of loss of stock in the amount of R883 870.42.

[67] Counsel for the Plaintiff also pointed out that despite the alleged confusion on the part of the Defendant's expert and his chosen method of calculation, he arrived at a calculated loss of cash in the amount of R206 182.66 an amount which is considerably higher than the final amount of R158 949-86, arrived at by Mr

Guillarmod, including all reasonable and justifiable deductions. Mr Dreyer submitted that the conduct of the Defendant's expert calculating a loss, on the one hand, and then turn around and state that there is no loss, on the other hand suggests that the witness is blowing hot and cold.

[68] Regarding the calculation of the loss of stock Mr Dreyer submitted that it requires no speculation by the Court. There really is no doubt as to the agreement expressed in paragraph 6 of the joint minute, read in conjunction with Annexure C to the joint minute. It is abundantly clear that the experts agreed on the method of calculation (VAT to be included) and the total value of loss of stock, in the amount of R 883 870.42.

[69] Mr Dreyer also submitted that the Plaintiff's expert witness arrived at a negative cash balance, possibly, because he included deposits which were clearly not related to the Plaintiff. He did not heed descriptions of the transactions on the Plaintiff's bank statements which would clearly have distinguished such deposits from any deposit made by the Plaintiff. On the other hand the evidence of Mr Guillarmod was pertinent and to the point as he fully explained the accounting and mathematical basis of his calculations which did not result in a negative cash balance. Mr Guillarmod's evidence should be preferred and accepted to that of Mr Sithole for the Defendant, Mr Dreyer submitted.

[70] Regarding the evidence by the Defendant's expert and perhaps also the Defendant that it required further documents or information in order to facilitate proper calculation of any part of the loss, Mr Dreyer submitted that the Defendant ought to have requested amplification through additional disclosure or discovery in terms of the Rules of the Court. He added that the Defendant has failed to do so since October 2020 when the report by Defendants' experts was drafted. The Defendant or its experts could have taken reasonable steps to obtain whatever information or documentation required for proper calculation, Mr Dreyer pointed out.

[71] Mr Dreyer submitted that a proper case has been made out by the Plaintiff for its claim in the amount of at least R158 949. 86 in respect of loss of cash and the

amount of R883 870. 42 in respect of loss of stock, both in the total amount of R1 042 820. 28. Further that cost should follow this outcome.

Submissions on behalf of the Defendant

[72] Mr Phaswane, counsel for the Defendant, apart from what appears above, also made the following submissions for the dismissal of the Plaintiff's claims.

[73] He pointed out the legal principle that, a claimant such as the Plaintiff is entitled to recover from the wrongdoer, such as the Defendant (albeit vicariously so) the amount by which the claimant's patrimony was diminished as a result of the wrongdoer.²¹ Also that, the Plaintiff is saddled with onus to prove the damages it seeks to recover from the Defendant and may rely on expert evidence to discharge the necessary onus for the recovery of the damages sought.²² The Court is not bound by the expert opinion, as it decides the matter on the basis of the expert evidence, Mr Phaswane pointed out.²³

[74] Counsel, further, submitted that an expert witness is required to lay a factual basis for the conclusions reached and offer an explanation for the opinions or reasons advanced for their views, including satisfying the Court as to the correctness thereof.²⁴ For the reasoning or opinion of the expert ought to be based on the correct facts, which facts to be reconcilable with all other evidence in the matter.²⁵

[75] Regarding the loss of cash, Mr Phaswane for the Defendant, among others, made the following submissions. The reconciliation statement and the amounts therein are constituted, among others, by cash declarations of which Ms Ackerman, the first witness for the Plaintiff, only completed one declaration, as the other declarations were either completed by Mr Ben Ackerman or a member of the Plaintiff staff. Also that there is no policy or protocol as to when the cash in the safe should be deposited into the business bank account, as banking or the depositing of cash takes place when there is enough money in the safe to do so.

²¹ *National Sorghum Breweries (Pty) Ltd t/a Vivo African Breweries v International Liquor Distributors (Pty) Ltd* 2001 (2) SA 232 (SCA).

²² *Philip Robison Motors (Pty) Ltd v NM Dada (Pty) Ltd* 1975 (2) SA 420 (A).

²³ *Road Accident Appeal Tribunal and Others v Gouws and Another* 2018 (3) SA 413 (SCA) para [33].

²⁴ *BEE v RAF* 2018 (4) SA 366 (SCA) para [22].

²⁵ *BEE V RAF supra* para [23].

[76] Further, counsel submitted that the cash movement from the business to the bank cannot be properly ascertained. There is a dispute about the open balance on the reconciliation. This is a dispute of fact which should be resolved by evidence. Counsel referred to the evidence of Mr Sithole that, if all the deposits in the bank statement are accounted, the cash in the safe would result in negative cash balance. This could mean that there was no cash in the safe during the robbery or the information provided is incorrect. He discarded as unconvincing the evidence by Ms Ackerman that the opening balance depends on how far back one would have to start in order to verify the open balance. Counsel also dismissed the suggestion that in order to determine the amount of cash available, one ought to start with an opening balance is not being always correct.

[77] Mr Phaswane argued that on a proper analysis of the evidence there is nothing to show that the amount claimed by the Plaintiff as calculated by Mr Guillarmod was the amount of the cash robbed. Mr Guillarmod's calculation of the amount of the cash stolen lacks factual foundation, counsel argued. Counsel concluded that the Plaintiff does not know how much cash was in the safe when the robbery occurred. If there was money left in the safe it ought to have been a small amount as it can be inferred from the amount of the insurance paid out to the business for the cash.²⁶ He dismissed the explanation by Ms Ackerman that the business could only afford the insurance in an amount of R40 000, as unconvincing when regard is had to the evidence that the business daily generated between R100 000 to R200 000. Therefore, the Plaintiff has failed to discharge its onus to prove that it lost the amount it seeks to recover..

[78] Regarding the stolen stock Mr Phaswane, among others, made the following submissions. The evidence relating to when the stock was delivered to the Plaintiff's premises is unclear. Counsel submitted that it is difficult to reconcile the inventory, the tax invoice and the payment of the stock. Also that none of the experts from both sides could verify the correctness of the stock-taking process and the information in support of the items of stock is unsatisfactory. Counsel concluded that, it is

²⁶ Page 0002-223 of the CaseLines.

improbable that the robbers would only take mostly the new stock that was delivered possibly on 13 May 2010 and leave the other items of cigarettes that were on the premises. Therefore, this part of the Plaintiff's claim ought to be also dismissed, with costs.

Conclusion and costs

[79] I have considered the evidence adduced by the witnesses called to testify on behalf of both the Plaintiff and the Defendant. I have also considered both written and oral submissions by Mr Dreyer for the Plaintiff and Mr Phaswane for the Defendant. There is no need for me to traverse the specifics of the material appearing above for purposes of reflecting the determination reached in respect of both the claims for loss of cash and loss of stock.

[80] With regard to the cash lost during the robbery, I have noted the misgivings of the Defendant's expert regarding, in the main, the origin of the opening balance set by the Plaintiff at R78 395.15 to arrive at the loss initially in the amount of R211 734.18. The main complaint by the Defendant's expert witness, as I understood his evidence, is that he was not furnished with the required documentation. But – with respect – this cannot be a valid ground for the Court to reject the calculations by the Plaintiff's expert. As Mr Dreyer for the Plaintiff pointed out, correctly so in my view, the Plaintiff ought to have utilised the rules of practice of this Court to acquire better discovery of the required documents or particulars, and not to have waited until trial stage to complain about the conduct of the Plaintiff's expert. But is it very significant that despite adopting a different opening balance and approach, the Defendant's expert arrived at a figure of R206 182.66 for the loss of cash? Ironically, I must respectfully add, this figure is higher than the amount now sought by the Plaintiff in respect of the claim for loss of cash: R158 949. 86. Therefore, I will find for the Plaintiff in respect of the claim for the loss of cash in the amount of: R158 949. 86.

[81] Regarding the claim for the stolen stock I have made the following observations. The methods adopted initially by Mr Ben Ackerman, assisted by the external accountant Ms Putter, in establishing the stolen stock was quite commendable even though it was, understandably so, beset with challenges. There was no reasonable way they could be expected to know exactly what was stolen

during the robbery and therefore they had to employ the available means in determining the value of the stolen stock. I have found nothing in the evidence to criticise the invoice prepared by the late Mr Ben Ackerman immediately after the robbery. The use of the average cost price or value was ably explained by Ms Putter as a better approach to arrive at the possible value for the stolen stock. I agree. I also, despite his admitted errors in reflecting in his report the fact that he used retail or selling prices only to change during the trial that he used cost prices, find the evidence by Mr Guillarmod to be reasonably satisfactory. I find his use of the average gross profit margins over the period before, during and after the robbery to be practical and sensible. I did not understand the evidence to be that the stock stolen is the new stock, as argued by Mr Phaswane, for the Defendant. My understanding was that because it is not known which stock (i.e. whether the new or old stock) was stolen the averages of the last two deliveries is used to arrive at the estimated value for the stolen stock. Therefore, I will also find for the Plaintiff with regard to the claim for loss of stock in the amount of R883 870. 42 and thus for a total amount of R1 042 820. 28 in respect of both claims.

[82] I must add that although the evidence by the Plaintiff's expert witnesses is not without blemish, I found it to be reasonably satisfactory, when considering the facts of this matter and the amount of time that has elapsed since the robbery in May 2010. I found the evidence by the Defendant's expert to be more of a criticism towards the approach and calculations by their counterpart, as opposed to assisting this court to arrive at a fair and appropriate outcome.

Order

[83] In the premises, I make the following order:

- a) the Defendant shall pay to the Defendant the amount of R1 042 820. 28 in respect of both claims for loss of stock and loss of cash due to the robbery on 15 May 2010;
- b) the Defendant shall pay interest on the amount in a) hereof at the prevailing prescribed rate of interest with effect from 1 June 2022 to date of full payment of the amount in a) hereof, and

c) the Defendant shall pay the Plaintiff's taxed or agreed party-and-party costs on the High Court scale, including:

i) the costs consequent upon the employment of junior-senior counsel, wherever employed, including the fees of preparation and appearance on 22, 23 and 25 November 2021, including the heads of argument.

ii) costs consequent of the instructing and correspondent attorneys, and where applicable, for court attendance on 22, 23 and 25 November 2021;

iii) reasonable expenses incurred by the representative of the Plaintiff, Ms Ackermann and the witness Ms Putter to attend court;

iv) qualifying fees and expenses of the expert witness Mr Guillarmod for preparation and attendance of court.

Khashane La M. Manamela
Acting Judge of the High Court

DATES OF HEARING : 22, 23 & 25 NOVEMBER 2021

DATE OF JUDGMENT : 25 APRIL 2022

Appearances:

For the Plaintiffs : Mr W Dreyer

Instructed by : VZLR Inc, Pretoria

For the First Defendant : Mr MS Phaswane

Instructed by : State Attorney, Pretoria