REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION

CASE NO: 19395/14

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO.
(2) OF INTEREST TO OTHER JUDGES: YES / NO.
(3) REVISED.
DATE **SIGNATURE**

In the matter between:

LEWIS KAPLAN IMPORT & EXPORT CC t/a

KAPLAN QUANTITY APPLICANT

and

SHINE SHARKS (PTY) LTD t/a

SERENGETTI LOUNGE RESPONDENT

J U D G M E N T

WEINER J:

1. The Applicant claims payment from the respondent for goods sold and delivered during the period 28 August 2013 to 3 October 2013. The Respondent does not dispute that goods were sold and delivered to it. It, however, states that certain of them were defective and that on occasion, there was short delivery.

2. The Respondent contends that it has a valid defence to the Plaintiffs' claim and a counterclaim. The Respondent refers to letters that were sent to the plaintiff as well as a supplementary affidavit in which these allegations are dealt with. The Respondent states that, as early as May 2013, there were defective goods delivered and, as a result, it has suffered damages.

3. On the Respondent's affidavit it appears that the alleged defective goods were delivered in August or before. There is, however, no allegation that the goods delivered in September and October were defective. This has not been raised by the Respondent in either of the two affidavits and accordingly, in my view, the Applicant would be entitled to judgment for the amount owing for those months.

4. The question is whether or not the Respondent's

counterclaim (which is in excess of what the plaintiff claims) should be taken into account by this Court, in granting leave to defend, against the full amount of the Plaintiff's claim, including the amount due for September and October.

5. The Respondent's counterclaim reads as follows:

> "On more than one occasion, the Applicant failed to deliver timeously and when delivery did transpire more often than not the quantities were short of the amount ordered. Significantly of material concern was the defective nature of the particular batch of leather that was delivered during or about August 2013, the August batch. The Respondent used the August batch to supply lounge suites to one of the Respondent's largest customers, Union Furniture Outlets ("UFO"). The leather cracked and the colour came off. As a result UFO was inundated with complaints and gave rise to a series of refunds to UFO customers and returns. The Respondent states this has severely impaired the Respondent's relationship with UFO and the Respondent incurred significant expenses in having to replace the

> defective lounge suites. It suffered a subsequent loss of business and continues to suffer losses as a result of the August batch which was defective."

6. The respondent then sets out its damages in an amount of R599 300.00 which it calculates as follows:

    1) R65 000,00 in relation to additional costs incurred by the respondent having to procure replacement leather as a result of the applicant's non-delivery.

    2) R216 700.00 in relation to costs incurred by the respondent in replacing defective lounge suites, net of any salvage costs received by the Respondent, for defective lounge suites.

    3) R317 600.00 in lost profits as a result of a reduction in orders from UFO following the damage to the respondent's reputation with UFO as a result of the defective August batch.

7. The respondent contends that this is sufficient for the court to grant leave to defend and it does not have to set out anything more.

8. In my view, this flies in the face of authorities dealing with defences and counterclaims that go back to as early as the

case of *Breitenbach v Fiat S.A. (EDMS) BPK*[1]. This was referred to and confirmed in *Soil Fumigation Services Lowveld CC v Chemfit Technical Products* (Pty) Ltd[2] where Brand JA said the following:

> "The defendant's contention in the Court *a quo* was that its unliquidated counterclaim for damages constituted a *bona fide* defence, as contemplated in Rule 32(3)(*b*) of the Uniform Rules of Court, to the whole of plaintiff's claim, despite the fact that the plaintiff's claim was for more than double the amount of the counterclaim." The Court then said that the *court a quo's* interpretation of the remarks of Corbett J in the Stassen v Stoffberg[3] case were incorrect.

Brand JA[4] went on to state:

> "I do not agree that Corbett J must be understood to have said that where a counterclaim raised by the defendant is for less than the plaintiff's claim, the defendant can establish his *bona fides* only by paying

[1] 1976 (2) SA 226 [T]
[2] 2004 (6) SA 29 (SCA) at [2]
[3] 1973 (3) SA 725 (C)
[4] Soil Fumigation Supra at [8]

the balance into Court. Such sentiment would be in conflict with the dictates of logic and ordinary human experience. After all, a dishonest defendant is even more likely to inflate his unliquidated counterclaim to the extent where it exceeds the amount of the plaintiff's claim." In relation to the detail to be contained in the counterclaim, Brand JA held:

"With reference to the second part of the counterclaim, which is for lost sales commission, the opposing affidavit is so devoid of any factual foundation that it can hardly be said to comply with the requirements of Rule 32(3)(*b*)."[5] Brand JA dealt with the third part of the counterclaim which was for alleged loss of profit. He found that this claim too was devoid of any factual foundation and thus it was impossible to determine whether it was *bona fide* or otherwise.[6]

[5] Soil Fumigation Supra at [22]
[6] Ibid at [23]

9. Brand JA referred to Colman J's exposition in *Breitenbach v Fiat*[7] in saying that the Defendant "failed 'to disclose fully the nature and the grounds of [its counterclaim] and the material facts relied upon therefor as required by Rule 32(3)(*b*)."[8] Brand JA concludes:

> "What remains to be considered is whether, in these circumstances, the court *a quo* should have exercised its overriding discretion to refuse summary judgment in the defendant's favour. I think not. For the reasons I have stated above, a Court should be less inclined to exercise its discretion in favour of a defendant in a matter such as this, where the answer to the plaintiff's claim is raised in the form of a counterclaim as opposed to a defence to the plaintiff's claim in the form of a plea. Moreover, the Court can only exercise its discretion in the defendant's favour on the basis of the material placed before it and not on the basis of conjecture or speculation."[9]

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[7] *Supra* at [25]
[8] Ibid at [24]
[9] Ibid at [25]

10. In the present case the material placed before this Court amounts to the following:

    1) The Respondent has not raised a defence to the claim for the goods that were delivered in September and October.
    2) The only defence is in the form of the counterclaim.
    3) If one has regard to the facts giving rise to the counterclaim, they do not fall within the definition of a full disclosure of the nature and grounds of the claim and the material facts relied upon therefor.

11. It seems to me that it would have been a relatively simple task for the Respondent in its counterclaim (after some time has passed since August 2013) to set out precisely how each of these costs and damages has been calculated. The figures are not based on any documentation, which must exist. Invoices, credit notes relating to replacement goods and returned goods must be in the Defendant's possession to corroborate the claims. But for whatever reason, it chose not to do so. Whether this is because it did not have the facts at hand or because these figures cannot be substantiated, this Court cannot determine as there is nothing before it. It might be that there are several counterclaims which the Respondent may have in relation to certain of the goods. It will have the opportunity to raise the counterclaim in the trial, as the Applicant has not sought judgment on the full amount

but only the amount owing for the September and October deliveries.

12. In relation to costs the Applicant has been substantially successful and is therefore entitled to same.

13. Summary judgment will accordingly be granted against the Respondent for:-

    1. Payment of R223 141,11.
    2. Interest thereon at the rate of 15,5% per annum from 3 November 2013 to date of payment.
    3. Costs of suit.
    4. In respect of the balance of the amount claimed, leave to defend is granted.

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WEINER J

APPEARANCES:

For Applicant:	M.D Silver
Instructed By:	Moss Cohen & Partners
For Respondent:	G.D Wickins
Instructed By:	Norton Rose South Africa
Date of Hearing:	13 November 2014
Date of Judgment:	08 October 2014