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SWAZILAND HIGH COURT

CIVIL TRIAL NO.2314/98

In the matter between:

MT & MB (PTY) LTD	**PLAINTIFF**
AND	
COUNCIL OF SWAZILAND CHURCHES	**DEFENDANT**
CORAM	**ANNANDALE J**
FOR PLAINTIFF	**MR. A. SHABANGU**
FOR DEFENDANT	**ADV. P. FLYNN**
	(instructed by Mlangeni & Co.)

JUDGMENT

9TH SEPTEMBER 2002

In this action, plaintiff company sues the Council of Churches for damages it alleges arose from an unlawful lockout from its leased premises, to the tune of just over E530 000, being loss of profit on sugar sales, the value of trading stock and loss of business reputation and goodwill, plus costs and interest.

During the course of the trial, just prior to plaintiff's case being closed, exhibits A_1 and A_2 were admitted by consent between the parties. These documents, headed "Schedule A" in manuscript and in typescript: "MT+MB Office Contents" was referred to in paragraph 9 of plaintiff's particulars of claim, but not annexed to the summons. It

comprises a list of office furniture and equipment as well as kitchen and cleaning equipment. This list was apparently drawn up by defendant's financial officer, Ms. Nkambule on the 20th June 1997, about a month after the offices were locked.

Also by consent, a further prayer for relief was added to plaintiff's claim, which was said to have been omitted due to an oversight.

Prayer 6 of plaintiff's claim now reads that "Defendant be ordered to return the goods, as per "Schedule A" (exhibits A_1 and A_2) to defendant".

From the pleadings filed herein, it is common cause that plaintiff leased its premises from defendant, the lease still being operative at around the 14th May 1997, being the date when defendant is blamed for locking up of the premises, which is alleged to have been the cause of the complaint.

Defendant denies that its alleged actions were the cause of any damages that may have been suffered, calling on strict proof of damages. It further denies that through its alleged actions, plaintiff was prevented from removing its trading stock, stationary, furniture and documents, pleading that plaintiff itself used a lock and chain to secure the leased premises.

Notworthy is defendant's reaction in its pleadings to the allegation that it is the one who "...whilst the lease agreements were subsisting locked the plaintiff out of the premises without any lawful justification and in the absence of any court order" (paragraph 4 of the particulars of claim). Initially it pleaded (in paragraph 2.3) that "Defendant further avers that at the time in question the Plaintiff closed the business premises, put a chain and padlock at the door and disappeared for a long time" (*my underlining*). It reiterated in paragraph 3.1 of its plea that "As stated above, Defendant denies that it closed the shops and avers that it is the Plaintiff that locked and left".

The initial plea in paragraph 2.3 was subsequently amended after defendant's witness gave evidence to the contrary, that indeed defendant's financial officer locked the premises at the time as alleged. The amended plea was dealt with during the course of the trial on the 25th July 2002 in a ruling on the issue. The substituted plea now has it that defendant locked the premises on the 14th May 1997, whereafter, on Saturday the 17th May, plaintiff removed his lock and substituted it with its own, then to disappear for a long time.

As already mentioned in the course of the earlier ruling on the amendment, it negatively impacts on defendant's case, as the plea is self-contradictory, on the one hand a denial that it locked the leased premises, on the other hand, an admission of having done just that. It also has to be viewed in the context of when the amendment was effected, namely after the presentation of its own evidence which starkly conflicted with its plea in paragraph 2.3, but for an unexplained reason did not also seek to amend the still conflicting plea in paragraph 3.1.

In the course of protesting the claim, defendant (in convention) filed a counterclaim of E21 088.50 in respect of arrear rental pertaining to the same premises said to be owed by plaintiff (in convention).

This counterclaim is essentially non-disputed, save for pleading that an unstated amount is to be deducted from it, being a refundable deposit paid (on taking up the lease) and also reducing the amount by taking into account the value of stock, furniture and documents on the premises. The latter part hereof (stock etc) is inelegantly pleaded in paragraph 3.2 of the plea of the counterclaim in that a number of key words are omitted whereas the amount of the first assertion (the deposit) was neither pleaded nor dealt with in evidence. Seemingly, it is expected of the court to obtain the necessary papers, documents and lease contracts from which the amount of the deposit is to be gleaned, then to go to the premises and see if any of the mentioned

items are still there and to place a value on it, after which processes the quantum of the counterclaim must be reduced.

Even if this is not expected, plaintiff does not succeed anywhere near proof of any kind as to show how much should be deducted from the counterclaim. What it does do is to say that all of its business documents were locked up in the leased premises and that it could not get hold of it, which may well be the case, but it does not further the scope of the defence to the counterclaim.

The evidence that was heard during the trial does not auger well for the plaintiff, though one cannot help but sympathise with the position its director, Mr. Mkhaliphi, found himself driven into – between a rock and hard place.

According to him, the business venture which concentrated on the sales and export of sugar to neighbouring countries was a lucrative and rewarding concept. Sugar quotas and sales agreements had the potential of very high rewards, but market forces and unforeseen events could take a heavy toll. Especially some fraudulent conduct by an employee, a sales representative called Enock Dlamini, was said to have been most destructive to the company. Apparently, the employee acting in cahoots with a transport operator, one Faizal Latif, was said to have siphoned off a large quantity of sugar at Simunye Mills, by way of forged signatures and false details of trucks to load the sugar. In this manner, plaintiff's director said that the company had lost some E80 000 around May to June 1996.

As a result of this loss, which also had a devastating effect on their allotted sugar quota and loss of existing export contracts, with the company having to make good for the losses and finding it difficult to timeously arrange for sugar from other sources, financial drought inevitably stepped in. In order to try and keep the company afloat, its director made all sorts of arrangements with the Swaziland Sugar Association and their clients, especially Callie Ellis Investments in Mocambique, who needed sugar. Royal assistance in the form of Princess Dlalisile was obtained to facilitate the supply of 500 tonnes of

sugar from her own quota, and other sources to supply 1200 tonnes, from which an order received on the 13th May 1997 would have resulted in a handy profit to bridge the gap, with the client paying in advance to receive 60 tonnes a week. Mr. Mkhaliphi said that from the 500 tonnes alone, though not sure, he expected a gross profit realisation of no less than E40 000. Sixty tonnes a week, or 240 a month, with a truckloads of 30 tons each would have an estimated profit of +-E6 000 a load. Annually, it could have resulted in an expected E480 000 profit, again an estimated and anticipated profit, all things being equal and market fluctuations excluded. He said more than E500 000 would be netted annually, were it not for the turn of events.

This turn of events is blamed squarely on the shoulders of the defendant, the landlord of plaintiff's business premises in Manzini. Being fraught with the fraudulent conduct of their employee and resultant drying up of the fountain of money, a day after the big sugar order was received, the Council of Churches decided to lock-up the premises. It is common cause that the Council had no legal instrument authorising it to do so as it did and that it did so despite pleas by Mr. Mkhaliphi, which fell on deaf ears.

Due to plaintiff's financial difficulties, it was unable to pay the rent for a number of months. The director of plaintiff company said he informed the Council of Churches of the fraud and resultant loss and requested a period of grace as the annual swing in the cycle towards better business was anticipated in the month of May. Since October 1996 it had difficulties to service the rentals, but through negotiations with the landlord it managed to keep their offices open. He claims to have told the Council of Churches about the pending deal which would take it out of the doldrums, soon before the lock-up.

Surprisingly, on the morning of the 14th May 1997 his wife, who assisted him to run the business, found the business premises locked with chains around the door handles. Mrs. Mkhaliphi told him that it was locked by defendant due to unpaid rentals and her husband then

tried to have it undone, to no avail. He tried to speak to the Council's officers, who were in a meeting and wouldn't hear him. He was referred to their attorneys, who he said denied having locked up the shop or obtained any court order and again he returned to the meeting of the defendant's officials. He received a cold shoulder once more, and they would not hear of letting him remove the business documents, books, trading licence, certificate of incorporation, etcetera from the locked premises, with which he wanted to process the sugar orders. The trading licence and certificate of incorporation was also needed to renew sugar quotas every four months.

Mr. Mkhaliphi's further evidence is that as a result of defendant locking up his leased premises, due to non-payment of rental but without a court order authorising it to do so, his whole operation collapsed. Five employees lost their jobs, his sugar quota fell to pieces and over E480 000 profit was lost. Also lost is office furniture and effects, listed as per exhibits A_1 and A_2, which was said to have remained in the locked offices over the ensuing years, no particular value being placed on it.

His evidence in chief did not particularise the claimed E100 000 in respect of the claimed loss of business reputation and goodwill, nor the claimed E7 000 pertaining to their trading stock of foodstuffs. More importantly, as far as the main body of the claim is concerned, the loss of profits so precisely claimed in the specific amount of E425 997,00 (not E426 000 or any global type of figure) has not been so shown to be such. He said "in excess of E480 000 was lost", and that actually, it is nearer to E500 000 though in fact is should have been "millions".

The muddy waters in so far as the lack of precise details of monetary losses are concerned were not cleared up during cross-examination by Ms. Hlabangwane who appeared for defendant at the time. Nor did it bring much clarity to the issues in dispute. He said that the office was needed to process the administration of sugar dealings, the sugar itself being kept at the mill from where it is

despatched, but as the office was unlawfully locked, he was prevented from operating the business, thus suffering his losses. He tried in vain to have at least his papers released, through his attorneys' assistance and his own contacts with the defendant's staff. He was somewhat at a loss to explain the period over which the claimed losses would have been incurred, whether it was for the 1996/7 financial year or from the time the offices were closed to the date of his evidence.

It is this lack of detailing the losses and the speculative nature of estimation of it that is the downfall of plaintiff's evidence. He is not a witness who cannot be believed – to the contrary, he made a very favourable impression as witness as far as his veracity is concerned. There is no reason to disbelieve him but it is another story if his optimistic estimation of business profits is sufficient proof to establish his claim as quantified on the papers filed. For instance, no explanation was offered as to why the sum of E425 997.00 as "net profit on sames (sic) of sugar during the financial year" was claimed in such a precise amount in if plaintiff's estimation E480 000, or more than E500 000, or million of nett profit would have been realised annually. I have already alluded to the E7 000 value of trading stock and especially the E100 000 loss of business reputation and goodwill, which also have been quantified in such a cavalier fashion.

I have no doubt that plaintiff has suffered financial losses at around the time their offices were closed, but have a difficulty to equate that to proof that it was as a direct result of the closure and not to a great extent due to extraneous factors. Equally if the claimed losses have actually been proved above the level of optimistically anticipated profits. The claimed loss of business reputation and goodwill is even more jaundiced.

Despite this, defendants attorney did not ask for absolution of the instance at the close of plaintiff's case, for reasons unknown but open for speculation, and proceeded to present the defendant's case.

Defendant's financial officer, Ms. Nkambule, testified about the ongoing difficulty to get plaintiff company to pay its rental for offices leased from the Council of Churches. At some stage in February 1997, a cheque of E5 000 in respect of arrear rentals was returned by the bank.

This was contested by plaintiff's attorney in cross-examination, who said that it was paid by the bank. The cheque was not handed in as exhibit, as she contends that she returned it to the plaintiff's director. In its plea to the counterclaim, plaintiff (in convention) also denied that its cheque was dishonoured. At a time when about E21 000 arrears had accrued, in May 1997, a letter was received from plaintiff to have the lease terminated earlier, at the end of May, instead of the end of July that year.

This letter, exhibit "B", is dated the 2nd May 1997, written on Plaintiff's company letterhead and signed by Mr. Mkhaliphi, plaintiff's director. It sets out the financial difficulties it suffered, the inability to obtain overdraft banking facilities due to "bureaucratic problems with the surity (sic) papers" but also the hope to make a "projected gross profit of E47 499.75" within the next two to three months. It asks to bring forward the expiration of the lease agreement ("contract") (as also testified by Ms. Nkambule) and also "to give us five equal monthly instalments of E4 259.60 effective 31st May 1997 to pay all our dues".

With plaintiff's returned cheque and thereafter the request for early termination of the lease, and about E21 000 arrears due, she decided to lock plaintiff's office. It is common cause that she had no order of court to do so on this occasion. The following day while the council's officers attended a meeting she saw Mr. Mkhaliphi talk to their Ms. Vilakati, trying to resolve the matter.

After the ensuing weekend she discovered that the padlock she had used to lock the office was replaced with a different one. While she has it on hearsay from a security guard at a nearby restaurant, which guard was not called as a witness, (he could not be traced), that this was done by Mr. Mkhaliphi, there is no proof of it.

A further witness called by defendant, Ms. Dube, a waitress at a restaurant near the leased offices, testified that on the Saturday after the closure, she noticed that the door had been opened and that she saw two men at the offices. She did not confirm that Mr. Mkhaliphi himself was there, nor that he opened and relocked the doors. Mr. Mkhaliphi himself did not deny being there but he also did not admit it, nor that it was him who would have unlocked the premises and relocked it with his own lock. He did say that he did not remove anything at all from the locked offices, not even a piece of paper.

Thus, apart from the hearsay evidence, there is no proof that plaintiff's director interfered with the lock of defendant, nor that he removed any of his property from it. Due to the outcome of this matter, it is not necessary to come to any firm finding on this issue.

Some time later, Ms. Nkambule observed that items had been removed from the office, notably a photocopier. She still anticipated that Mr. Mkhaliphi would call on them to settle the outstanding rent, but nothing happened. Then, on the 20th June 1997 she had the replacement lock cut, opened the office and made the abovementioned inventory (exhibit A_1 and A_2) i.e. the remainder of plaintiff's effects in the office.

Ms. Nkambule was at a loss to explain how her evidence was different from defendant's plea, where it was stated that it was the plaintiff itself who locked the premises, and not the defendant. She has it that she did explain to their attorney what the factual position was, contrary to the version in their pleadings.

From the above abridged version of the evidence, it is clear that neither of the litigants adduced evidence that supported the pleadings to a level that is to be expected, especially given the very long period of time to prepare for the trial. Not once was any mention made of any effort to obtain important documentary evidence, ostensibly in the possession of the other party or that such efforts were in vain. If it is so, for instance, that all of the business books of plaintiff are still with defendant, in the locked premises or elsewhere, it is relatively easy to

obtain it for trial purposes, in a legal manner. The same applies to the cheque said to have been returned by plaintiff's bankers to the defendant. There is no evidence that plaintiff instituted spoliation proceedings at any time during the ensuing years. If he wanted to continue trading and realising the huge profits he said were on the verge of being made, he certainly can be expected to have done something about the situation. He is not only a businessman but also has a degree in law. He had access to attorneys. What was done to mitigate his losses? Did he take reasonable steps under the circumstances to recover his documents and regain his sugar quota? The question remains. If indeed he was able to make a fortune, was it really the Council of Churches that prevented him from doing so, or it was the culmination of various factors that converged at about the same time? Nor has there been persuasive evidence to show to what extent the anticipated profits would have materialised if not for the lock-up, save for the naturally biased version of plaintiff's director.

In lengthy argument heard from plaintiff's attorney at the conclusion of evidence, Mr. Shabangu wants to have plaintiff's claim found to be proven beyond doubt and beyond the claimed amounts, if that would be possible. His argument goes that if it was not for defendant's unlawful closing of the premises, and its subsequent refusal to amicably resolve the unpaid rental issue and release the required documents and papers, plaintiff would have continued selling sugar and earned the assured regular income and profits he testified about. He based plaintiff's action on both contract and delict, ultimately arguing the claim to be founded on *lex aquilia*, of which all components are said to have been satisfied, the *culpa* compounded by defendant's persistent and unjustified disregard of the tenants predicament it had caused, the diminishing patrimonial loss actually being an *actio iniuriarum* due to the intent it displayed recklessly of the consequences it knew about.

With reliance on CORONATION BRICK (PTY) LTD VS STRACHAN CONSTRUCTION COMPANY (PTY) LTD 1982(4) SA 371(D),

he argues that pure economic loss is claimable if the wrongdoer knew that such loss would result from an intentional wrong, vis-à-vis patrimonial loss.

The claimed damages are sought to be awarded "as the proven damages far exceed the claim of E425 997.00 being the net profit on sames (sic) of sugar during the financial year". I will revert to this further down.

Mr. Shabangu concedes that no evidence was adduced to support the second part of the claim in respect of the loss of "trading stock of foodstuffs" amounting to a claimed E7 000. Concerning the third leg, E100 000 being loss of business reputation and goodwill, he argues that it has been proven more than adequately.

He argues that regard must be had to the relevant factors that makes up this loss, general damages to be awarded 'on the value the court places on it", submitting that E100 000 is a fair amount. The court is expected "to decide how much to allocate", based on the projected income, contracts asset base and the sugar quota.

Insufficient persuasive evidence has been placed before me to determine an amount that would be either realistic or fair. It can be no more than a shot in the dark, a thumsouck figure.

The sixth prayer, which was belatedly added during the course of the trial, seeking to have some goods returned to the plaintiff, is all that plaintiff can succeed in. It seeks an order by which defendant is to return property belonging to plaintiff to it. It comprises items listed in schedule A (exhibit A_1 and A_2), which list was compiled by defendant's financial officer, Ms. Nkambule, soon after the locking up of premises occurred, when she discovered that her own lock had been substituted with another. There is no dispute that those items are the property of plaintiff company. It was also not pleaded or contended to be an attachment to perfect the landlord's hypothec.

Defendants counterclaim is sought to be dismissed on the ground that "no evidence" was heard in support of arrear rentals, further that plaintiff's cheque of E5 000 which was said to have been

dishonoured by its bankers, has not been produced by defendant. In the event that the court decides to award the counterclaim, it is further sought to have that amount reduced by an unknown amount, said to have been paid as deposit. Regard must also be had to plaintiff's plea to the counterclaim which reads that "...this paragraph is not disputed save to state..."

For reasons unknown, neither party sought to compel the other in the pre-trial stage to produce documentary evidence allegedly in possession of the other. The applicable document in this instance would be the contentious cheque. Be that as it may, defendant does not sue on the basis of the dishonoured cheque, but for unpaid rentals. The cheque itself was said by defendant's witness, Ms. Nkambule, to have been returned to Mr. Mkhaliphi personally. Were it not for the fact that it was returned by the bank, the amount claimed would have been reduced to that extent.

Although the contract of lease was not proven at the trial, it is beyond doubt that infact there was a lease agreement in place at the material times, claimed for by defendant/plaintiff in reconvention. The monthly amounts are also not disputed, save that plaintiff wants it to be found that for the month of May, no rental should accrue as it did not have full benefit from the middle of the month onwards.

At the very best, plaintiff could be met halfway in respect of the month of May 1997. Plaintiff sought to bring the lease to an early end, prior to the expiry date, to have it terminated at the end of May, the month during which defendant would not tolerate any further occupation of its premises without receiving any rent. On the 14th May, it locked the leased premises without any lawful order of court authorising it to be done. For reasons unknown, but according to plaintiff director's evidence due to ill assistance by his different attorneys, no spoliation proceedings were brought to court. Having regard to the available evidence, he most likely would have been successful with such proceedings and would have been able to at

minimum retrieve his business papers and documents, enabling him to continue trading from other premises.

Through its pleadings in the counterclaim, which claims unpaid rental only up to the end of May 1997 and not until the end of July 1997, it seems as if the landlord accepted early termination of the lease, as sought by plaintiff in the letter of the 2nd May 1997.

Ms. Nkambule did testify about the outstanding rentals and said that at the time the abovementioned letter (exhibit B) was received, plaintiff owed "about E21 000 rentals, which he had agreed to pay before July". It was this letter, seeking early termination of the lease, coupled with a dishonoured cheque tendered for rent, which prompted her to go to the premises and sort it out with plaintiff. Finding nobody there and acting on her instincts, she then locked the premises.

Defendant in reconvention cannot be heard to say that there was "no evidence" in support of the counterclaim. Nor can it expect the court to reduce the amount any more than meeting it halfway in respect of rent due for the month of May 1997. Half of that amount (E2 662.25) is E1 331.13, which is the extent to which the counterclaim is to be reduced, bringing it to E19 757.12.

As remarked repeatedly earlier in this judgment, the plaintiff bears the onus to not only establish the fact of patrimonial loss but also to prove the quantum thereof. Apart from proving that the defendant is the cause of his loss for which he claims damages, he is to prove how much he must be awarded. The best available evidence must be produced even though it might be difficult to assess the quantum from such evidence. The failure to produce the best available evidence may cost the plaintiff his remedy.

In this matter, I have alluded to the conspicuous absence of evidence to substantiate plaintiff's claims for damages. No books of business were sought from defendant, nor were they produced. No auditor's reports on the business of plaintiff company were produced. No evidence by any expert was adduced about the economic climate at

the time and what plaintiff company stood to gain but lost, apart from the subjective and rosy expectations held by its director, who incidentally is by profession a prosecutor. No bank statements, deposit slips or any related documents were proven. Plaintiff failed to prove his claims on any measure of persuasive evidence.

In ESSO STANDARD (PTY) LTD VS KATZ 1981(1) SA 964 (A) at 969-970, Diemont JA with reliance on DE VILLIERS J IN LAZARUS V RAND STEAM LAUNDRIES (1946) (PTY) LTD 1952(3) SA49 (T) held that:-

> "It has long been accepted that in some types of cases damages are difficult to estimate and the fact that they cannot be assessed with certainly or precision will not relieve the wrongdoer of the necessity of paying damages for his breach of duty.... Not only is the principle not a novel one but the English precedents which have given some guidance on the problem have gone so far as to hold that the court is doing the best it can with insufficient material may have to form conclusions on matters on which there is no evidence and to make allowance for contingencies even to the extent of a pure guess.... Whether or not a plaintiff should be non-suited depends on whether he had adduced all the evidence reasonably available to him at the trial...".

I am fully aware of these principles, and do not expect plaintiff to prove the last cent what it claimed for. I am also conscious of Mr. Mkhaliphi's evidence pertaining to the difficulties he had to get his business papers from the locked premises, but also that he did not seek an order compelling the Council of Churches to make it available for purposes of the trial, if it would have helped his case. The issue of mitigating his losses has also not been explored, most likely due to the lack of evidence already mentioned. I do not find that the plaintiff has adduced the evidence that is available to it. A private company is by law compelled to have audited books of account. Various other forms of evidence has also not been adduced. Thus, the best evidence available has not been adduced, and accordingly the plaintiff is non-suited.

In all, it cannot be found that plaintiff adduced proper proof of its damages, showing such damages to be attributable to defendant's

conduct in the closure of the leased premises. In these particular circumstances, absolution of the instance in respect of prayers 1,2 and 3 of plaintiff's claim is ordered.

It is further ordered that plaintiff's claim in respect of prayer 6 is to succeed, and defendant is ordered to restore to plaintiff's possession all the items mentioned in Schedule "A" (exhibits A_1 and A_2) forthwith.

Defendants counterclaim succeeds to the extent of E19 757.12, with interest as claimed.

Concerning the issue of costs, Mr. Shabangu wanted it to be ordered on an attorney client scale. I do not agree, especially so in view of the outcome of the matter.

In the event, with each litigant succeeding to some extent, the fairest order would be that each party is to pay its own costs.

J.P. ANNANDALE

Judge