Sneller Verbatim/lks

IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

JOHANNESBURG CASE NO: 13424/02

2002-09-10

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES ~~YES~~/NO
(3) REVISED ✓

DATE 2/10/2002 SIGNATURE

In the matter between

**CHEMFIT TECHNICAL PRODUCTS (PTY) LTD** Applicant

and

**SOIL FUMIGATION SERVICES (LOWVELD) CC** First Respondent

**MAARTEN DIRK KOPPENOL** Second Respondent

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J U D G M E N T

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WILLIS, J: The applicant has made application for summary judgment as against the first defendant as follows:

1. Payment of the sum of R1 260 829,18;
2. interest on the said amount calculated at the prime overdraft rate charged by First National Bank from time to time being at present 16% per annum from 24 July 2002 to date of payment;
3. costs of suit;
4. alternative relief.

The summons was issued and served. As against the second defendant an order is sought rectifying a deed of suretyship contained in Annexure "A" to the summons and thereafter claiming payment of the aforesaid amount as against the second defendant jointly and severally. The applicant does not proceed against the second defendant in respect of this application for summary judgment.

The claim is for goods sold and delivered.

The first defendant does not dispute that goods were sold by the plaintiff to the first defendant and delivered. The defence appears as follows:-

"25. From January 2000 when the first orders were placed to April 2002 when the last order was placed, the Rand devalued approximately 100% from its January 2000 price per US Dollar. During the same period the price per kilogram of methyl bromide charged by the supplier to applicant increased approximately 100%. The applicant or mark up during the period increased by more than 500%. It is abundantly clear, even in the absence of full disclosure by the applicant of all the information it is obliged to disclose in terms of the agreement reached between the parties, that it has overcharged the first defendant.

26. As a result of this overcharging first respondent's clients have cancelled orders for methyl bromide and quotes have been rejected by our clients in favour of other

competitors selling methyl bromide in the South African market. The first respondent had lost sales as a direct consequence of applicant's breach of contract and these damages were reasonably foreseen and within the contemplation of the parties at the time of entry into the agreement. I annex hereto marked 'L1' and 'L2' a copy of a letter indicating a firm order that was cancelled. First respondent has lost income to the value of R22 500

...

28. Applicant has also not fully accounted to first respondent in respect of commissions due for sales and the shortfall of commissions for sales to Hadeco which second respondent estimates to be the sum of R118 200. This sum is calculated as follows: R103 200 being the short payment of commissions due for sales to Hadeco and R15 000 in respect of commissions for sales to Sun Valley and Green World. I suspect that the applicant has made other sales directly to my client and I am in the process of investigating it.

...

31. It is clear that the first respondent has a counterclaim against the applicant in the sum of at least R590 492,50 and calls for a statement of debatement of the applicant's account in order to determine the exact figure due to it by the applicant."

Crisply stated, the first defendant's defence to the application for summary judgment is that it has a counterclaim. It is clear from what I have quoted above that this claim is for an unliquidated amount.

The position with regard to resisting summary judgment by way of an unliquidated counterclaim is conveniently summarised at p.9-35 in *Summary Judgment : A Practical Guide* by Van Niekerk, Geyer and Mundell.

> "It is generally required, that for an unliquidated counterclaim to constitute a *bona fide* defence that the *quantum* of the counterclaim should exceed (or be at least of similar magnitude, but not less) the *quantum* of the plaintiff's claim. The implication hereof is that the defendant ought to quantify his counterclaim in order to demonstrate that the *quantum* thereof is at least as much or, in any event, not smaller than that of the plaintiff's claim. Only then is the counterclaim a *bona fide* defence to the plaintiff's entire claim. Should the defendant have a liquidated counterclaim with the *quantum* less than that of the plaintiff's claim, or if the *quantum* of the defendant's unliquidated counterclaim is less than that of the plaintiff's claim, the defendant should, in order to advance a *bona fide* defence, pay in the balance. In the former Rhodesia the fact that the counterclaim was less than that of the claim did not preclude leave to defend being granted to a defendant, the reasoning being that the *quantum* of the counterclaim was an

estimate only, but that the cause of action clearly constituted a triable issue requiring resolution at a trial in due course and not at a premature stage of summary judgment proceedings. This Rhodesian decision was followed in the Transvaal. The ratio of the latter decision was that it did not matter that the *quantum* of the counterclaim was less than that of the claim. The action as a whole required adjudication even though the defence was only to a portion of the plaintiff's claim. ... The defendant, in raising a counterclaim, should provide full particularity of the material facts upon which it is based. This means that he must be as comprehensive as when advancing only a defence. The court must be placed in a position to properly be able to consider not only the nature and grounds of the counterclaim, but also the magnitude thereof and whether it is advanced *bona fide*. The necessary elements of a completed cause of action must be included. The counterclaim must, moreover, be based on facts and not on the deponent's belief."

As I am busy giving judgment *ex tempore* in a busy motion court, I trust that I may be forgiven for not referring *in extenso* to the various cases that have been quoted in the aforesaid work in support of the propositions therein contained.

Counsel for the first defendant, not surprisingly, relied very much on the aforesaid Rhodesian case of *Wilson v Hoffman and Another* 1974 (2) SA 44 (R) where the learned judge Beck, J said as follows at 45G:

"As presently advised I am not sufficiently persuaded that the defendants should be subjected to the restrictions of a summary judgment against them when they made averments which I regard as sufficient to entitle them to plead a counterclaim as a partial defence with the magnitude of the claim, and to seek to protect their position with regard to costs, if so advised, by making the appropriate payment into court."

This case was referred to with approval in the case of *H I Lockhat (Pty) Ltd v Domingo* 1979 (3) SA 696 (T) where the learned judge quoted the very extract which I have quoted earlier. In the case of *Stassen v Stofberg* 1973 (3) SA 725 (C) Corbett J (as he then was) said as follows at 729A:

"Indien die teeneis minder as die hoofeis is, die verweerder die verskil gereqtelik kan inbetaal en op dié wyse 'n *bona fide* verweer teen die hele hoofeis opwerp. (Sien *Koornklip Beleggings (Edms) Bpk v Allied Minerals Ltd* 1970 (1) SA 674 (K). Waar 'n verweerder aan die anderkant 'n ongelikwideerde teeneis opwerp sonder om die hoeveelheid daarvan enigsins te bepaal of trouens om enige poging aan te wend om dit te bepaal en waar dit blyk dat die teeneis heelwaarskynlik aansienlik minder as die hoofeis is en geen regtelike inbetaling geskied het nie, openbaar sodanige "teeneis" na my mening, nie 'n *bona fide* verweer vir die doeleindes van summiere vonnis nie. Vir hierdie rede word summiere vonnis toegestaan soos aangevra met koste."

It is significant that even in the *Wilson v Hoffman* case and the *H L Lockhat v Domingo* case to which counsel for the first defendant referred, there is a reference to making a payment into court. No payment into court has been made, nor has there been an attempt by the first defendant to quantify the amount of the counterclaim. In my view, with due respect, if there is a conflict of law between the reasoning of the learned judge in the case of *Stassen v Stofberg (supra)* and the learned judge in the case of *H L Lockhat v Domingo*, I would prefer to follow the judgment of Corbett J (as he then was). In so far as it would be necessary for me to make a finding to this effect, I accordingly make a finding that if there is an unliquidated counterclaim for an amount less than the amount of the plaintiff's claim, the defendant should show his *bona fides* by making a payment into court for the difference. To the extent that the judgment in *H L Lockhat v Domingo* is in conflict with this proposition, I am satisfied that it is wrong.

In my view the plaintiff accordingly must succeed in its application for summary judgment save for the minor qualification to which I shall now refer.

The application for summary judgment includes a claim for interest on the said amount "calculated at the prime overdraft rate charged by First National Bank from time to time being at present 16% per annum from 24 July 2002 to date of payment". There is no allegation in the summons as to the prime overdraft rate and accordingly in my view it is appropriate to award the mora rate of interest being 15,5% only.