



MPHC1.35174 9169 2010

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

REPUBLIC OF SOUTH AFRICA

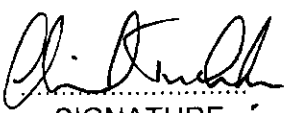
7/2/12
CASE NO: 9169/2010

In the matter between:

BARDEN TYRE SERVICES NW (PTY) LIMITED

Plaintiff

and

(1)	<u>REPORTABLE:</u>	<u>YES / NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES:</u>	<u>YES / NO</u>
<u>06/02/12</u> DATE		 SIGNATURE

BANSON TRUCKING (PTY) LIMITED

First Defendant

CHRISTINA PETRONELLA ELSA

VAN DER WESTHUIZEN

Second Defendant

JUDGMENT

Tuchten J:

- 1 The plaintiff is a member of a group of companies which sells, amongst other automotive components, new and retreaded tyres. The first defendant has two businesses, Banson Trucking and Tiro. The activities of both the first defendant's businesses involve transporting goods by trucks and the defendant bought on a substantial scale from the plaintiff for both its businesses to keep its trucks and those of its

subcontractors on the road, so much so that the plaintiff provided a fitter to be in attendance at the defendant's premises to fit tyres onto the first defendant's vehicles. The second defendant is the director of the first defendant and is employed by it. The second defendant attends to the first defendant's administration.

- 2 The first defendant is a family run business. It is run by Mr and Mrs van der Westhuizen and their sons Basil and Jason van der Westhuizen. For convenience and with no disrespect intended, I shall refer to the two younger Van der Westhuizens as Basil and Jason respectively.
- 3 The contractual foundation of the commercial relationship between the plaintiff and the first defendant is an agreement described in its body as a credit application. On 25 October 2006, the second applicant signed the credit application, which was accepted by the plaintiff. In terms of the application itself, the plaintiff extended credit to the first defendant with a credit limit of R20 000 per month and on terms described by the plaintiff as a seven day account. By 2009, the year relevant to this action, the credit terms had been extended to thirty days.

- 4 The agreement which came into existence when the credit application was accepted obliged the first defendant to pay attorney and client costs if the plaintiff took any legal action against it and pay interest equivalent to Standard Bank's prime rate plus 3% on any amounts outstanding for longer than 60 days.
- 5 In a suretyship attached to the credit application form, the second defendant stood surety for the debts of the first defendant to the plaintiff.
- 6 The first defendant operated two accounts with the plaintiff, one for the Banson Trucking business and the other for the Tiro business.
- 7 By summons taken out on 15 February 2010, the plaintiff sued the defendants for the amount of R95 930,31, said to be outstanding in relation to three invoices dated 23 July, 5 August and 29 September 2009 respectively plus some interest, less an amount of R10 926,33.
- 8 In a separate action, the plaintiff has also sued the defendants or the first defendant or a company said to be associated with the first defendant for an undisclosed amount said to reflect the balance owing for the Tiro business. The pleadings in this separate action, brought in this court under case no 9168/2010, were not put before me but the

evidence disclosed that the claim for the amount said to be owing for the Tiro business is due to be heard in this court later in February 2012.

- 9 It was common cause that the goods reflected in the three invoices were duly delivered. It was also admitted that the first defendant gave the plaintiff two cheques for R50 000 each toward its indebtedness, the first drawn by the plaintiff and dated 7 August 2009 and the second drawn by a close corporation called JQ Civils and Transport CC dated 30 September 2009. JQ Civils was apparently at the time controlled by Jason.
- 10 The issue which crystallised in relation to the plaintiff's claim in the present action was whether the two cheques had been allocated by express agreement between Basil for the first defendant and Herman Bezuidenhout for the plaintiff towards these three specific invoices or whether no allocation had been made in relation to the payments, in which case they would by operation of law have been allocated towards the oldest debts owed by the first defendant to the plaintiff.
- 11 This case was considerably troubled because the actual dispute between the parties was nowhere reflected on the pleadings. The confusion was compounded by the conduct of the defendants, or

rather their legal representatives, who seized upon the fact that the plaintiff had during its existence had different company numbers and the fact that the case as originally pleaded by the plaintiff attributed to the plaintiff an outdated company number.

12 In their plea as originally framed, the defendants pleaded that while they admitted that the plaintiff was a duly incorporated company, they asserted, eccentrically, that the plaintiff "lacked the necessary locus standi". No further indication was given in the plea for why this assertion was made. It was ultimately made clear to the plaintiff that the real issue which the defendants were trying to raise was not whether the plaintiff had locus standi, but whether the plaintiff had been deregistered. In paragraph 2 of a minute of a pretrial conference held on 20 January 2012, the defendants stated that it was still their case that the plaintiff "is not incorporated in terms of the Company Laws".

13 At the start of the trial before me on 31 January 2012, the plaintiff moved, in terms of a written application, for what it had every right to assume was merely a formal amendment to change the company number attributed in the pleadings to the plaintiff. But the amendment was strenuously opposed by the defendants on grounds at first quite incoherent. The defendants argued, as what defendants' counsel

termed a point in limine, that the plaintiff's action should be struck from the roll with attorney and client costs. After considerable questioning by me, it emerged that the defendant asserted that its case was that there were two companies called by the same name that the plaintiff bears; that the company with which the first defendant had contracted had been deregistered and that the other company, which if the amendment were granted (so ran the contention) would become the plaintiff, had had no business dealings with the defendants.

- 14 I then allowed the amendments, refused the relief sought in the point in limine, reserved costs and invited the defendants to address me on how much time they required to plead consequentially to the plaintiff's amended claim. Consistent, I regret to say, with a strategy to delay the hearing of this case on its merits known colloquially as ducking and diving, in which, deplorably, the defendants persisted throughout the trial, the defendants' counsel asked that the case be postponed sine die for them to amend their plea. I refused this request and directed that the matter stand to the following morning for this purpose. The defendants duly produced an amended plea and the plaintiff a replication and the trial proceeded.

15 The plaintiff's auditor, Mr Boake testified on this issue. He explained that the plaintiff had been registered in Bophuthatswana and thereafter registered in the Republic as an external company. It changed its name to its present one. The auditors found out that a process of deregistration had been initiated against the plaintiff but not completed. The auditors took steps and the deregistration process was stopped. So the plaintiff was never deregistered. When Bophuthatswana was reincorporated into the Republic, the plaintiff ceased to be an external company and was allocated a new number by the registering authority. There was no second company with the name of the plaintiff and never had been. This evidence was not disputed but Mr Boake was subjected to a lengthy, tedious and ultimately irrelevant cross-examination. In all at least a day and a half of court time was wasted by this unnecessary excursion. The defendants did not forthrightly acknowledge that the point was abandoned until they used the fact that the point was without substance as the starting point for another interlocutory application, with which I shall deal later.

16 I reject the defendants' submissions that it was reasonable for them to have raised the point at all. The foundation of the point was flimsy in the extreme: some cryptic utterances in documents generated by Cipro and accessible through the Internet. No effort at all was made

by enquiry, subpoena, rule 35 notices or the like to see whether there was any substance in the unlikely propositions advanced by counsel for the defendants. Even though the amendment was sought at a very late stage and thus constitutes a substantial indulgence sought by the plaintiff, I intend to mark my disapproval of the conduct of the defendants in this regard by awarding the costs of the amendment and the costs wasted by the amendment to the plaintiff to be taxed as between attorney and client. I said during the trial to the defendant's counsel that high court litigation should not be conducted this way. I see no reason to reconsider this view.

- 17 The other interlocutory application was one brought by the defendants on notice of motion on the third day of the trial, after much evidence had been led, for consolidation of the two actions. The basis for this application was that the defendants accepted that there was no second company and that the evidence to be given at the two trials would thus overlap. The reason given by the defendants' attorney in his affidavit delivered in support of the application for the delay in bringing the application was that the defendants' counsel is inexperienced. I refused the application and said I would give reasons later.

18 If the application for consolidation had been made at the commencement of the hearing before me, I might have granted it. There is possibly an overlap in evidence in the two actions. But the application for consolidation was made after the defendants' point in limine had been rejected, evidence had been led and the issue had become a narrow one. I was not satisfied that the application for consolidation was made bona fide. It seems to me to have been yet another attempt to delay an adjudication of the merits of the plaintiff's claim as presented to me for determination. The application for consolidation (with the concomitant application for a postponement of this trial) would not have been made if the defendants' lawyers thought their prospects of success before me were any good. To what extent the application was the product of inexperience on the part of the defendant's counsel, I need not decide. The defendants' attorney was in court throughout the trial. He does not say that he is inexperienced. Objectively, independent of the motives or capacity for professional judgment of the defendants' lawyers, the application for consolidation was an abuse. I award the plaintiff the costs of the application for consolidation, to be taxed on the scale as between attorney and client.

19 The way is now clear to deal with the issue of payment, the sole issue remaining between the parties in relation to the present claim.

20 I have mentioned that the alleged allocation agreements are nowhere alleged in the defendants' papers. The affidavit resisting an application for summary judgment brought by the plaintiff was made by Mrs van der Westhuizen on her own behalf and on behalf of the first defendant. In this affidavit, she raises numerous defences, including that goods were not delivered, that the first defendant was invoiced for the services of the fitter, who was according to Mrs van der Westhuizen supposed to render services without direct cost to the first defendant, that services charged for were not rendered at all, that the first defendant's subcontractors and the defendant were charged for the same work and that repairs were done without authorisation.

21 Mrs van der Westhuizen goes on to list in her affidavit the payments made by the first defendant in 2009 and concludes as follows:

In view of the abovementioned investigation concerning the fallacious and incorrect invoices, the [First] Defendant has a counterclaim for at least R150 000.00.

22 Early in the trial, the plaintiff tendered a bundle which included a reconciliation of the two accounts in its books for which the first defendant was liable, ie that of Banson Trucking and that of Tiro. The defendants objected to the document because it had not been discovered. The document was generated by the plaintiff's accounting

system and was printed for the first time on 27 January 2012. The defendants' position was that the document should be ruled inadmissible. I ruled against the objection and invited the defendants to take time to study the document. My invitation was refused. The defendants' position is that they are prejudiced by the admission of this document because it deals with matters relevant to the trial due to take place later in February and they were taken unaware for the purposes of this trial. This cannot be true. Mrs van der Westhuizen's affidavit shows that she had done an investigation which included both the Banson Trucking and the Tiro accounts. If she had only done an investigation of the Banson account, she could not have concluded that the plaintiff owed the first defendant at least R150 000 because the defendants' version given under oath before me was that the Banson account had been conducted largely on a cash against delivery basis. The defendants' case in the summary judgment affidavit was that invoices which the first defendant has not paid need not, on the grounds set out by Mrs van der Westhuizen in her affidavit, be paid at all. Those disputed invoices related, according to the defendants, exclusively, to the Tiro business. At my invitation, the defendants prepared and introduced into evidence their own reconciliation of the two accounts. The evidence of Thomas Rundle as to what the plaintiff's books said was not challenged in cross-examination. Not one of the entries relied upon by the plaintiff was

identified by the defendants' counsel as incorrect. I invited the defendant' counsel to apply to re-open the defendants' case to deal with any evidence that had not been put to the defendants' witnesses in cross-examination. The defendants' counsel declined the invitation. I reject the evidence tendered by the defendants that the defendants were unable because of lack of time to prepare unable to meet the plaintiff's case that a substantial amount was owed on the Banson Trucking and Tiro accounts, against which, save for the amount of R10 926,33, the two payments of R50 000 each were allocated.

23 As to the alleged counterclaim for at least R150 000, there was of course no counterclaim brought in the present action and it was admitted on behalf of the defendants that no counterclaim had been raised in the second action either, due to come on later in February 2012. Rather impudently, however, it was asserted on behalf of the defendants that the first defendant reserved its rights to bring such a counterclaim in the future.

24 The evidence that there were agreements regarding the allocation of the two payments of R50 000 each was given on behalf of the defendants by Basil van der Westhuizen. He was not a good witness. He was particularly evasive as to the financial position of the defendant at the relevant time and the question whether there were

amounts owed to the defendant in addition to the three invoices relied upon by the plaintiff. In my view he was evasive because he knew that an admission of the true position would weaken the defendants' case. He succeeded in evading all questions on this important point by testifying that his mother, Mrs van der Westhuizen, was the right person to ask about these matters. But Mrs van der Westhuizen testified that she knew nothing about the first defendant's financial position and said that these questions should be put to Basil. Mrs van der Westhuizen even denied that the first defendant was in financial difficulties at the relevant time. In this regard she was untruthful, in my view. The evidence of Basil van der Westhuizen, Herman Bezuidenhout and Thomas Rundle prove that it was. Mrs van der Westhuizen was an exceptionally bad witness. Her efforts to evade providing relevant information went so far that when she was asked to provide, on the following day, information which she said she had at home, she said that she would be unable to do so because her car was in for repairs and would thus be unable to come to court. But the following day, she was in the well of the court, listening to the evidence.

- 25 Basil explained the first payment of R50 000 as follows: He was unaware of the amount of the credit the first defendant was to be given for certain old tyre casings, a question with which I shall deal

below. He received the tyres on invoice no 76419 dated 23 July 2009 for R39 216 at the same time as the tyres on invoice no 76653 dated 5 August 2009 for R11 136,66. The total of the two purchases, before the credit reflected in the former invoice, was R50 352,66. He and Bezuidenhout had a good relationship and did not worry themselves if there was a small over- or underpayment.

- 26 The third invoice, no 77558 dated 29 September 2009 for R55 342,17 he explains in relation to the second payment of R50 000 in a similar way.
- 27 Herman Bezuidenhout gave evidence. He denied that there had been any express allocation agreements at the time the relevant orders, which led to the three invoices in question, were placed. He said that at the relevant time in 2009, because the first defendant was in arrears with its payments, he insisted on a payment on account before any further goods were supplied to the first defendant, in order, as he put it, to keep the first defendant's account open. If Basil so specified, Bezuidenhout said, the payments would be allocated to invoices identified by him. But, he said, no such specification was made, so that the default position applied, ie that payments would be allocated to the oldest debts.

- 28 Bezuidenhout agreed with Basil that he and Basil had a good relationship. Bezuidenhout was taken by the first defendant into its confidence as regards the first defendant's financial difficulties. He tried as far as he could, because of what he called the investment the plaintiff had made in the first defendant (by which he meant the investment a supplier makes in a customer, particularly one which owes the supplier money), to accommodate the first defendant and help it through its troubles.
- 29 I find Bezuidenhout to be an honest witness. He tried to tell the truth. However, his evidence was far from perfect. He was hesitant and in some respects confused about the arrangements he had made with Basil.
- 30 A subsidiary dispute arose in relation to a credit amount of R10 926,33 reflected on the first of the three invoices in question. Basil said that the credit was for old tyre casings supplied to the plaintiff by the first defendant. He said that at the time he caused the payment of the first R50 000 to be made, he was unaware of the amount which the plaintiff would pay the first defendant for these casings (by way of a credit to its Banson Trucking account) and thus did not deduct it from the R50 000.

- 31 Bezuidenhout, on the other hand said that the credit amount of R10 926, 33 was a payment by the first defendant. He explained that credits as such were accompanied by a journal narrative so that the amount could not have been a credit against casings supplied. In any event, Bezuidenhout said, the casings supplied by the first defendant had ultimately been returned to the first defendant in the form of retreaded tyres so no credit was due to the first defendant in that respect. I find Bezuidenhout's evidence on this question convincing. He is corroborated by the evidence of Thomas Rundle who explained what the plaintiff's books of account said relevant to this action.
- 32 Thomas Rundle testified that according to the plaintiff's books, the balances owing to the plaintiff immediately before the first payment of R50 000 on 11 August 2009 were R90 243,04 on the Banson Trucking account and R267 953,03 on the Tiro account. As I have said, the defendants made no attempt to contradict this evidence. Their explanation for their failure to do so, I have found, is untruthful. I therefore conclude that the evidence of Thomas Rundle in this regard is substantially correct.
- 33 In my view the probabilities favour the plaintiff. I say so for the following reasons:

- 33.1 If the payments had indeed been allocated by the first defendant to the specific invoices, the exact amounts would have been paid.
- 33.2 In the case of the second payment of R50 000 there was on the defendants' version an underpayment of R5 342,17. If the agreement had been that the first defendant would pay for the goods sold under that invoice against delivery, which in these circumstances would be equivalent to an agreement that the amount paid would be allocated against the invoice in question, then Bezuidenhout would have refused to hand over the goods until the amount agreed had been paid or at least raised the matter, which on any version Bezuidenhout did not do.
- 33.3 If the allocation agreements in fact were concluded, there would have been reference to them in the defendants' summary judgment affidavit and in the pleadings. The absence of any such reference suggests that the defendants' evidence regarding the allocation agreements is a recent fabrication.
- 33.4 If the allocation agreements in fact were concluded, Bezuidenhout would probably have implemented them. The plaintiff had nothing to gain by not doing so.

- 33.5 I give some weight in assessing the probabilities to the defendants' attempts to have the case postponed rather than meet the plaintiff's case on its merits. If the defendants had believed their case to be just, they would have been unlikely to try to have the case postponed.
- 34 When dealing, as I do in this case, with two irreconcilable versions, I must apply the test in *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others* 2003 1 SA 11 SCA para 5. Having done so, I conclude that the defendants have failed to discharge the onus of proving that they have paid the amounts reflected in the three invoices in question. The plaintiff is therefore entitled to judgment as prayed against the first defendant. No special defences having been raised by the second defendant, the plaintiff is entitled to judgment as prayed against her as well.
- 35 This brings me to costs. The capital amount claimed was within the jurisdiction of the magistrate's court. This case was poorly presented on both sides. Inadequate preparation resulted in a plethora of bundles, at least two of which were inadequately paginated. The duplication of bundles led to much time wasting as counsel, the court and the witness struggled to find the right bundle. The true nature of the issues only became apparent to counsel after much debate

between bench and bar. There was much cross-examination, especially on behalf of the defendants, that proved to be entirely pointless. On numerous occasions I had to intervene to curtail this pointless cross-examination. The case as formulated and presented does not justify high court costs. I intend to grant the plaintiff as the successful party costs on the appropriate magistrate's court scale.

36 As regards the scale on which the costs are to be taxed: as against the first defendant, the plaintiff is entitled to costs on the attorney and client scale because that is what the parties agreed.

37 As against the second defendant, I intend to grant costs on the attorney and client scale as a mark of my disapproval of the way in which her case was conducted. In this regard I take into account:

37.1 that the second defendant raised in the summary judgment affidavit numerous defences which had no merit and were not proceeded with;

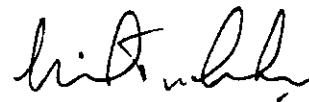
37.2 the failure to raise in the summary judgment affidavit or in the pleadings the defence actually advanced, ie that there had been allocation agreements;

- 37.3 the dishonest manner in which the second defendant sought to evade dealing with the plaintiff's case that older unpaid debts existed;
- 37.4 the dishonest assertion that the first defendant had a counterclaim against the plaintiff of at least R150 000;
- 37.5 the attempts on the part of the second defendant to have the case postponed rather than deal with the plaintiff's claim on its merits.

38 In the result, I make the following order:

- 1 Judgment is granted in favour of the plaintiff and against the defendants for:
- 1.1 payment of the sum of R95 530,31;
- 1.2 interest on the sum of R95 530,31 at the prime rate of Standard Bank plus 3% per annum, from 17 November 2009 to date of payment;
- 1.3 costs of the action, including those relating to the application for summary judgment, taxed on the appropriate magistrate's court scale as between attorney and client;

- 1.4 Costs of the application for amendment pursuant to the notice of application for amendment and the point in limine argued at the commencement of the trial on 31 January 2012 and the costs wasted thereby including the costs occasioned by the fact that the action stood down until the following day, taxed on the appropriate magistrate's court scale as between attorney and client;
- 1.5 Costs of the application for consolidation brought pursuant to the notice of motion dated 2 February 2012, taxed on the appropriate magistrate's court scale as between attorney and client;
- 1.6 All costs occasioned when the trial of this action stood down, save only those caused when the trial stood down during the evidence of Mr Barden senior, taxed on the appropriate magistrate's court scale as between attorney and client.
- 2 All the above orders are granted against the defendants jointly and severally, the one paying, the other to be absolved.



NB Tuchten
Judge of the High Court
6 February 2012

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Judgment rendered 10 Feb. 2012