

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No.: 842/2008

In the case between:

BRIDGESTONE SA (PTY) LTD

Applicant

and

S A TRUCK BODIES (PTY) LTD

Respondent

JUDGEMENT:

MOCUMIE, J

HEARD ON:

24 APRIL 2008_

DELIVERED ON:

15 MAY 2008

[1] The plaintiff instituted an action for summary judgment for payment of the amount of R1 220 256,00. The claim arises from a sale and delivery of goods by plaintiff to the defendant for the period 1 November 2007 to 29 November 2007 together with interest at the rate of 15,50% per annum.

[2] The defendant filed a notice of intention to defend the action. In the opposing affidavit the defendant stated that:

“Ek beklemtoon, soos hierinlater meer volledig uiteengesit, dat die verweerder ‘n geldige teeneis teen die eiser se vordering het, wat die eiser se vordering in total uitwis, en gevolglik geld as ‘n *bona fide* verweer teen die aksie wat deur die eiser ingestel is.”

The defendant's indebtedness to the plaintiff is not disputed.

- [3] The summary of the facts giving rise to the alleged counterclaim is the following: First it is alleged that before 2001 the plaintiff was manufacturing and selling tyres to Hendred Fruehauf (Pty) Ltd (“*Hendred Fruehauf*”) a manufacturer of trailers through its affiliate company Maxipress Tyres (Pty) Ltd (“*Maxiprest*”). Plaintiff paid R70,00 per tyre to Maxipress for services rendered to Hendred Fruehauf which was included in the purchase price of the tyres. During 2001 the defendant took over Hendred Fruehauf. When plaintiff took over Hendred Fruehauf, plaintiff wanted the defendant to continue buying tyres from it. The negotiations around this arrangement did not bear any fruits and the deal

was abandoned.

[4] On or about 30 January 2002 the parties entered into an oral agreement on the following terms:

4.1 That plaintiff will invoice the defendant for R200,00 more than the normal price which amount will be paid back to the defendant.

4.2 In addition plaintiff will pay the respondent R70,00 as rebate although in reality it was reimbursement for the amount paid to Maxiprest as per the original arrangement with Henred Fruerhauf; However the R200,00 negotiations did not materialise. But the R70,00 rebate remained valid between the parties.

[5] The defendant opposed this matter and filed an answering affidavit and a counter-claim. In the opposing affidavit the defendant averred unrefuted that it laboured under the impression that the R70,00 rebate was paid back as per the 2002 oral agreement until in 2005 when it discovered that no such rebates had been paid. This matter was taken up with plaintiff but was never resolved. In the period 1 March 2002 to 30 November 2007 defendant bought **60 854** tyres from

plaintiff but the **R70,00** rebate amounting to **R4 259 780,00** was never paid. Therefore plaintiff was in breach of the 2002 oral agreement.

[6] Secondly, the defendant alleged that an amount of **R29 879,60** appeared on the plaintiff's monthly statement but it was not supported by any invoice.

[7] In its Heads of Argument plaintiff averred the following in respect of the defendant's counterclaim:

"3. Defendant's counterclaim falls short of the abovementioned requirements in the following respects:

*3.1 Defendant makes a bold and unsubstantiated allegation that plaintiff's claim of **R1 220 256,00** relates to purchases made only for the month of November 2007. He must have some sort of documentation in support thereof, but chooses not to present it to the Court.*

3.2A further bold and unsubstantial allegation is made

that certain facts were brought under the attention of plaintiff as a result whereof payment for the November account was withheld. The allegations regarding the facts and circumstances lacked particularly as to whom these notices has been directed as well as to the specifics of the date and time. No documents of proof of these allegations are annexed.

*3.3 The averment to whom the amount of **R70,00** per tyre should be paid is vague and embarrassing. If the amount of **R70,00** were paid to MAXIPREST in stead of to HENRED FRUEHAUF, which is a complete separate entity from defendant, defendant himself will inevitably not be entitled to the payment of such rebate.*

3.4 Defendant's affidavit contains hearsay evidence. The Court is left completely in the dark as to the identity of the source of the hearsay.

*3.5 Defendant further alleges that tyres for an amount of **R60 854,00** were sold by plaintiff to defendant during the period 1 March 2002 to 30 November 2007. The Court is left completely in the dark as to how this quantity is arrived at. No proof in support of these*

figures are tendered to the Court.

3.6 Prescription of defendant's counterclaim is clearly applicable. The Court however is left in the dark as to the amounts of tyres sold before date of prescription as well as the amount thereafter. Defendant's claim lacks particularity in this respect.

*3.7 A further unsubstantiated allegation is made that an amount of **R29 879,60** must be deducted from plaintiff's claim. Defendant refers to invoices but does not present proof thereof to the Court neither gives an acceptable explanation why it is not done."*

[8] Plaintiff averred further that the allegations made by the defendant were vague. The defence was vague and lacked sufficient particularity. In that way the defendant was not *bona fide*.

[9] Rule 32 of the Superior Court Rules of Practice provides that the defendant may satisfy the Court by an affidavit that he has a *bona fide* defence to the action or a *bona fide* counterclaim

against the plaintiff. Such affidavit shall disclose fully the nature and grounds of the defence of the counterclaim.

- [10] In **GILINSKY AND ANOTHER v SUPERB LAUNDERERS & DRY CLEANERS** 1978 (3) SA 807 (O) at 810A the Court states the following:

“It requires the affidavit to state (a) the nature, and (b) the grounds of the defence, and (c) the material facts relied upon to establish such a defence and these requirements must be stated fully.”

- [11] In the seminal judgment of **MAHARAJ v BARCLAYS NATIONAL BANK (PTY) LTD** 1976 (1) SA 418 (A) at 426 B – D, the Appellate Division stated that the opposing affidavit must:

“.... Disclose the defence with particularity and completeness to enable the Court to decide whether the affidavit discloses a bona fide defence.”

[12] What “*fully*” in the context of Rule 32 means is not exactly the same in each and every case. Each case will be determined on its own merits. In **CALTEX OIL SA (PTY) LTD v WEBB & ANOTHER** 1965 (2) SA 914 (N) at 916 G the Court held that it is clear from all the decisions that in applications of this nature, the Court does not examine the evidence presented by the defendant in order to see whether there is a balance of probabilities that a defence will succeed. All that is required is that the Court should be satisfied that the defendant has presented ,where the defence is based upon facts, all the material facts upon which his defence is founded and that they appear to disclose a *bona fide* defence.

The Court then went on to state that the word “*fully*” connotes sufficient detail of the nature and grounds of the defence. See too **TRAUNT v DU TOIT** 1966 (1) 69 (O) at 70 H – 71.

I am in respectful agreement with the above dicta.

[13] It is trite that the defendant is, at this stage, not required to demonstrate the correctness of the facts stated by him nor does the Court at this stage have to weigh up or decide disputed factual issues or to determine whether or not there is a balance of probabilities in favour of one party or the other. The test as shown in different cases is not whether the defence to be raised is likely to succeed or fail, but merely whether it is *bona fide*. See **MULLER AND OTHERS v BOPHUTHATSWANA DEVELOPMENT CORPORATION LTD** 2003 (1) SA 651 (SCA) at 656.

[14] It is against this background that I have to decide if the defendant has proved he has a bona fide counter-claim. In this case the defendant's counterclaim is that the plaintiff owes him an amount of R4 290 000 based on an oral agreement. To my mind, the defendant's averments concerning its counterclaim was due and payable to him. Furthermore, the averments are substantiated and the amounts owed are computed. These averments are not refuted. The history of this oral agreement is set out clearly and at length. In my view the defendant's affidavit sets out the nature and grounds of the its counterclaim as clearly and succinctly as is expected in actions of this nature. The defendant's inability to sue plaintiff prior to the institution of this application for summary judgment is indicated in

the opposing affidavit. Accordingly the issue of prescription can be ventilated properly in the main proceedings. See Murray and Roberts v Upington Municipality 1984 (1) SA 571 (A)

[15] It follows that the defendant has set up a *bona fide* defence as to the plaintiff's claim as required by R32 (3) so as to avoid summary judgment. Needless to state that summary judgment is a drastic remedy which holds serious consequences for a defendant. At worst, it has the effect of shutting the Court's door on a defendant. It also allows a Court to grant judgment for the plaintiff without hearing a defendant. Evidently such remedy can only be granted after careful consideration and where a Court is satisfied that a defendant does not have a *bona fide* defence.

[16] In the circumstance I make the following order:

16.1 Application for summary judgment is refused.

16.2 Defendant is granted leave to enter an appearance to defend.

16.3 Costs will be costs in the main action.

B. C. MOCUMIE, J

On behalf of Applicant: Adv. D.M. Grewar
Instructed by
Pierre Krynauw Attorneys
C/o Du Toit Louw Botha
BLOEMFONTEIN

On behalf of Respondent: Adv. C Ploos van Amstel SC
Instructed by
Mcintyre & Van der Post
Bloemfontein

/em