

FREE STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC OF SOUTH AFRICA

Case no: 842/2008

BRIDGESTONE S.A (PTY) LTD

PAINTIFF

And

S.A TRUCK BODIES (PTY) LTD

DEFENDANT

JUDGMENT BY:

G KHAN, AJ

HEARD ON:

17 SEPTEMBER 2010

DELIVERD ON:

28 JULY
~~10 FEBRUARY~~ 2011

JUDGMENT

- [1] The Plaintiff *in casu* instituted action against the Defendant for payment in the sum of 1,220 256.00 rands for goods sold and delivered for the period 1 November 2007 to 29 November 2007 (inclusive thereof). The Defendant defended the action and counter-claimed in the sum of 4,043 326.31 rands in respect of monies due and owing by the Plaintiff to the Defendant. The said amount arises in consequence of an additional rebate owing by the Plaintiff to the

Defendant in respect of fitment and alignment services ("services") which is charged at the rate of 70 rands per tyre. At the commencement of the trial, I ordered a separation of the merits and *quantum* of the counterclaim, as per the party's request. The amount owing by the Defendant to the Plaintiff in the said sum of 1,220 256.00 rands is not in dispute. The only issue in dispute is whether the Defendant is entitled to an additional rebate of 70 rands per tyre.

- [2] At the rule 37 conference the parties agreed to confine the issues of dispute as follows:

"The parties are *ad idem* that the essential dispute between them is: it is common cause that the Plaintiff has paid Defendant a discount of 200.00 per tyre bought by Defendant from Plaintiff and the main dispute hereof is, had it ever been agreed that the Plaintiff would pay to the defendant a rebate of 70.00 per tyre, in addition to the 200.00 discount, purchased from the Plaintiff by the Defendant".

- [3] It was further agreed that if it is found to have been the case, the matter is to be postponed for the determination of the quantum of the counterclaim.

- [4] Two witnesses testified. One, MR. STEVEN GREGORY EHLER ("EHLER") represented the Plaintiff at the time the agreement was concluded and accordingly testified on behalf of the plaintiff. The other witness, Mr. D S BOTHA ("BOTHA"), who represented the Defendant at the time the agreement was concluded with the Plaintiff,

testified on behalf of the Defendant. Their evidence is substantively similar.

- [5] It is common course that Plaintiff and Defendant concluded an agreement in terms of which the Plaintiff agreed to supply the Defendant with tyres for the new trailers of the Defendant. The parties agreed that the price would be inflated by 200.00 rands per tyre and such amount will be passed on to the Defendant. It was also not disputed that before the Defendant acquired the interest of Hendred Freauhauf ("Hendred"), an associate Company of the Plaintiff, namely Maxiprest, had been rendering a like service to Hendred at a charge of 70.00 rands per tyre. As the Defendant had its own staff, machinery and infrastructure, it intended doing the service itself and was not keen to outsource such service to Maxiprest.
- [6] It was further agreed that Maxiprest should be given an opportunity to deliver a presentation to the Defendant with a view to securing the same service. Should it reach an agreement with the Defendant, Maxiprest would be entitled to charge a fee of 70.00 rand per tyre for such service and payment thereof would be made by the Plaintiff directly to Maxiprest. However, should no such agreement transpire then the Defendant would be entitled to receive the amount of 70.00 rand per tyre from the Plaintiff, as an additional rebate over and above the 200.00 rands agreed upon for such service. It is further common cause that no agreement was arrived at between Maxiprest

and the defendant and the service was in fact rendered by the defendant via its own staff, machinery and infrastructure.

[7] Counsel for the Plaintiff submitted that the term relating to the payment of the rebate of 70.00 rands per tyre, according to the evidence led, was not unconditional but was subject either to a suspensive and/or resolute condition, namely, that the Plaintiff's entitlement to the 70.00 rands per tyre was subject to Maxiprest having been afforded an opportunity to make a presentation and that presentation being rejected. The Plaintiff has not pleaded, either in the summons or in its plea to the claim in convention, the presence of the said suspensive or resolute condition nor was this raised as an issue in the Rule 37 meeting.

[8] Ehlers testified that a delegation of Maxiprest attended the premises of the Defendant in Bloemfontein to evaluate the provision of the service but it does not appear that any presentations were made to the Defendant. What is notable however is Botha's evidence to the effect that Maxiprest, after evaluating the provision of the service, made a proposal to the Defendant which was also reduced to writing. Furthermore, that the Defendant did not accept the said proposal. This evidence was not challenged by the Plaintiff and the probabilities favor such version. It is common cause that Maxiprest never rendered such service to the Defendant in Bloemfontein and it is

highly unlikely that Maxiprest would go to all the trouble of evaluating the provision of the service in Bloemfontein and not make a proposal.

[9] In either event, whether no proposal was submitted or if such proposal was submitted and declined, Maxiprest was afforded an opportunity to make a presentation in terms of the agreement between the parties. It is my view that the evidence of Ehlers and Botha, both of whom concluded the agreement on behalf of the parties respectively, does not support the contention of Plaintiff's Counsel that the payment of the 70 .00 rands per tyre was subject to a suspensive or a resolute condition. The evidence in fact points to the contrary, more particularly that such payment was in fact unconditional *simpliciter*. It is also consistent with the Defendant's pleadings. However Maxiprest, who was not a party to the agreement, was afforded an opportunity to persuade the Defendant to make use of their proposed service but it is clear that no such agreement materialised

[10] Counsel for the Plaintiff made great play of the fact that the evidence of Botha in court materially contradicted his affidavit in the Summary Judgment Application. Close scrutiny of the evidence as well as his affidavit does not bear out such contradiction. In any event, Botha provides a reasonable explanation for any possible ambiguity. The

evidence of Botha is in fact corroborated materially by the evidence of Ehlers. In my view both witnesses were honest and credible in the delivery of their respective testimony.

[11] They readily made concessions when requested to do so by the other party *inter alia* Ehlers conceded that the payment of 70 00 rands per tyre to Maxiprest was an error because the computer was programmed to pay it to Maxiprest. He conceded further that if an agreement was concluded between the Defendant and Maxiprest, it would constitute a new agreement between them. It makes good commercial sense that that a new agreement had to be negotiated between them, given the costs implications for both parties.

[12] I am satisfied that Maxiprest was given an opportunity to negotiate with the Defendant for the service, previously delivered to Henred in Johannesburg but that no such agreement materialized. The said service had been provided by the Defendant itself via its own staff, machinery and infrastructure at its own premises in Bloemfontein and in terms of the agreement; it was entitled to the fitment and alignment fee of 70.00 rands per tyre. The question posed by the parties in the Rule 37 conference is accordingly answered in the affirmative. In the circumstances the matter ought to be postponed for the determination of the *quantum* of the counterclaim.

[13] In the premises, the following order is made;

1. In addition to the 200.00 rand per tyre rebate, the Defendant is entitled to a further rebate of 70.00 rands for each tyre purchased by it from the Plaintiff from the inception of the agreement to the termination thereof;
2. The matter is postponed *sine die* for the determination of the quantum of Defendant's counterclaim.
3. The Plaintiff to pay costs.


G Kahn, AJ

On behalf of the Plaintiff: Adv J.B Maritz
Instructed by: Pierre Krynanu Attorneys
42 Pres Steyn, Westdene
BLOEMFONTEIN

On behalf of the Defendant: Adv S.J Reinders
Instructed by: McTyre & Van der Post Attorneys
12 Barnes Street, Westdene
BLOEMFONTEIN

a/r