G.P.-S.59968—1970-71—2 500

J 219

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(APPELLATE Provincial Division)
(Provinsiale Afdeling)

and Cross Appeal

Appeal in Civil Case
Appèl in Siviele Saak

CHOC ... MALOVYRIAS *Appellant,*

versus

SHAIZ INVESTMENTS (PTY) LTD. *Respondent*

Appellant's Attorney / *Prokureur vir Appellant* Herwitz, Arvan & L
Respondent's Attorney / *Prokureur vir Respondent* Goodricke & Kramklein

Appellant's Advocate / *Advokaat vir Appellant* E ...
Respondent's Advocate / *Advokaat vir Respondent* L.D. Weinstock, S.C.

Set down for hearing on
Op die rol geplaas vir verhoor op ...

6 /

Coram Botha, Wessels, Trollip, Rabie et Hoexter, JJA.

Jan - 9.45 - 11.00; 11.19 - 12.45; 2.15 - 3.02; 4.35 - 5.00;
Weinstock - 3.02 - 4.05; 4.20 - 4.35;

(W.L.D.)

Cross Appeal noted on 6/8/74

Writ issued Lasbrief uitgereik	Bills taxed—Kosterekenings getakseer		
	Date Datum	Amount Bedrag	Initials Paraaf
Date and initials Datum en paraaf			

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

SHATZ INVESTMENTS (PROPRIETARY) LIMITED ..... APPELLANT

AND

THEO KALOVYRNAS ..... RESPONDENT

Coram: Botha, Wessels, Trollip, Rabie and Hofmeyr, JJ.A.

Heard: 17 November 1975.

Delivered: 2 March 1976.

J U D G M E N T

TROLLIP, J.A. :

On Sunday, 28 December 1975, before the

completion .... /2

completion of this judgment, Death, ever present on our public roads, wrenched from our midst with sad and awesome suddenness, our dear friend and colleague, BOTHA, J.A. We deeply mourn his untimely passing, in the fullness of his useful life, in the prime of his illustrious judicial career. It is some small consolation that, in our deliberations immediately following the hearing of this appeal, we had the benefit of his sage and able guidance as presiding Judge, and that his views on all the issues accorded substantially with the conclusions expressed in this judgment. In terms of section 12(3) of the Supreme Court Act, 1959, this judgment now becomes the judgment of this Court.

This appeal concerns the award by the

Witwatersrand .... /3

Witwatersrand Local Division (IRVING STEYN, J.) of R2 500 damages and costs to a lessee of premises against the lessor for breach of the lease and its consequent cancellation by the lessee.

The litigation and appeal came about in this way.

(1). The plaintiff (present respondent) is a Greek. From his evidence and the remarks of the learned Judge a quo he appears to be neither educated nor intelligent. His knowledge of English is also limited. He gave his evidence through an interpreter. Even so, he appears to have had difficulty in expressing himself, and the interpreter appears to have experienced difficulty in understanding him.

(2). He had previously worked in several restaurants that included the special line of business of selling take-away-foods.

His .... /4

lease. Under it the plaintiff hired a shop and change-rooms ("the leased premises") in defendant's building, then in the course of being erected. The defendant undertook to complete the leased premises substantially in accordance with plans annexed to the lease. The lease was for 4 years 11 months with an option to plaintiff to renew it for a similar period. The commencing date was to be fixed by defendant by notice. (It actually commenced about mid-February 1972.) The rental for the first period worked out at R410 per month and for the renewal period at R492 per month.

(4). Clause 5 of the lease stipulated the purpose for which the leased premises could be used. By subsequent agreement, concluded by the parties about 8 December 1971 and contained in

a .... /6

a letter signed by them, clause 5 was amended and clause 5a was added. These clauses then read as follows (my underlining):

"5. THE Lessee shall be entitled to use the Leased Premises for the purpose of carrying on the business of a Restaurant, Take-away-Foods and General Dealer, and for no other purpose whatsoever, save with the consent of the Lessor, which consent shall not unreasonably be withheld.

5a. THE Lessor agrees to give full protection to the Lessee by not letting any of the existing other shops, and those still to be erected in the same building, for the same nature of business or allied business, as that of the Lessee, i.e. Coffee Bar, Fish and Chips, Tea Room, Take Away Foods, Steak House etc., and such like, other than Bakery and allied lines produced on the premises."

The underlined words in clause 5 were inserted at plaintiff's request. So was clause 5a., except for the underlined words which were inserted at defendant's instance.

(5). In negotiating the lease and amendments plaintiff was

assisted .... /7

assisted by his friend Ganopoulos. He had had some experience in similar and other businesses. The effect of their uncontradicted evidence (for no evidence was called on behalf of defendant) was that, when these amendments were negotiated, defendant also contemplated letting one of its shops as a bakery; plaintiff was agreeable provided that the bakery did not sell confectionery or take-away-foods, like kosher and other Jewish foods, which defendant had mooted; and the parties then agreed to the amendment simply permitting defendant to let another shop for a "bakery and allied lines produced on the premises."

(6). Plaintiff proceeded to equip the leased premises for the business of a restaurant and selling take-away-foods.

According .... /8

According to the acceptable evidence for plaintiff, they were noticeably well equipped. The plaintiff testified that he expended about R14 000 on equipment, including the cost of installing the machines etc. He was subjected to an inordinately lengthy cross-examination on that averment, about which more anon.

(7). During January 1972, while plaintiff was preparing to open his business, notices were prominently displayed in the vacant corner shop of defendant's building, publicizing the opening there in March of the Quinta Bakery. They also advertised that it would, inter alia, sell take-away-foods. Plaintiff, with Ganopoulos's help, immediately composed and sent a registered letter to defendant, complaining that this

was .... /9

was directly contrary to their agreement and asking for clarification. In reply defendant denied that Quinta Bakery's business would compete with plaintiff's. He then consulted his attorneys; and further correspondence ensued.

(8). Ultimately, on 15 March 1972, plaintiff's attorneys asked for an immediate unconditional undertaking that defendant would prevent Quinta Bakery from competing with plaintiff, especially in the selling of take-away-foods. This request went unheeded.

(9). Indeed, on 16 March 1972, without plaintiff's knowledge, defendant let the corner premises by written lease to Quinta Bakery. The lease was for 5 years with an option to the latter to renew it for a further period of 4 years 11 months. The

lease .... /10

lease entitled Quinta Bakery to use the premises for the business of a bakery, confectionery, and selling take-away-foods prepared or cooked on the premises.

(10). On 22 March 1972, plaintiff applied to the Court a quo to interdict defendant from permitting Quinta Bakery to carry on any competing business on the corner premises and the latter from carrying on such business. Only then did he discover that the lease had already been entered into. He was consequently advised that his application for an interdict could not succeed. So he decided not to proceed therewith, but to cancel his lease and sue defendant for damages for its breach. Hence the present proceedings. At the trial counsel agreed that the costs of the interdict proceedings should be

costs .... /11

costs in the cause.

(11). In the meantime plaintiff had started his business on the leased premises on 21 February 1972. It was called the Miami Restaurant. He was assisted by a friend, Johnos Stamatiou, at a salary of R250 per month. He too was experienced in this kind of business. From the very beginning the Miami Restaurant flourished and continued to do so during March 1972. However, the Quinta Bakery opened at the beginning of April 1972 and had an immediate and appreciable adverse effect on its turnover.

(12). On 1 May 1972 plaintiff cancelled the lease and vacated the leased premises. The problem then arose about what to do with the equipment, i.e., the fixtures and fittings. Their

value .... /12

value would have been substantially diminished, and plaintiff's loss correspondingly increased, if they had to be removed from the leased premises and sold. Plaintiff therefore suggested that, in the interests of both parties, defendant should take them over *in situ* at a negotiated price. After protracted correspondence and negotiations defendant agreed, the price was fixed at R10 000 , and it was duly paid.

(13). In the present proceedings defendant denied that it had committed any breach of the lease by letting the corner shop to Quinta Bakery for the abovementioned purposes. The Court *a quo* correctly rejected that defence. It is quite clear that defendant had breached the lease. Indeed, the contrary was not contended on appeal.

(14) .... /13

(14). An alternative defence alleged that the lease, by common mistake, did not correctly reflect the parties' oral agreement, in terms of which defendant was to be entitled to let other premises in its building for "a bakery and confectionery selling kosher foods and other foodstuffs produced on the premises". This defence was also correctly rejected by the Court a quo. It was not resurrected on appeal. That it was raised in the Court a quo, and (so it was maintained) persisted in to the end of the trial, was, however, used in support of the argument on the cross-appeal for an award of attorney and client costs. It suffices to say briefly here that Mr. Zar, for the defendant, is probably correct in saying that, in view of the evidence for plaintiff (see par. (5) above) and the

defendant's .... /14

defendant's case having been closed without its calling any evidence, he then abandoned this defence, and did not persist in it afterwards. The recollection to the contrary of the learned trial Judge (who was not sure about it) and of Mr. Weinstock, for plaintiff, was probably due to some misunderstanding of Mr. Zar's attitude.

(15). The Court a quo awarded plaintiff R2 500 damages and the costs, including those of the interdict proceedings. (See paragraph (10) above regarding the latter.) The defendant has appealed against that judgment only on the issue of damages. The plaintiff has cross-appealed against the quantum of damages and the scale of costs awarded, maintaining that damages of R15 000 and costs on the attorney and client scale should have

been .... /15

been awarded.

That completes the summary of facts leading to this appeal.

The plaintiff's claim for damages was formulated in his particulars of claim, as amended, as follows:

"13. At all material times the Plaintiff and the Defendant contemplated that the Plaintiff would be able to sell his business as a going concern at a substantial goodwill and contracted on that basis.

14. As a result of the Defendant's breach of contract the Plaintiff lost the goodwill pertaining to his business on the basis that it would be the only business of that nature in that building.

15. As at the date of the breach of contract Plaintiff could have sold the business including fixtures and fittings for an amount of R30,000.00 if the Defendant had not breached the agreement of lease as amended, but lost that right by virtue of the Defendant's breach of contract.

16. The Plaintiff has mitigated its damages by disposing of the fixtures and fittings for an amount of R10,000.00.

17. .... /16

17. In the premises the Plaintiff has suffered damages in an amount of R20,000.00 for which the Defendant is liable which amount notwithstanding demand the Defendant refuses to pay."

Plaintiff explained in his further particulars that - "The R30 000-00 is the estimated price that Plaintiff would have received at the date of the breach of the contract for the goodwill and fixtures and fittings, of which amount R10 000-00 would have been for the fixtures and fittings and the balance for goodwill."

The defendant admitted the disposal of the fixtures and fittings for R10 000, but otherwise denied the above allegations.

According to these particulars plaintiff's claim was not for (a) "general damages", but was for (b) "special

damages .... /17

to the circumstances peculiar to each case. One well-known example is ascertaining the extra cost of hiring other comparable premises. (See, for example, Pothier, supra, par. 161; Graham v. Alcock's Estate 1906 T.H. 38 at pp. 43, 44; and Viola v. Molivar 1910 T.H. 46 at p. 48.) Where the premises are expressly let for a profit-making business, as is the case here, loss of profits for the unexpired term of the lease may be recoverable in appropriate circumstances. Such damages are ordinarily regarded, however, not as general damages, but as special damages (Pothier, supra, par. 162; Hine and Hine v. Parliament 1933 S.W.A. 96 at p. 93; and Yates v. Dutton 1938 D.L. 177 at p. 183). A fortiori here, plaintiff's claim was for special damages. For it was founded upon his being deprived,

through .... /20

through defendant's breach, of making a gain of R20 000 for goodwill on a disposal of the business. That is not a loss that generally flows from such a breach of the lease of business premises. To use Pothier's terminology (supra, par. 161), it is not an intrinsic loss, i.e., one affecting the leased premises per se, but an extrinsic one, incidentally affecting the plaintiff's other affairs, i.e., the goodwill of his business on the leased premises. Its recoverability therefore depends upon the special circumstances (to be canvassed presently) said to have been attendant upon the letting of the premises and to have been known to the defendant at the time the lease was entered into.

Consequently, unless the plaintiff proved, in

accordance .... /21

acc .... \22

(C.A.) and Perlos v. C. Czarnikow Ltd. (1959) 1 A.C. 350 H.L. -

(Victor) Ltd. v. Newman Industries, Ltd. (1949) 2 K.B. 528

was recently undertaken in Australia law in Victoria Law Rev

the principles there stated should be reconsidered. That task

approaching when, in an appropriate case, the correctness of

criticizable in certain respects. Perhaps the time is fast

Lavery's case, I should say at the outset that they are

Turning now to the principles enunciated in

that the plaintiff had failed to discharge the onus of proof.

of that kind would probably cause on such a breach, those dama-

the parties actually or presumptively contemplated that a loss

accordance with the principle in Lavery's case, supra, that

ges are too remote and not recoverable. Mr. Carr contended

see McGregor on Damages, 13th. ed., pars. 182 et seq. In those cases the rules in Hadley v. Baxendale (1854) 156 E.R. 145, the locus classicus on special damages in contract in English law, were reconsidered and restated. In the absence of full argument, that task cannot be undertaken by this Court in the present case. I can only mention and discuss some of the problems that are relevant.

Firstly, according to Lavery's case, the decisive time for ascertaining the parties' contemplation is when they contract and not when the contract is breached. The whole of the present approach to general and special damages, including the rule just mentioned, is trenchantly criticized with characteristic bluntness by De Wet and Yeats in Kontraktereg

en .... /23

or by stipulating for an enhanced consideration for assuming liability for them; and it is inequitable afterwards to fasten a party with liability for damages that were neither foreseen nor foreseeable at the time he contracted. Such reasoning is, of course, also cogent. That is manifestly evident from the adoption of the rule by this Court in Lavery's case, and also by its acceptance in English law (see Hadley v. Baxendale, supra,) and in American law (see, for example, Corbin on Contracts, Vol.5, par. 1007 et seq.). Hence, at any rate for the present, the rule must still be applied.

Secondly, Chief J.B. J.A., who drew the main judgment in Lavery's case 1931 A.D. 156, referred to Hadley v. Baxendale, the well-known dictum about damages of 1854, C.J. in

Victoria .... \25

Victoria Falls & Transvaal Power Co. Ltd. v. Consolidated Langlaagte Mines Ltd. 1915 A.D. 1 at p. 22, and pars. 159, 161, and 162, of Pothier, supra. He then summed up the position at p. 169, as follows:

"The question whether damage claimed in an action for breach of contract is or is not too remote depends in our view on whether at the time when the contract was made, such damage can fairly be said to have been in the actual contemplation of the parties or may reasonably be supposed to have been in their contemplation, as a probable consequence of a breach of contract ..... It may also be possible for a Court to come to such a conclusion on consideration merely of the subject matter and of the terms of the contract. But in most cases such special damages would entirely depend on special circumstances which would have to be proved before a Court could possibly say that such damage can reasonably be supposed to have been within the contemplation of the parties as the probable consequence of a breach of the contract."

(I shall refer to that approach as "the contemplation principle".) According to CURLEWIS, J.A., therefore,

the .... /26

the requisite contemplation may be inferred from (a) the subject matter and terms of the contract itself, or (b) the special circumstances known to both parties at the time they contracted. In regard to (b), however, the learned Judge went further at p. 172 by also insisting that, not only must there be such common knowledge, but the contract must be entered into "on the basis" of such knowledge. That seems to suggest that the rationale of special damages is the parties' convention and not merely their contemplation. WESSELS, J.A., in his concurring judgment, puts that beyond doubt. For he held that, not only must the contract be entered into "with the knowledge and in view of these special circumstances", but (quoting Street on Foundations of Legal Liability, p. 448/9,

with .... /27

with approval) it must also be "so far in the mind and contemplation of the parties as virtually to be a term of the contract" that such damages are to be recoverable (pp. 175, 176).

And, at p. 177, he concluded:

> "The defendant could only be held liable if he in such a case had contracted that he would pay damage for loss of business or business reputation in case the shafts were defective. There is no such allegation in the declaration, and the exception, therefore, was rightly upheld."

According to the original record of the case the other three members of this Court, DE VILLIERS, C.J., STRATFORD, J.A. and ROOS, J.A., also appear to have concurred in that judgment.

(I shall refer to that approach as "the convention principle". It had also been previously accepted in Lazarus Bros. v. Davies and Kamann 1922 O.P.D. 88 at p. 91, and it is put forward in Wessels on Contract, 2nd ed., par. 3266,

supported .... /28

supported by Lazarus's case and certain English authorities.)

Now neither the Hadley v. Baxendale nor the Victoria Falls Power case, supra, both of which were inter alia relied on in the judgment of CURLEWIS, J.A., insist on the convention principle; they postulate merely the contemplation principle. And the latter principle is apparently not only the present English law (see Halsbury, Laws of England, 4th (Hailsham) edition, vol. 12, par. 1175; McGregor on Damages, supra, pars. 171, 182 to 196), but is also American law (Williston on Contracts, 3rd Ed., Vol. 11, pars 1356, 1357; Corbin on Contracts, Vol. 5, pars. 1007 et seq., especially par. 1010).

True, in certain English cases the Courts, purporting to apply the rule in Hadley v. Baxendale, added a gloss

that .... /29

that mere knowledge of the special circumstances giving rise to the special damages was insufficient: the parties must also have contracted on the basis of the defendant's assuming liability for such damages (for example, British Columbia Saw Mills Co. v. Nettleship (1868) L.R. 3 C.P. 449 per WILES, J., at p. 509 and Horne v. Midland Railway Co., (1872) L.R. 7 C.P. 583 at p. 591/2 and on appeal, 8 C.P. 131, at pp. 139/140, 141, 145/6). CURLEWIS and WESSELS, JJ.A., possibly had those authorities in mind in Lavery's case. Horne's case is inter alia relied on for the convention principle in Street, Foundations of Legal Liability, p. 449, which is quoted and adopted by WESSELS, J.A. at p. 176 in Lavery's case, and both cases are relied on in par. 3266 of Wessels on Contract, already referred to above.

That .... /30

That gloss seems, however, to be inconsistent with Hadley v. Baxendale (cf. Bower v. Sparks, Young and Farmer's Meat Industries Ltd., 1936 N.P.D. 1 at p. 15/16). It has long been suspect in English law (McGregor on Damages, supra, par. 193 to 196, Halsbury, supra, par. 1175, note 5, and Koufos's case, supra, (1969) 1 A.C. 350 at p. 421/2).

The learned Judges in Lavery's case also relied on par. 162 of Pothier, supra. The relevant passages in that paragraph prima facie support the convention principle. The first part, enunciating the general principle, reads as follows (my italics for emphasis):

> "Sometimes the debtor is liable for the damages and interests of the creditor, although extrinsic; which is the case when it appears that they were contemplated in the

contract .... /31

contract, and that the debtor submitted to them expressly or tacitly, in case of the non-performance of his obligation."

Two illustrative examples are then given, the one of a sale, the other of a lease. In each example the defaulter, because of the particular terms or subject matter of the contract, foresaw or must have foreseen the risk of the extrinsic damages in question, and (in the first example) he must therefor be "deemed to have taken it" upon himself, or (in the second example) he must be "considered as having tacitly submitted" to it. Possibly Pothier there meant nothing more than that, if the extrinsic damages were foreseen or (perhaps) foreseeable at the relevant time, the defendant is deemed or considered in

law .... /32

(Cf. .... \33

date in the Code Napoleon by Pothier and Chancellor Kent".

of the rule on the subject as it had been stated at an earlier

ment of civil-law principles and is substantially a paraphrasing

16, the rule in that case is said to be "in reality an embodi-

can Jurisprudence 2d, Vol. 22, Sub voce Damages, Par. 36, note

upon what is to be found in Pothier". And according to Ameri-

p. 91 NOTE, I.P., said that that rule was "entirely based

Indeed, in Melio v. African Merchants Ltd. 1903 T.R.C. 89 at

as to special damages (cf. Bower's case, supra, at pp. 13 - 15).

is substantially the same as the rule in Hadley v. Baxendale

13\14. If that interpretation is correct, then Pothier's view

seems to have interpreted Pothier in Bower's case, supra, pp.

law, to have submitted to them. That is how I, TH [illegible], I.P.,

(Cf. also Bower's case at p. 14).

But be that as it may, that is not how WESSELS J.A., interpreted par. 162 of Pothier. He clearly accepted that passage as supporting the convention principle, and the majority of this Court appears to have concurred in his view. WILLES J., in the British Columbia Saw Mill case, supra, at p. 509, took the same view of that paragraph in Pothier.

Nearly all the subsequent cases in our Courts that refer to or apply Lavery's case, including those in this Court of Jockie v. Meyer 1945 A.D. 354 at p. 363 and Whitfield v. Phillips and Another 1957 (3) S.A. 318 (A.D.) at pp. 325/6, 329, mention only the contemplation principle as expounded by CURLEWIS, J.A. A notable and important exception is Bower's

case .... /34

case, 1936 N.P.D. 1, already mentioned. There FEETHAM, J.P., carefully considered Pothier's view and Lavery's case. He accepted and applied (p. 13) the requirement that the contract must have been entered into "on the basis" of, or "with a view" to, the parties' common knowledge of the special facts, as laid down respectively by CURLEWIS and WESSELS JJ.A. But without even referring to the opinion of WESSELS, J.A., ON on the convention principle, he rejected this principle as being inconsistent with Hadley v. Baxendale and as not being supported by Pothier (pp. 14 - 16). The other exception is North & Son (Pty.) Ltd. v. Albertyn 1962 (2) S.A. 212 (A.D.). There this Court, through VAN BLERK, J.A., relied not only on the contemplation principle, but also on the requirement that the contract

must .... /35

must be entered into "on the ..." or "with a view" to the

parties' common knowledge of the physical facts (see pp. 215

A - C, 215 F - H). No reliance, however, was placed on the

convention principle as laid down by "ESSO", U.A.

Have our Courts now jettisoned the convention

principle? Some writers say so - see "Waterman", In of

Goode, 3rd ed. p. 337, note 19, but cf. 4th ed., p. 271/2,

note 47; Norman on Purchase and Sale, 4th ed., p. 449;

cf. Kerr on Contract, p. 244 et seq. But until the judgment

of "ESSO", U.A., apparently concurred in by the majority of

the other learned Judges, in Lavery's case in this Court has

been authoritatively overruled, that view cannot be sustained.

The view expressed by C.A. (Mahon, Gavan Duffy and O'Byrne JJ.) at p. 31

principle, ... /36

principle were obiter does not seem sustainable in the light of the extracts from his judgment quoted above.

Should the convention principle not be jettisoned now and merely the contemplation principle be retained? If so, should the other concomitant requirement not also go by the board, namely, that the contract must have been entered into "on the basis" of or "with a view" to the parties' common knowledge of the special circumstances? For in regard to the latter, the American law and (now) English law do not insist on it; and, in the artificial context in which the contemplation principle has usually to be applied, to insist on that requirement too seems merely to add unnecessarily to that criticizeable artificiality.

Doubtlessly .... /37

Doubtlessly in the present case the plaintiff's onus of proving defendant's liability for the special damages claimed would be appreciably alleviated if only the singular principle of contemplation need be applied. But, as previously observed, this is not the proper case in which the principles enumerated in Lavery's case should be reconsidered and overhauled and the above questions answered. Hence, at present the convention principle, as there expounded, must still be regarded as subsisting.

Even on that more rigorous test, for reasons that follow, I am of the opinion that the plaintiff discharged the onus of proving defendant's liability for the special damages.

That at the time of entering into the lease

plaintiff .... /38

plaintiff contemplated building up the business of the Miami Restaurant and its goodwill and then advantageously disposing of it, is clear. He not only so testified, but, according to Ganopoulos, Greeks in Johannesburg who acquire such businesses customarily do that. That is probably why plaintiff claimed, not for loss of profits, but for loss of goodwill. There was no direct evidence, however, that defendant knew of that Greek custom or plaintiff's intention, or that he was made aware of those facts at the relevant time. But defendant then knew the following special facts: that defendant's business of a restaurant and take-away-foods would be a modern, well-equipped one (according to the plans annexed to the lease); that it would be conducted at street level in an industrial and factory area

where .... /39

where all the workers employed in the vicinity and passing pedestrians would be potential customers; and that the plaintiff would have the monopoly of that type of business in defendant's building for the duration of the lease. Certainly plaintiff was also aware of these facts - that is why he chose the leased premises for his business.

From these facts it can be inferred that the parties must have contemplated that plaintiff's business would probably be successful, profitable, and so develop a goodwill in course of time. Indeed, defendant believed that the business's profit potentiality in that area was so good that even another similar business, Quinta Bakery, could also operate in its building and that both businesses would be successful.

Defendant .... /40

Defendant said as much in its letter of 7 March 1972 to plaintiff's attorneys.

Now, as the lease was for a long period and the leased premises were let and were to be designed and equipped for the business of a restaurant etc., the parties, when entering into it, must also have contemplated that plaintiff might, at some stage during its term, want to dispose of the business with all its equipment intact as a going concern and so capitalize its locality goodwill. As that goodwill would attach inseparably to the leased premises, plaintiff, in that event, would also have to assign the lease, or sub-let the leased premises. That such a disposal of the business was within the parties' contemplation at the time of contracting is evident

from .... /41

from clause 11 of the lease. It provided for the cession or assignment of the lease or subletting of the leased premises by plaintiff subject to defendant's written consent, which, in the case of sub-letting, would not be unreasonably withheld. Although clause 11 did not mention the business itself, the parties must have envisaged that a reason for plaintiff's wanting to assign the lease or sublet the leased premises might be his desire to dispose of the business intact with its equipment as a going concern. It is also fair to infer that the parties must have envisaged that, if the prospective purchaser was considered by defendant to be a suitable tenant, he would probably consent to the assignment or subletting, subject to any reasonable terms it might impose. Lastly, it was also an obvious,

objective .... /42

of his business through defendant's breach of the lease, he would probably lose the advantage of continuing its Goodwill; and also - to use the language of Wasmuth, J.Y., and Potter, supra, - the defendant, by contracting in those terms, virtually or tacitly assumed liability for such damages. In my view, therefore, plaintiff established defendant's liability for the alleged special damages.

I now turn to consider the problem of the quantum of these damages. Goodwill in the kind of business in question is the probability of the continuance of patronage at a profitable rate. It is a locality Goodwill. The longer the business profitably exists, the stronger the probability of such continuance, and the easier the calculation of the value .... \44

value of its goodwill. Here the plaintiff claimed damages in respect of potential and not actual goodwill, for the business had only been in existence for about 2¼ months. For defendant it was contended (A) that, because of the brief existence of the business, the vicissitudes of commerce, the covetousness of possible future competitors, and the capriciousness of customers, its future prospects were too speculative to sustain any inference that it had a potential goodwill, and (B) that, in any event, the evidence adduced by and for plaintiff, including the trading results of the business while it existed, was so untrustworthy and inadequate that an amount for any such goodwill could not be determined with any reasonable certainty.

As to (A). For reasons already given, the

future .... /45

future prospects of plaintiff's business prospering in that locality were good, especially as its monopoly would have continued if the terms of the lease were duly observed. That Quinta Bakery saw fit to start a similar business there is confirmatory of those optimistic prospects. The unanimous sense of the testimony of the witnesses - plaintiff, Stamatiou, Ganapoulos, Cambitsis - who saw or took part in plaintiff's business during its progress in February and March 1972 before Quinta Bakery opened, was that it prospered and had good prospects. Prima facie that is also indicated by its turnover figures for that period (to be dealt with presently). Hence, despite the difficulty in prognosticating its future prospects with any certainty, due to the imponderables just mentioned,

one .... /46

one is justified in accepting, as a broad probability, that, without Quinta Bakery's competition, it would have continued to prosper and develop a goodwill. A further feature that, according to the evidence, rendered it an attractive proposition to would-be purchasers was this: its hours were reasonable, since it could close on weekdays at about 5 p.m., and on Saturday afternoons, on Sundays, and on public holidays, when its main customers, the workers in the area, were off work.

As to (B). I must emphasize again that plaintiff's claim is not for loss of future profits, but is for the loss of the opportunity of advantageously disposing of the business as a going concern and thereby capitalizing its potential goodwill. Both kinds of loss, relating as they do to the

future .... /47

future, are usually difficult to quantify, the latter generally more so than the loss of profits. But in the present case the Court's task is appreciably alleviated because of an offer made to plaintiff by Cambitsis during March 1972 to purchase the business as a going concern for R25 000. This price covered its fixtures and fittings and its potential goodwill. Understandably, the offer was the cornerstone of plaintiff's case for quantifying his damages.

The evidence of the offer was as follows.

During March 1972 Cambitsis wanted to purchase a restaurant business in Johannesburg. He had investigated a few such propositions before Stamatiou introduced him to plaintiff and his Miami Restaurant. He became interested in the business,

and .... /48

and, as is customary for a prospective purchaser to do, he spent a few days there, part-time, in seeing for himself whether or not it was worth purchasing. He was favourably impressed and satisfied by what he saw and heard. He therefore broached the subject to plaintiff. The latter wanted R30 000 of which R10 000 was to be paid in cash. Cambitsis counter-offered R25 000, payable by R5 000 in cash and the balance in instalments. Before negotiating further, however, Cambitsis wanted a warranty from plaintiff that Quinta Bakery (which was then about to open) would not compete with the Miami Restaurant. Plaintiff was unable to comply. For it will be recalled (see par. (8) of the summary of facts above) that on 15 March 1972 plaintiff's attorneys had asked defendant

for .... /49

of damages claimable for his loss with the requisite degree of certainty, or that the amount was reasonably within the parties' contemplation when contracting as being a probable consequence of defendant's breach of the lease. In regard to the latter argument I shall assume without deciding in defendant's favour that, even though the nature of that loss was contemplated, defendant would nevertheless not be liable if its amount was "beyond the bounds of reasonable prediction" (see Corbin on Contracts, Vol. 5, par. 1012, p. 88).

In support of his contention counsel maintained that Cambitsis was so inexpert in this line of business and his offer was made on such inadequate information that it was quite unreliable as any guide to the value of the potential

goodwill .... /51

goodwill. He relied on these features in Cambitsis's evidence: (i) he had never run a similar business before; (ii) he had only spent approximately three or four days, part-time, at the business; (iii) plaintiff did not inform him of, nor did he inquire about, the expense of the business; (iv) he was not told anything about the takings of the business; (v) he could not remember how he had arrived at the figure of R25 000; (vi) he never saw, nor did he ask to see, any books of the business; (vii) he was not informed what the fixtures and fittings cost, what their value was, nor did he himself place any value on them.

At the outset I should observe generally that the importance and relevance of those points seem to be

pitched .... /52

pitched too high. For this was a simple kind of business, and not an extensive or complicated one as the above contention seems to presuppose. More particularly as to (i), Cambitsis said he did have previous experience in this line of business. He was for some time in charge of and ran the entire catering services for the crews of some tankers at sea. That had made him, he said in effect, sufficiently knowledgeable in the business of a restaurant and take-away-foods to be able to make an informed offer for plaintiff's business. He was an impartial and credible witness, so there is no reason for not accepting his testimony. As to (ii) Gouveris, the expert, said it was customary for a prospective purchaser to spend some days in the business before buying it. Cambitsis

obviously .... /53

obviously regarded the time he spent there as being sufficient to enable him to have assessed its worth and prospects. The contrary was not suggested to him in cross-examination, nor was he contradicted by any evidence for the defendant.

As to (iii), (iv), and (v), one should bear in mind that both Cambitsis and plaintiff testified about the offer some 2 years later, and as Cambitsis said, when their negotiations terminated, he lost all interest in the proposition. His inability to remember at the trial how he arrived at the figure of R25 000 is therefore comprehensible. Moreover, the unreliability of their evidence about precisely what information Cambitsis was then furnished with is similarly understandable. Thus plaintiff said he told him that

the .... /54

the takings in March 1972 were or would be about R4 000. Cambitsis could not remember that, but he agreed that he must have been informed of the turnover. Plaintiff said he did not inform him of the expenses. Cambitsis at first agreed, but later he said he must have received some information about them; perhaps, he said, he saw for himself what the expenses were. It is probable that he did acquire sufficient information to make the offer. As he himself said, "I will not give the money like that", i.e., make an offer of R25 000 without good reason. In that regard, too, there is no substance in Mr. Zar's further point that plaintiff might have furnished Cambitsis with false information. Apart from the learned Judge's favourable view about plaintiff's integrity, his

refusal .... /55

refusal to give Cambitsis the requested warranty about Quinta Bakery's competition indicates his honesty in his dealings with him.

As to (vi), the books of the business at that early stage of its existence had not been fully written up; and in any event they would not have revealed anything more than the information Cambitsis otherwise acquired.

As to (vii), this is irrelevant. The evidence of Stamatiou and Gouveris proved that customarily goodwill and fixtures and fittings are sold for a globular, composite price without the seller or purchaser apportioning it between the two elements. Here Cambitsis obviously saw that the Miami Restaurant was newly and well-equipped, and he

fixed .... /56

fixed a globular price of R25 000 to cover both elements, without itemizing or evaluating them separately.

For those reasons the points mentioned in (i) to (vii) above do not sustain counsel's contention.

Moreover, there is other acceptable evidence from which it can be inferred that the price of R25 000 was reasonable. As this approach depends to some extent on the trading results of the Miami Restaurant, especially for March 1972, I must now deal with them.

The business was a cash one, the takings being recorded on a cash register and placed in its till. Supplies required for producing the meals, take-away-foods, etc.,

were .... /57

were bought daily for cash. This was taken out of the till and vouchers were substituted. According to plaintiff he balanced the cash at the end of every day by setting-off the cash float and purchases against the recorded takings and then reconciling the balance with the cash found in the till. He recorded the cash takings and purchases daily in a book (exhibit C). The cash register's records of the takings were then destroyed. But the vouchers for the purchases were kept. Periodically the bookkeeper, Valatiades, transferred the entries in exhibit C to the Bank and Cash Book, exhibit E. These records showed that the takings for the 8 days in February 1972 were R1296, in March R4056, and in April R2094 (with competition from Quinta Bakery).

For .... /58

For the trial plaintiff produced inter alia exhibits C and E, his paid cheques, a bundle of invoices, and a box of vouchers for cash purchases. He was subjected to a lengthy and elaborate cross-examination, with detailed reference to these documents, particularly on two points: (i) his testimony that he had paid R14 000 for equipping the Miami Restaurant, and (ii) his recording in exhibit C of his cash purchases. He fared badly on both. But that was probably due to the passage of 2 years since the transactions occurred, his ignorance, and his mentality. At any rate, the learned Judge nevertheless regarded him as an honest and not deceitful witness. I have not been persuaded that he was wrong in that assessment of plaintiff.

In .... /59

In regard to (i), I think (speaking now, of course, with some hindsight) that far too much importance was attached to, and time and energy were expended on, trying to show that plaintiff's figure of R14 000 for the fittings and fixtures was inflated. That that figure is probably correct is shown by Stamatiou's estimate of their value as being R10 000 to R14 000, and by the price of R10 000 subsequently paid by defendant when plaintiff was ultimately forced to dispose of them. Moreover, as will presently be seen, acceptance of the figure at R14 000 is to defendant's advantage.

In regard to (ii), plaintiff was unable to explain why several purchases for which he had produced vouchers were not recorded in the daily figures for cash purchases.

Possibly .... /60

Possibly some were capital, not current, purchases. But even so, the figures in exhibit C must be regarded as being possibly too low. Probably his daily cash reconciliation was merely a rough and not an accurate check. But I agree with the learned Judge that the figures for the daily takings should be regarded as being substantially correct. After all, they were contemporaneously recorded and then daily transcribed into exhibit C - that was not disputed - and no reason emerges why plaintiff should have wanted to falsify them. If their correctness were suspect, and the figures for the cash purchases should have been higher, which was the drift of the cross-examination, then it means that those for the takings should also be correspondingly increased for the cash to have roughly balanced.

That .... /61

That would advantage plaintiff's and not defendant's case.

The optimum turnover figures to take for testing Cambitsis's offer are undoubtedly those for March 1972. For it was during that month that he spent a few days in the business and assessed its worth, and those figures reflect a full month's trading without any competition from Quinta Bakery. As already stated, the turnover for March was R4056.

Now Stamatiou was experienced in this kind of business. He had just sold his own similar business as a going concern for R28 000 (goodwill and fittings etc.). He thereafter worked in and knew plaintiff's business from its inception. Without knowing its actual turnover, he estimated it to be about R140 - R200 per day. That substantially accorded

with .... /62

with the actual figures during February and March. He thought that the gross profit of the business should be about 50 - 55% of the turnover. On that basis he considered that the fixtures and fittings and goodwill of the business as a going concern would be worth about R30 000 to a purchaser. That indicates that Cambitsis's offer was reasonable.

Gouveris, expert in the buying and selling of such businesses, testified that ordinarily the gross profit in this kind of business was 40 - 45% of the turnover. He thought that plaintiff's business ought to achieve the same rate of gross profit. On that basis, with a turnover of R4 000 a month, and on information he was furnished with about the expenses of the business (the details and amount of which he

could .... /63

could not recall), he thought that Cambitsis's offer was an eminently fair one. The probative value of that opinion was, however, appreciably diminished by the lack of proof of the data he was furnished with and on which he based his opinion.

But Gouveris also said that another, practical method of assessing what should be paid for goodwill and fixtures and fittings is to multiply the monthly net profit by 30. The sense of his evidence about the application of this method to plaintiff's business was as follows. It is best applied to an established business, one that has been in existence for at least 12 months. To apply it simply to the net profit of plaintiff's business for March would not give a true reflection of its potential goodwill etc., since it would leave out of

account .... /64

account any future increases in net profit during the next 12 months. Thus, plaintiff's business, with its future prospects as mentioned in (A) above, might well have increased its turnover within the next 12 months to R6 000 per month without greatly increasing its expenses,

It is indeed probable that Cambitsis envisaged an increase in the turnover of the business if there was no competition from Quinta Bakery, and offered the R25 000 on that basis. That figure, divided by 30, would predicate a potential net profit of about R800 per month. In that regard, it is of some significance that plaintiff, although he could not remember well, thought that his own earnings from the business were R800 to R850 per month (which must be a reference to March 1972).

That .... /65

That too would tend to show the reasonableness of Cambitsis's offer. But apart from that, it can be inferred from the other available evidence that a future net profit of about R800 per month was a reasonable prospect, therefore justifying the price of R25 000 offered by Cambitsis. The reasons for that inference are as follows.

As to the monthly ordinary expenses of the business (i.e., those excluding production expenses) the only two items that were not clearly quantified by the books and other evidence are (a) wages, and (b) sundries, such as industrial levies, unemployment insurance, telephone charges, bank charges. The amount of (b) would have been comparatively small. The learned Judge estimated it at R300, which seems generous, but

I .... /66

I shall accept it too. As to (a), the cook was the best paid. He received R80 per month. (I ignore that this amount should possibly be regarded as a production expense.) The other 6 or 7 employees received from R35 to R60 per month, i.e., totalling from R210 to R420 per month. A fair, average figure to take would be R350 per month. The total for wages would therefore have been about R430 per month. The approximate expenses (in rounded figures) for March 1972 would therefore have been:

Rent	R410
Valatiades's salary (as in ex. E)	60
Water and light (as in ex. E)	22
Insurance (as in ex. E)	18
Stamatiou's salary	250
Wages	430
Sundries	300
	R1490

Now .... /67

Now, on a potential turnover of R6 000 per month, the gross profit, according to Gouveris, would have been 40 - 45%, i.e., R2400 to R2700. (I pause to remark here that that is arrived at, of course, after taking into account all production expenses, such as purchases.) Thus, to achieve a potential net profit of R800 per month, as predicated by Cambitsis's offer, the ordinary expenses would have to be less than R1600 to R1900 per month. So even if a liberal allowance is made for any increase in such expenses above the figure of R1490 per month, due to the greater turnover, such a potential net profit seems quite feasible. That is a fortiori so if one takes the estimate of 50 - 55% for gross profit made by Stamatiou, who knew the business intimately.

Hence .... /67

Hence, in the absence of any evidence for defendant to the contrary, I think that plaintiff did prove satisfactorily that Cambitsis's offer of R25 000 was reasonable. The learned Judge arrived at the same conclusion by a somewhat different route, which I need not deal with. It suffices to say merely that I agree with him that the offer can therefore be used as a basis for assessing the quantum of plaintiff's damages, and that counsel's abovementioned argument to the contrary fails.

In reaching that conclusion I have not been unmindful of another criticism by Mr. Zar of plaintiff's case. He failed, counsel said, to keep or subsequently prepare a reasonably accurate record of his trading activities, and to produce

at .... /68

at the trial a proper trading and profit and loss account based on such a record in support of his claim for damages. That criticism was the foundation of a contention in the Court a quo and in this Court that plaintiff had failed to produce the best available evidence to prove the quantum of his damages, and that he should therefore be non-suited. Of course, it would have been better had plaintiff done all that - it would certainly have been of assistance to the two Courts. But, having regard to the brief existence of the business, that seems to be a counsel of unnecessary perfection, especially as plaintiff's claim was not for loss of profits as such, but was for the loss of potential goodwill based on Cambitsis's offer. In fact plaintiff did produce all the evidence available to him.

Although .... /69

Although the method of its presentation could have been better, its contents were sufficient for the purpose in hand. And lest it may also be thought that, in making some of the estimates and inferences above, I might have been too generous to plaintiff, let me hasten to reiterate that the purpose in hand is not so much to determine accurately the amount of the potential goodwill lost by plaintiff, but rather to ascertain whether the amount of Cambitsis's offer fell within reasonable, predictable bounds. Counsel's criticism and contention therefore cannot be sustained.

In determining the quantum of damages the learned Judge allowed 50% for the contingency that Cambitsis, even if he had received the warranty, might nevertheless not

have .... /70

have bought the business for R25 000 or at all. He therefore held that plaintiff had lost R12 500 by reason of defendant's breach of the lease. From that he deducted the R10 000 that plaintiff had received for the fixtures and fittings, since both he and plaintiff regarded that amount as having mitigated the damages. So he awarded plaintiff R2 500 as damages.

With due respect to the learned Judge, whose judgment was a most careful and exhaustive one, I think that that approach was wrong. As I read the particulars and further particulars of plaintiff's claim set out earlier herein, he claimed damages for loss of goodwill only. No loss in respect of the fixtures and fittings was claimed. It is incorrect therefore, to treat the R10 000 as having been received in

mitigation .... /71

mitigation of damages. It was received for the fixtures and fittings. Its only relevance, on the form of the pleadings, is that it affords some guide to the value of the fixtures and fittings, which value has to be deducted from the R25 000 in order to ascertain the potential goodwill content in Cambitsis's offer.

Now the R10 000 was obtained under a virtually forced sale after the dispute between the parties had crystallized and the business had ceased. It consequently does not necessarily represent the value of the fixtures and fittings, as Cambitsis saw and appraised them, as part of a flourishing, going concern for which he offered the R25 000. The fair and correct amount to deduct from that offer in order to determine the value of

its .... /72

its element for potential goodwill is, I think for reasons already given, R14 000. Hence the value of the potential goodwill element in that offer must be taken at R11 000.

As the learned Judge pointed out, some allowance must be made for contingencies. I take a more optimistic view than the learned Judge did of the prospects that Cambitsis or someone else would have purchased the business had the warranty been available. After all, the plaintiff's declared intention was to sell the business at some stage in order to capitalize its goodwill, and here was an early, profitable opportunity to do just that. That Cambitsis wanted to buy a business in Johannesburg at about that time is clear, for after the Miami Restaurant proposition fell through, he thereupon acquired a dry-cleaning concern.

On .... /73

On the other hand, they might not have been able to agree on the price or the terms of payment. But, even so, it is probable, having regard to the location of the Miami Restaurant, its prospects, its attractive, reasonable hours, and plaintiff's intention to sell, that someone else would have wanted to purchase it in due course for a reasonable price, i.e. about R25 000. However, it would have been sold on terms. Plaintiff would not have received the entire price for some appreciable period and Cambitsis or any other purchaser might have defaulted on paying the instalments. Those factors have also to be taken into account.

In addition Cambitsis or any other purchaser would have wanted the maximum security of tenure of the leased

premises .... /74

premises. So he would probably have insisted on plaintiff's assigning the lease rather than merely sub-letting the leased premises to him. To my mind the weightiest contingency to consider is the possibility that defendant might not have consented to the assignment to Cambitsis or anyone else. In assessing the amount to be deducted for this contingency, one has to take the following factors into account.

Clause 11 of the lease does not absolutely forbid its assignment. Assignment is permitted with defendant's written consent. The parties must therefore have envisaged that, if during the ordinary course of the lease the defendant was approached to consent to its assignment, it would have dealt with the matter as a business proposition and would probably

grant .... /75

grant its consent provided it was satisfied with the suitability of the prospective assignee and the premium plaintiff was able and willing to pay for its consent. I say "during the ordinary course of the lease" advisedly for this reason. The fact that, because of defendant's impending or actual breach of the lease, the plaintiff would probably not have approached the defendant for its consent or defendant would probably not have granted it, cannot be used to enhance the amount to be deducted for this contingency. It must be ignored. For otherwise it would mean that defendant could benefit by its own wrongdoing.

Prima facie it would appear that Cambitsis would have been a suitable tenant. He has been running his dry-cleaning business ever since he acquired it in May 1972.

He .... /76

He made a favourable impression on the learned Judge, who accepted his evidence. Nothing was suggested to him in cross-examination, and the defendant did not adduce any evidence, tending to show that defendant would have objected to him as a tenant. Probably, therefore, he is the kind of person whom, according to the parties' contemplation, defendant would normally have been prepared to accept as an assignee of the lease. Any premium payable by plaintiff to defendant for its consent to an assignment to Cambitsis or some other suitable assignee would reduce the amount receivable by plaintiff for the sale of the business. That must also be taken into account in assessing the amount to be deducted for this contingency.

Lastly, a deduction must also be made for

the .... /77

the possibility that Cambitsis or any other prospective assignee put forward by plaintiff might not have been acceptable to defendant or that defendant would not consent to the assignment because plaintiff would not pay the premium demanded by defendant.

There was also some suggestion that a further factor to be taken into account is that, after abandoning the business, plaintiff had first earned income through employment and then as a partner in another business. Had plaintiff's claim been for loss of profits for the unexpired term of the lease, that factor might have been relevant. But it has no relevance to the claim for a loss of potential goodwill. For if he had sold the business to Cambitsis for R25 000, he could thereafter still have earned the abovementioned income.

Weighing .... /78

Weighing up all these factors and contingencies and evaluating them as best I can, I think that R6 000 should be deducted from the R11 000 and that R5 000 should therefore have been awarded to plaintiff as damages. It follows that the appeal fails and that the cross-appeal succeeds to that extent.

Two further questions remain. The first is whether defendant should be ordered to pay the costs in the Court a quo on the attorney and client scale. Such costs were only claimed on plaintiff's behalf from the bar at the argument stage of the trial. The Court a quo, by implication, refused such an order, for it merely ordered defendant to pay the costs, i.e., on the ordinary party and party scale. No

reasons .... /79

reasons for not awarding attorney and client costs were given. Probably this claim was overlooked. The grounds on which such costs were claimed before us may be summarized as follows:

(a) the breach of the lease committed by defendant was wilful;

(b) the defence of rectification was dishonest, and it was persisted in right to the end of the trial; (c) the trial was conducted on defendant's behalf in a vexatious and contemptuous manner, especially having regard to the prolixity of the cross-examination concerning the alleged cost to plaintiff of the fixtures and fittings (R14 000).

As to (b), I have already found (see par. (14) of the summary of facts at the commencement of this judgment) that once defendant's case was closed without any evidence

having .... /80

having been called, the defence of rectification was abandoned. Apart from that, in the particular circumstances of this case, notice that such costs were going to be claimed on grounds (a) and (b) should have been given to defendant at some stage before defendant closed its case, so that it could have ventilated those issues by evidence if it had so chosen (cf. Genn v. Genn 1948 (4) S.A. 430 (C)). Without defendant's having been afforded such an opportunity, its breach of the lease should not be condemned as having been wilful or its defence of rectification dishonest.

I do not think that (c) is well-founded. It is true, as already remarked, that the cross-examination on the item of R14 000 was inordinately lengthy and, with some

hindsight .... /81

hindsight, it now appears to have been irrelevant. But generally in regard to that complaint and others by plaintiff about the manner in which the trial was conducted on defendant's behalf, one should bear in mind that usually a wide latitude should be afforded a defendant in presenting his defence, especially when he is confronted with a substantial claim for damages. In such a case, I think, the defendant is usually entitled "to put his back against the wall and to fight from any available point of advantage" (cf. KEKEWICH, J., in Blank v. Footman, Pretty & Co. 39 Ch. D. 678 at p. 685 quoted with approval in Nel v. Nel 1943 A.D. 280 at p. 288).

The cross-appeal for an award of attorney and client costs is therefore dismissed. But as plaintiff

has .... /82

has succeeded substantially on his cross-appeal, he should be awarded its costs.

The second question still outstanding is whether plaintiff should be awarded interest a tempore morae on the award of damages with effect from the date of the judgment in the Court a quo. The Court a quo did not award it, possibly because it was not claimed in the pleadings. But be that as it may, in the absence of any cross-appeal to correct the order of the Court a quo to plaintiff's advantage and defendant's detriment by including an award of such interest, we cannot deal with it (cf. Standard Bank of S.A. Ltd. v. Stama (Pty.) Ltd. 1975 (1) S.A. 730 (A.D.) at p. 746 E).

In the result:

1. .... /83

1. The appeal is dismissed with costs.

2. The cross-appeal succeeds to the extent that the amount of damages awarded by the Court a quo is increased to R5 000.

3. The cross-appeal on the costs awarded by the Court a quo is dismissed.

4. The costs of the cross-appeal are to be paid by the appellant (defendant in the Court a quo).

W.G. TROLLIP, J.A.

WESSELS, J.A.)
RABIE, J.A.) concur
HOFMEYR, J.A.)