# FREE STATE HIGH COURT, BLOEMFONTEIN
# REPUBLIC OF SOUTH AFRICA

Appeal No. : A842/2008

In the appeal between:-

**BRIDGESTONE SA (PTY) LTD** Plaintiff

and

**SA TRUCK BODIES (PTY) LTD** Defendant

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**HEARD ON:** 21 OCTOBER 2011

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**JUDGMENT BY:** JORDAAN, J

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**DELIVERED ON:** 3 NOVEMBER 2011

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[1] This is an application for leave to appeal brought by the plaintiff against a judgment given by Acting Judge Khan delivered on 28 July 2011. Due to the fact that Judge Khan's acting appointment has expired in the meantime, the application was heard by me.

[2] The applicant will be referred to as plaintiff and the respondent as defendant.

[3] It is common cause that the plaintiff issued summons against the defendant for payment of an amount representing the

outstanding purchase price of certain tyres manufactured by plaintiff and sold to defendant. The plaintiff's claim was not in dispute, but defendant filed a counterclaim in excess of the plaintiff's claim. In the counterclaim the defendant alleged that, when the parties originally entered into an agreement for defendant to buy tyres from the plaintiff, which was an oral agreement, it was *inter alia* also agreed that:

> "Benewens voormelde, staan eiser 'n verdere R70.00 per band rabat ten aansien van die aangekoopte bande aan verweerder toe."

[4] In its plea to the aforesaid counterclaim the plaintiff merely denied such agreement. During the Rule 37 conference the parties agreed to limit the issues for adjudication to the following as appears from the minutes of the Rule 37 conference:

> "It is common cause that plaintiff has paid defendant a discount of R200.00 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 R70.00 per tyre, in addition to the R200.00 discount, purchased from the plaintiff by the defendant'."

It was then agreed that, should the aforesaid question be answered in favour of defendant, the matter should be postponed for determination of the quantum of the counterclaim.

[5] In the opening address on behalf of the plaintiff, counsel for plaintiff mentioned the following:

> "Your Ladyship would see from the minutes of the pre-trial conference there is actually only one factual dispute to be tried by this court and that is whether the plaintiff had agreed to pay the defendant R70 per tyre sold. It is actually common cause between the parties that there was an agreement between them regulating their business from the beginning of 2002."

[6] After hearing evidence and argument on behalf of the parties, the trial court found as follows:

> "In addition to the R200.00 per tyre rebate, the defendant is entitled to a further rebate of R70.00 for each tyre purchased by it from the plaintiff from the inception of the agreement to the termination thereof."

[7] The plaintiff's stance in the application for leave to appeal is

summed up in paragraph 6 thereof as follows:

> "6. There is a reasonable prospect that another court might find:
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> 6.1 The evidence was that the undertaking by the plaintiff, to pay R70.00 per tyre, was upon the conditional basis that Maxiprest would first be given the opportunity to make a proposal to the defendant and then only if the defendant eventually rejected that proposal;
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> 6.2 That being so, the defendant had not proved the <u>unconditional</u> undertaking (to pay the R70.00 per tyre) it had alleged in the particulars of its Counterclaim;
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> 6.3 There should not have been a finding about the fulfilment of the condition as that was not the defendant's case on the pleadings;
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> 6.4 It is exactly because the condition and the fulfilment thereof was not pleaded by the defendant, who bore the duty to allege and prove both the condition and fulfilment thereof, that the plaintiff had not presented evidence about the proposal by Maxiprest. Therein lies the prejudice to the plaintiff."

The general background against which the matter had to be adjudicated, appears to have been common cause. The defendant manufactured high speed truck trailers at its premises in Bloemfontein and bought tyres from a manufacturer for those trailers, not being the plaintiff who is a manufacturer of tyres. For some time before the parties entered into negotiations, the plaintiff sold tyres to a similar business operating in Germiston or Wadeville called Henred Fruehauf (Pty) Ltd who also build high speed truck trailers at those premises. The tyres bought from plaintiff by Henred Fruehauf were fitted and balanced at the premises of the last mentioned company by a company called Maxiprest, a subsidiary of plaintiff and for which services the plaintiff paid R70.00 per tyre to Maxiprest. To deliver that service, Maxiprest had personnel and equipment at the premises of Henred Fruehauf. Shortly before the parties started negotiating, the defendant bought and took over Henred Fruehauf (Pty) Ltd. Because of the aforesaid takeover, in the words of the plaintiff's witness, Mr. S.G. Ehler,:

> "... I was obviously nervous of the buyout of Henred because we were at risk of losing a large volume of tyres which we were supplying to Henred. At the same time it gave me an opportunity to hopefully sell some tyres to SA Truck and pick up the business we never had because I think at the time they were supporting Goodyear South Africa in Bloemfontein."

[8] As a result of the aforesaid, a meeting was arranged with the defendant's representatives, in particular Mr. D.S. Botha, the managing director of defendant, and, at that time also the stakeholder in Henred Fruehauf (Pty) Ltd. This meeting was held during about November 2001 and followed up with a meeting in January 2002. At the meeting the plaintiff was represented by Mr. Ehler, the aforesaid witness, and *inter alia* Mr. Botha, on behalf of the defendant, who was present. The meeting was also attended by a representative of Maxiprest in view of the services rendered by the latter to Henred Fruehauf in its Germiston factory and for which it was paid R70.00 per tyre by plaintiff. At the meetings Mr. Botha, on behalf of defendant, was aware of the last-mentioned arrangement, but indicated that the defendant fitted and balanced its tyres itself and is not really interested in the same services being rendered by Maxiprest to defendant. Mr. Botha rather wished the plaintiff to pay the R70.00 to defendant for doing the same job itself. According to the evidence of Mr. Ehler, on behalf of plaintiff, his reaction was that, because plaintiff worked closely with Maxiprest, he wanted Maxiprest to have the opportunity to come and duplicate in Bloemfontein what they were doing for Henred Fruehauf in Johannesburg. In his words:

> "Because as shown in the letter, myself and Maxiprest were present at the meeting negotiating the thing together, so it would be unfair for me to cut them out immediately if we were in it together. So that was the request on my behalf, that they be given an opportunity."

According to him:

> "The commitment was if they weren't successful then the R70.00 would be given to SA Truck Bodies."

Then he went on to say that basically the R70.00 which was on the table would be paid to SA Truck Bodies and that that was an oral agreement. According to him that would only be the case if the proposal of Maxiprest was not accepted by defendant.

[9] From the evidence it is clear that Mr. Botha, on behalf of the defendant, from the outset was not really interested in Maxiprest supplying the same services to defendant in Bloemfontein as they did for Henred Fruehauf in Germiston. His stance was that the defendant already does that itself, has the necessary equipment and workforce to do that and that defendant would rather receive the R70.00 per tyre. He,

however, consented to Maxiprest being given an opportunity to make a proposal to defendant which defendant could either accept or refuse. It is also clear from the evidence that there was no obligation on the defendant to accept any such proposal at all, notwithstanding whatever the proposal might entail.

[10] It appears from the evidence that the representatives of Maxiprest indeed attended the premises of defendant in Bloemfontein to evaluate the provision of the services. Whether Maxiprest made any proposals to defendant, remained in dispute. According to defendant's witness, Mr. Botha, they did indeed make a proposal which was not accepted by defendant. It was however common cause that Maxiprest never delivered the services to defendant at its premises in Bloemfontein, as was envisaged in the said so-called condition.

[11] The main thrust of the argument on behalf of the plaintiff was that the undertaking by defendant to allow Maxiprest to make a proposal amounted to a suspensive condition to defendant's entitlement to the R70.00 per tyre rebate. According to the argument the defendant should have pleaded that condition

and should have also pleaded whether the condition was fulfilled or not before it became entitled to payment as claimed. According to the argument, the defendant did not plead such condition nor plead or prove that Maxiprest made a proposal which was rejected, entitling defendant to the said rebate. Since defendant did not plead such condition and the fulfilment of non-fulfilment thereof, it was precluded from relying on evidence to that effect. The trial court therefore erred in either finding that the condition has been fulfilled in that a proposal was made by Maxiprest and not accepted by defendant or alternatively, in finding that the agreement was in effect unconditional and that plaintiff was therefore liable for the said rebate since the inception of the agreement, so the argument went.

[12] Viewed against the background circumstances as aforesaid, I am not convinced that the proposal by Maxiprest and the acceptance of refusal thereof constitutes a suspensive condition if a condition at all. Although termed a rebate by the parties, the R70.00 per tyre appears not to have been a rebate but indeed a fee for fitting and balancing, etc. of each tyre bought. At the time the agreement was entered into, it was clear that Maxiprest would need some time to evaluate the

circumstances at the defendant's premises and to make a proposal regarding those services. In the meantime the defendant would start buying tyres from the plaintiff, those tyres have to be fitted and balanced and whatever needs to be done had to be done until Maxiprest had the opportunity of evaluating the circumstances and making a proposal. Until that happened, the defendant would do that itself for each tyre bought from the plaintiff. If Maxiprest thereafter or at any stage made a proposal to plaintiff and the proposal is not accepted, the *status quo* would just continue and defendant would have been entitled to the R70.00 per tyre. If a proposal by Maxiprest was accepted by plaintiff, that would rather be a resolutive condition terminating the defendant's entitlement to payment of the said amount per tyre. The resolutive condition would then only be fulfilled once the defendant accepts a proposal from Maxiprest and if not it would never be fulfilled. In such circumstances, where the resolutive condition has not been fulfilled, the defendant was entitled to plead and prove only the agreement without the necessity of pleading a resolutive condition and the non-fulfilment thereof. See R.H. Christie: **The Law of Contract in South Africa**, 5th Edition, page 140 where the following is, in my view, correctly stated:

> "A party claiming on a contract subject to a condition precedent must plead and prove the condition and its fulfilment. No doubt the same applies in the case of a resolutive condition, in the sense that a party whose claim depends upon the fulfilment of the condition must plead and prove the condition and its fulfilment, but a party whose claim arises because the condition has not been fulfilled is simply claiming on the contract and there seems no good reason why he should refer to the condition."

[13] In the present matter it was the plaintiff that tendered evidence referring to the so-called condition and the fact that the proposal, if any, of Maxiprest, has not come to fruition at any stage. To argue, in those circumstances, that defendant is precluded from relying on that evidence, appears to be highly technical and indeed opportunistic. What is more, if the said undertaking to allow Maxiprest to make a proposal constituted a condition at all, it is clear from the evidence that the said condition was dependent upon the defendant's unlimited discretion whether to accept or refuse such proposal. This amounts to a pure potestative condition and is void in any event.

[14] In the result I am not convinced that there are any reasonable prospects of success and the application for leave to appeal is refused with costs.

**A.F. JORDAAN, J**

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| On behalf of plaintiff: | Adv. J.D. Maritz SC<br>Instructed by:<br>Pierre Krynauw Attorneys<br>c/o Vermaak en Dennis Attorneys<br>BLOEMFONTEIN |
| On behalf of defendant: | Adv. S.J. Reinders<br>Instructed by:<br>McIntyre & Van der Post<br>BLOEMFONTEIN |

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