IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A519/2007

DATE: 25 JANUARY 2008

In the matter between:

SHELL SOUTH AFRICA MARKETING (EDMS) BPK Appellant

and

BAR-B-QUE DISTRIBUTORS (EDMS) BPK Respondent

J U D G M E N T

DAVIS, J:

Appellant sued the respondent for payment of the sum of R499 654,39, together with interest and costs in respect of the balance due to the appellant, arising from the sale and delivery of paraffin to the respondent. At the trial, the appellant's claim was conceded by the respondent. Judgment in favour of the appellant was granted, together with interest and costs. The respondent counterclaimed in the sum of R712 551,77, together with interest and costs in respect of damages due to it as a result of breaches of certain

contractual obligations alleged to have been owed by the appellant to the respondent. The capital sum claimed by respondent was then amended to a sum of R687 770,51.

The counterclaim was essentially based upon an allegation that it was a tacit term of the agreement concluded between the parties, alternatively a term implied by law, that prior to the installation of an underground tank on the premises, the plaintiff would comply with all statutory requirements which may have been applicable, and that plaintiff had acted in breach of this term, thereby causing the defendant loss. The underground tank concerned the storage of paraffin.

The court *a quo* found that the appellant had owed the respondent the contractual duties alleged by it and that in breach of such obligations, appellant had caused the respondent to suffer damages. The damages arose from the fact that the respondent was obliged to vacate the premises from which it had previously conducted business and to relocate to alternative premises. These findings were not the subject of the appeal.

The appeal itself is confined to an appeal against the quantum of damages found by the court *a quo* to be owing to respondent, being R664 675,88, together with interest. In

particular, the appeal focused on the following issues:

1. That the respondent had proved that it suffered a loss of business as a result of relocation.

2. Respondent was entitled to damages constituted by rental, allegedly due and owing to the landlord of its former premises for the months of September, October, November 2005.

3. The respondent was entitled to damages constituted by the erection, design and manufacture of certain sign boards.

4. In the alternative, and in the event that the court found that the respondent did prove he was entitled to claim the various damages, that he was, in addition to compensation of such loss, also entitled to claim for wasted wages paid by it in June 2005.

1. Claim of Loss of Business due to Relocation:

Mr Gordon, who appeared most ably on behalf of the appellant, referred extensively to a decision of the House of Lords in British Westinghouse Electric & Manufacturing Company

Limited v Underground Electric Railway Company of London Limited [1911-1913] ALL ER 63 (HL). In that case, the appellant contracted to supply to the respondent certain machines in accordance with particular specifications. In breach of the agreement, the machines did not comply with the specifications. Respondents elected, for a period, to utilise the machines, but later replaced them with far superior machines to mitigate the loss.

In an arbitration, respondent counterclaimed damages from the appellant, constituted by the excessive coal usage of the machines over their life, which was some 20 years. The arbitrator found that respondents had acted reasonably and properly in mitigating the damages by purchasing the superior machines, but found that the purchase of these machines was the overall pecuniary advantage to respondents. If the appellants had supplied them with machines complying with the contractual specifications, it would have been to the respondents pecuniary advantage to replace these with superior machines. Accordingly, the arbitrator found that the respondents had not suffered any damages.

When the matter finally reached the House of Lords, Viscount Haldane, LC stated the following:

> "When in the course of his business (the plaintiff) was taking action arising out of the transaction, which action has diminished his loss, the effect in the actual diminution of the loss which he has suffered, may be taken into account even though there was no duty on him to act." at 69h.

Mr Gordon employed this judgment in support of his argument that benefits to the respondent from the move to the larger, more extensive premises, had to be taken into account in any calculation of damages. In Mr Gordon's view, the two critical features derived from the test as set out in British Westinghouse, were the action taken must be in the course of business of the plaintiff and the action must derive from the transaction in respect of which the offending part is in breach. Applying this test to the facts as established, Mr Gordon submitted that the inquiry which ultimately led to the establishment of the appellant's breach in this matter, and the need for the respondent to relocate, was of the appellant to establish whether capacity at the former premises could be increased.

The respondent had some three months prior to the critical events in the matter, entered into a further three year lease with the landlord, expiring on 29 February 2009. The monthly

rental payable in respect of the premises was R35 000,00, including VAT, and the extent of the leased premises was 750 square metres. As a result of the appellant's breach, the respondent was obliged to relocate. It required alternative premises in close proximity and at the same rental. The alternative premises were 1 400 square metres in extent, almost double the size of the previous premises. Revenue generated by the respondents for the year ending 2004, was some R11 million and the ratio of revenue to cost was 55%. The revenue generated by the respondents in the following year (2005), was of the order of R12 million and the ratio of revenue to cost was 52%. The revenue generated by the respondents in the year ending 2006 was R13 million and the ratio of revenue to cost was 55%. The revenue generated by the respondent in the year ending 2007 was some R17 million and the ration of revenue cost was 56%.

Accordingly, in the first full financial year in which the respondents occupied the premises, Mr Gordon noted an increase in revenue of some 30%. The reason for the increase, in his view, was at least partially attributable to the larger premises. In short, the submission was that as a result of the breach by the appellant, respondent had acted diligently and in terms of his duties to mitigate losses, and had therefore concluded a new lease agreement in respect of larger

premises, with the result that its business was able to expand significantly beyond the constraints placed upon it by the former premises. But for the breach, the respondents would have remained in its former premises at least until 29 February 2008, its business would have remained restricted by the established capacity constraints at such premises.

The problem with this submission, in my view, is at least twofold:

1. Westinghouse has been employed in South African law, but as authority for the general proposition that a plaintiff has a duty to mitigate damage. It has not, in my view, been extended to deal with the kind of scenario envisaged in the factual matrix of that case.

2. Even though Westinghouse has been cited with approval by Corbett, J, (as he then was), in Everett & Another v Marion House (Pty) Ltd 1970 (1) SA 198 (C) at 205, the facts were very different. In that case a tenant refused to vacate premises which had been bought by a new owner, who therefore could not obtain vacant possession thereof. The new owner was forced to pay the tenants and to forfeit certain rentals in order to procure their movement out of the premises. He claimed these

amounts in damages. The question arose as to whether the rentals which had been received by him during the period, should be taken into account in the calculation of damages. After citing the British Westinghouse case, Corbett, J said at 205G-H:

"In the present case the pecuniary advantages in the form of rental, which accrued to the respondent, could be described, with every justification, as having risen out of the consequences of the appellant's breach of contract, inasmuch as had there been no breach, this advantage would not have accrued. It was the continued occupation by the tenants of the premises, which at the same time caused the breach of contract and produced the pecuniary advantage. Until 31 August 1967, no real loss could be caused to respondent by reason of their continued occupation, but after this date the loss would have been real and substantial and it was to mitigate this prospective loss that the payment of R750,00 was made. In all the circumstances it seems to me that this pecuniary advantage cannot be regarded as completely collateral or merely *res alios acta* and that it should be offset against the respondent's claim for

R750,00."

This is a different factual matrix from that which pertains in this case, where production declined during the period of the move, that is when respondent had to vacate the old premises before commencing operations in the new premises. In his judgment in the court *a quo*, Koen, AJ, at para 29, said:

> "The loss of profit claim was based upon evidence given by Mr Le Roux of actual production figures during the period in question, compared to expected or budgeted figures. It was apparent from the evidence that the production decreased significantly during the period June/July 2005, when compared to the actual production for previous years and compared to what had been planned. The loss of profit claim was thus based on the fact that fewer firelighters had been manufactured and that as a result fewer would be sold."

In uncontested evidence, Mr Le Roux, the director of respondent, placed the evidence before the court, regarding the record of units manufactured. Significantly, whereas in the period June 2003-4, 234 844 units had been manufactured and 224 125 were made in the comparative period 2004-5, the

decline in 2005-6 for the same period until June, was 69 005. It was clear from the evidence of Mr Le Roux, that there had been a significant decline in the production of the units and further that respondents net profit before tax, had declined this during the relevant period. In this connection, the relevant figures are as follows, February 2004, R1 041 912,00, February 2005, R1 561 213,00, February 2006, R572 117,00, February 2007, R836 402,00.

This evidence was never placed in issue under cross-examination, and neither was the fact that during June and July 2005, a decline of 187 533 units of manufacture took place in comparison with the comparative period in the previous year. Mr Le Roux's calculation of the average production cost per unit was also never disputed. Hence, the calculation of the damages suffered because of the breach of agreement, cannot be contested, given the uncontested nature of the evidence.

In relation to the British Westinghouse case, Mr Gordon's essential assumption is, that an increase in product took place thereafter. It was as a result of the move to larger premises, the larger premises being equated to the turbines of British Westinghouse. This court should effectively extend the law by the development of this proposition and accordingly,

notwithstanding the adverse calculation of damages, set the benefits off against those damages so as effectively to award no damages. That, in essence, was the basis of the debate before this court.

Having set out the approach adopted by Corbett, J in Everett supra, it is, in my view, relevant, briefly, to refer to the evidence of Mr Le Roux under cross-examination when it was suggested to him that the increased premises in the new building, had been the real cause of the increased in turnover and, therefore, profit. The passage reads:

> "--- Ek sien nie die relevansie van die grootte van die perseel of die invloed daarvan op die syfers nie.
>
> U kon meer produksie... --- Nee dit is nie waar nie.
>
> U het meer inkomste. --- Ons het meer produksie gehad, maar so het ons kapasiteit gehad by die ou perseel.
>
> Ekskuus tog? --- Ons het ook ekstra produksie-kapasiteit by die ou perseel gehad.
>
> So die perseel het nie bygedra tot die vergrote omset nie. Dis hoekom u wil die tweede tenk hê nie nè. Dis hoekom u wil die tweede tenk hê daar by die eerste perseel, is dit korrek? --- Dis reg, omdat

ons nog kapasiteit daar gehad het.

Maar nou het u die kapasiteit daar by die nuwe perseel. --- Dis reg, dieselfde.

En dis wat gehelp het om hierdie 17 miljoen bruto inkomste te kry, is dit korrek? Die grootte in die syfers hierso het te doen met die groei in die besigheid en omset. Ja en die nuwe perseel met meer kapasiteit het daarin gehelp nè. --- Dit kon dit makliker gemaak het, maar ek sien nie 'n direkte bydra nie."

Try as one might, with the most energetic process of hermeneutic exercise, this evidence cannot be forced into the British Westinghouse matrix, even if we were to do what no court has done so far, and adopt this principle fully.

Mr Gordon was correct to submit that the onus is on the respondent, but there is some evidential burden placed upon the appellant to show this court why the increased production and, therefore, profit, flowed from the move to the new premises in circumstances where it can be extrapolated that the production was a result of those premises in the same way as it could be argued that increased production flowed from the new turbines as opposed to the old. That simply is not this case.

If one returns to the dictum which I cited earlier from Corbett, J in Everett, it cannot be said, in my view, that the pecuniary advantages in the form of increased production, accrued to the respondent from having arisen out of the consequence as a breach, inasmuch as if there had been no breach, the advantage would not have so accrued. Precisely the opposite was suggested by Mr Le Roux in his evidence. Without more, there is no evidence to justify disturbing this particular finding of the court *a quo*.

2. Rental Payments to the Respondent's Former Landlord:

As regards the alleged rental payments made by the respondent to Mr Le Roux's family trust, Mr Gordon submitted that best for respondents, the following payments were made. A payment on 17 November 2005 in respect of the July rental, of the sum of R39 900,00, a payment on 9 December in respect of the August rental. Mr Gordon submitted that the respondent's claim in respect of the costs of associated with the relocation had to be reduced by further R99 750,00, being the sums claimed for rental for September, October, November 2005, because there was no evidence that these amounts had been paid.

What the evidence does reveal clearly is:

1. That there was a written lease agreement between the respondent and the Jeremiah Trust, the owner of the property, in respect of the hiring of the particular premises.

2. That the respondent was obliged, on 13 June 2005, to stop production at those premises for the reasons I have already described.

3. That new premises were procured on 1 July 2005 and pursuant thereto, respondent had to reinstall those premises so that production only began at the end of July 2005.

4. That payment for July was made on 17 November and for August on 9 December 2005 and this is reflected in bank statements forming part of the record.

5. That payment for September 2005 was effected on 25 January 2007 and that is also supported by bank statements.

Mr Gordon submitted that the claim was brought on the basis of payments for the entire period and that at least, in his view,

for the months September, October, November, there was no such evidence. But it is clear that from the evidence as I have already set out, that Koen, AJ was correct to find that a binding obligation to pay rent for the relevant period was established and that for a series of months those payments were effected. The claim was based on an unconditional obligation, evidenced partly by the payment and by the agreement. There is no reason to disturb the finding that it was as a result of the breach of the contract that the rental payments, pursuant to that obligation, had to be effected, and to the extent that they were, damages were suffered for that period.

3. The Sign Boards:

A claim was made for R7 687,65 in respect of a sign board for the purpose of alerting respondent's customers to the fact that it had been relocated. On the face of it, Mr Gordon conceded that the expense was reasonable. However, he submitted that the overwhelming majority of the respondent's customers had no need to be advised of the relocation, because the respondent delivers product to them. Accordingly there was no need for the sign board. This is surely beside the point. The expenses flowed from the breach, because of the need to inform at least some customers, maybe only a few, of the move which had been effected pursuant to the breach. There

appears to be no basis by which to suggest that that particular expense did not flow directly from the need to relocate, which itself flowed directly from the breach of contract.

4. Wasted Wages:

Finally Mr Gordon reached a point in his argument where, to some extent, the court had some sympathy. He submitted if the court did not find in favour of the appellant in respect of the various contentions which are set out above, certainly the "verspilde lone" in the sum of R11 329,24 for the period during which the respondent claim for his loss of businesses, needed to be deducted from its claim. If the contract had not been breached by the appellant and the respondent had had manufactured product for the month of June 2005, it would have been obliged to pay these wages in order to generate business. I agree. This is clearly a point where, notwithstanding the breach, these expenses would have flowed therefrom and they cannot be considered to be directly attributable to the breach of contract and must be deducted from the overall amount which was awarded in favour of respondent.

The only question that therefore remains, is the question of costs. Mr Gordon submitted that somehow this court should craft a costs order to take account of the limited success achieved by the appellant. In my view, the success is so

limited and the appeal so overwhelming fails, that it would be incorrect for this court not to effect the usual cost order, which is to the idea that as overwhelming the respondent succeeded, it is entitled to its costs. For these reasons, therefore, I would make the following order:

1. The order of Koen, AJ of 16 May 2007, is set aside and replaced by the following. In respect of the claim in reconvention, the plaintiff is to pay to the defendant the sum of R653 346,44 (six hundred and fifty three thousand, three hundred and forty six rand, forty four cents), together with interest thereon at the legal rate from 8 December 2005, being the date upon which the counterclaim was delivered to date of payment. Plaintiff is to pay the defendant's costs of suit.

2. As the appeal substantially has failed, the appellant is ordered to pay respondent's costs pursuant to the prosecution of this appeal.

MOOSA, J: I agree.

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MOOSA, J

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GOLIATH, J: I agree.

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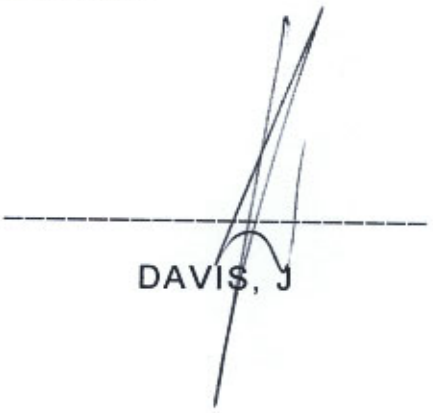
GOLIATH, J

10 DAVIS, J: It is so ordered.



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DAVIS, J