THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE
Case number : 680/2002

In the matter between :

SOIL FUMIGATION SERVICES LOWVELD CC **APPELLANT**

and

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

CORAM : HARMS, CAMERON, MTHIYANE, BRAND and HEHER JJA

HEARD : 18 MARCH 2004

DELIVERED : 31 MARCH 2004

Summary judgment – unliquidated counterclaim for amount less than claim in convention – can in principle constitute '*bona fide* defence' to corresponding part of claim – court's discretion to refuse summary judgment despite defendant's failure to comply with provisions of rule 32(3)(b).

JUDGMENT

BRAND JA/

BRAND JA :

[1] In the High Court, Johannesburg, the present respondent ('plaintiff') instituted action against the appellant ('defendant') for payment of the sum of R1 260 829,18 together with interest and costs. When the defendant entered an appearance to defend, the plaintiff brought an application for summary judgment. In the opposing affidavit filed on behalf of the defendant, no defence was offered to the plaintiff's claim and the material allegations in the particulars of claim were not denied. Instead the defendant resisted the claim in the form of a counterclaim for unliquidated damages, arising out of an alleged breach of contract by the plaintiff, for 'at least' R590 492,50. Despite this opposition the court *a quo* (Willis J) granted summary judgment in favour of the plaintiff for the full amount of its claim. Subsequently he granted leave to the defendant to appeal to this court.

[2] 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), 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. As authority for this proposition, the defendant relied on the decision in *Wilson v Hoffman and Another* 1974 (2) SA 44 (R)

which was followed in *H I Lockhat (Pty) Ltd v Domingo* 1979 (3) SA 696 (T). Though the latter case was a judgment of the same division binding on Willis J, he was nevertheless satisfied that it had been wrongly decided to the extent that it was in conflict with the judgment of Corbett J in *Stassen v Stoffberg* 1973 (3) SA 725 (C). The latter decision, so Willis J found, constitutes authority for the further proposition that where a defendant in summary judgment proceedings raises a counterclaim for an unliquidated amount which is less than the amount of the plaintiff's claim, the defendant must show its *bona fides* by paying the balance into court. On this premise he held that, because the defendant in the present case had failed to make any payment into court, its counterclaim constituted no *bona fide* defence at all and that, consequently, the plaintiff was entitled to summary judgment for the full amount of its claim.

[3] It appears that Willis J's understanding of the *Stassen* case was largely influenced by the following statement by Corbett J (at 729A-C):

'Ek sal aanvaar dat ingevolge die Eenvormige Hofreëls - en in besonder Hofreël 22 (4) - 'n verweerder wat die hoofeis erken, by magte is om 'n ongelikwideerde teeneis as 'n verweer op te werp: dat indien die teeneis die hoofeis oorskry dit 'n geldige verweer uitmaak ten opsigte van die hoofeis in sy geheel (sien *Spilhaus & Co. Ltd. v Coreejees*, 1966 (1) SA 525 (K)); en indien die teeneis minder as die hoofeis is, die verweerder die verskil geregtelik kan inbetaal en op dié wyse 'n *bona fide* verweer

teen die hele hoofeis opwerp (sien *Kroonklip Beleggings (Edms.) Bpk v Allied Minerals Ltd* 1970 (1) SA 674 (K)). Waar 'n verweerder aan die ander kant '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.'

[4] These remarks by Corbett J must, of course, be understood, first, against the factual background of the *Stassen* case and, second, in the light of the authorities to which he referred. As to the facts of the *Stassen* case, it appears that the plaintiff's claim was for the balance of the purchase price of an immovable property. The defence raised by the defendant was that the plaintiff had failed to complete the house on the property in a workmanlike manner, as he contracted to do. The defendant did not even consider his defence to be in the nature of a counterclaim for damages. He thought he was raising the *exceptio non adimpleti contractus.* As a consequence, he proffered no evidence as to what the cost of remedying the plaintiff's unworkmanlike performance of the building operations would be. The remarks by Corbett J followed upon his essential finding that the *exceptio non adimpleti contractus* was inappropriate since the building contract relied upon by the defendant

was a contract different from the sale agreement that formed the basis of the plaintiff's claim.

[5] *Spillhaus & Co. Ltd. v Coreejees (supra)*, to which Corbett J referred, was one of two judgments by Watermeyer J in which he resolved the issue whether, as a matter of principle, the requirement of a *bona fide* defence in summary judgment proceedings can be satisfied by the defendant raising an unliquidated claim for damages which exceeds the sum of the plaintiff's claim. In this case, as in the earlier case of *Weinkove v Botha* 1952 (3) SA 178 (C) 183A-D, Watermeyer J held that, if, as a matter of pleading a defendant is allowed to raise the existence of an unliquidated counterclaim which exceeds the amount of the claim as a defence to the plaintiff's claim, it must also be permissible to raise that same defence in answer to an application for summary judgment.

[6] The other case to which Corbett J referred, ie *Kroonklip Beleggings (Edms) Bpk v Allied Minerals Ltd (supra),* went one step further. In that matter the alleged amount of the defendant's counterclaim for unliquidated damages was less than the plaintiff's claim, but the defendant had paid the difference into court. In these circumstances Grosskopf AJ found (at 676H) that:

'Such a cause of action, raised by way of counterclaim, coupled with the payment into Court of the balance of plaintiff's claim, would in my view constitute a *bona fide* defence for the purpose of summary judgment proceedings. (*Vide Weinkove v Botha*, 1952 (3) SA 178 (C) ; *Spilhaus & Co. Ltd. v Coreejees*, 1966 (1) SA 525 (C) at p. 529, and Rule of Court 22 (4)).'

[7] It appears to me that the key to the understanding of all these judgments, including *Stassen*, is to be found in rule 22(4). It provides that:

'If by reason of any claim in reconvention, the defendant claims that on the giving of judgment on such claim, the plaintiff's claim will be extinguished either in whole or in part, the defendant may in his plea refer to the fact of such claim in reconvention and request that judgment in respect of a claim or any portion thereof which would be extinguished by such claim in reconvention, be postponed until judgment on the claim in reconvention. Judgment on the claim shall, either in whole or in part, thereupon be so postponed unless the court upon the application of any person interested, otherwise orders, but the court, if no other defence has been raised, may give judgment for such part of the claim as would not be extinguished, as if the defendant were in default of filing a plea in respect thereof, or may, on the application of either party, make such order as it seems meet.'

[8] Against this background I cannot agree with the court *a quo*'s interpretation of the remarks by Corbett J in the *Stassen* case. More particularly, 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 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 short, payment into court of the balance has nothing to do with *bona fides* at all and Corbett J did not say that it does. What Corbett J referred to was the result of a rather simple arithmetical exercise. If the counterclaim put up by the defendant is less than the plaintiff's claim, the defendant cannot be said, in this manner, to have put up a defence to the *whole* of the plaintiff's claim. If, however, the balance is covered by a payment into court, a defendant succeeds, in the words of Corbett J:

'[om] op *dié wyse* 'n *bona fide* verweer teen die *hele* hoofeis op te werp'.

(My emphasis.)

[9] What Corbett J did not deal with explicitly, was the question in the present case, namely whether as a matter of principle a counterclaim for a lesser amount could be regarded as constituting a '*bona fide* defence' to that part of the plaintiff's claim which the counterclaim, if successful, would extinguish. The dictates of logic referred to by Watermeyer J in

Weinkove and *Spillhaus & Co. Ltd.,* in my view, indicate that it could. The reasoning adopted by Watermeyer J was that if it is permissible for a defendant, by way of a plea, to raise the existence of an unliquidated counterclaim as a defence to the plaintiff's claim, then, it should be equally permissible to raise that defence by way of affidavit in summary judgment proceedings. Rule 22(4), and particularly the second part thereof, specifically allows the defendant to put up a counterclaim for a lesser amount as a defence to the extent of that amount. In the light of these provisions I can, as a matter of principle, see no reason why a defendant should not be allowed to raise the same partial defence by means of a counterclaim for a lesser amount in summary judgment proceedings. A defendant who fails to pay the balance into court runs the risk that summary judgment may be granted for the balance together with the costs resulting from the summary judgment application. In order to avoid this risk a defendant may therefore be well advised to follow the example of *Kroonklip Beleggings (Edms) Bpk* by paying the balance into court.

[10] In order to be successful in a defence, the defendant must, of course, comply with the provisions of rule 32(3)(b), which requires a full disclosure of the nature and the grounds of the counterclaim as well as

the material facts upon which it relies. Failure to comply with these provisions will not necessarily mean, however, that summary judgment will follow. In accordance with the provisions of rule 32(5), the court retains an overriding discretion to refuse summary judgment. This overriding discretion pertains not only to that part of the claim which would be extinguished by the counterclaim, but also to the balance of the claim. In short, the court retains a discretion to refuse the application for summary judgment in its entirety, even where a defence to only a part of the claim has been raised. Although not spelt out like that in the rather terse judgments in *Wilson v Hoffman and another (supra)* and *H I Lockhat (Pty) Ltd v Domingo (supra)* relied upon by the appellant, this overriding discretion may afford the explanation why summary judgment was refused in these cases, also in respect of that part of the plaintiff's claim which exceeded the amount of the counterclaim.

[11] With regard to the court's overriding discretion to refuse summary judgment even where the defendant's affidavit does not measure up to the requirements of rule 32(3)(b), it has been said that, in view of the extraordinary and stringent nature of the summary judgment remedy, that discretion may be exercised in a defendant's favour if there is doubt as to whether the plaintiff's case is unanswerable and there is a

reasonable possibility that the defendant's defence is good. (See eg *Maharaj v Barclays Bank Ltd* 1976 (1) SA 418 (A) 425H; *Tesven CC and Another v South African Bank of Athens* 2000 (1) SA 268 (SCA) 277H-J.) The reason why the remedy of summary judgment is referred to as 'stringent' and 'extraordinary' is because it effectively closes the door of the court on the defendant without affording an opportunity to ventilate the case by way of a trial. When the answer raised in the opposing affidavit is in the nature of a counterclaim instead of a plea, the position is, however, somewhat different. Even where summary judgment has been granted for that part of the claim that would be extinguished by the counterclaim, the defendant can still pursue the counterclaim by issuing summons in a separate action. Of course, summary judgment would deprive the defendant of a significant procedural advantage. But the fact remains that the doors of the court are not finally closed. Moreover, in the rule 22(4) situation where a counterclaim is raised as a defence in pleadings, the rule specifically affords the plaintiff an opportunity to apply for earlier adjudication of the claim. The court then has a discretion whether or not to postpone judgment on the claim in convention pending its decision on the counterclaim. (Regarding the exercise of this discretion, see eg *Truter v Degenaar* 1990 (1) SA 206 (T) 211E-F and *Consol Ltd v Twee Jongegezellen (Pty) Ltd* 2002 (2) SA 580 (C) 584J-

585J.) In summary judgment proceedings, the plaintiff has no opportunity to bring such application. Rule 32(2) expressly provides that the defendant has the last say. In *Cape Town Transitional Metro Substructure v Ilco Homes Ltd* 1996 (3) SA 492 (C) 501B-C it was held that an application for summary judgment cannot be regarded as an application for earlier adjudication of the plaintiff's claim under rule 22(4). Consequently, so it was held, the court's discretion envisaged by rule 22(4) does not arise in summary judgment proceedings. This line of reasoning loses sight of the provisions of rule 32(6) as well as the very fact that in summary judgment proceedings the plaintiff is deprived of the procedural benefit that rule 22(4) otherwise enables it to seek.. In these circumstances, I can see no reason why a court considering an application for summary judgment should not, in the exercise of its overriding discretion under rule 32(5), have regard to the different considerations that arise when the defence put forward is by way of a counterclaim as opposed to a plea.

[12] Against this background, I revert to the present appeal. As appears from the aforegoing, the reasoning of the court *a quo* which formed the basis of its judgment did not rest upon accurate analysis of general principle. Consequently, that reasoning cannot be upheld. This, however,

is not the end of the matter. The alternative argument raised on behalf of the plaintiff was that the defendant had failed to 'disclose fully the nature and grounds of [its counterclaim] and the material facts relied upon therefor', as required in terms of rule 32(3)(b). The evaluation of this argument requires a somewhat more detailed analysis of the particulars of claim and the defendant's opposing affidavit.

[13] According to the particulars of claim the plaintiff's claim of R1 260 829.18 was mainly for the purchase price of a chemical used for soil fumigation, called methyl bromide, which had been sold and delivered to the defendant over the period 9 May 2001 to 30 June 2002. All these sales were concluded pursuant to a written credit agreement ('the credit agreement') entered into between the parties on 9 May 2001 and were alleged to have been governed by 'conditions of sale' in the credit agreement.

[14] The defendant's opposing affidavit was deposed to by its sole member, Mr M D Koppenol. As already indicated, Koppenol did not dispute any of the material allegations in the particulars of claim. His answer, on behalf of the defendant, was formulated by way of a counterclaim. The affidavit is anything but a model of clarity and simplicity. The starting point of Koppenol's version appears to be a

written credit agreement in virtually the same terms as the one relied upon by the plaintiff, save that it was not concluded between the plaintiff and the defendant, but between the plaintiff and a company, Soil Fumigation Services (Pty) Ltd ('the company') and that it had been entered into on an earlier date, ie 29 January 2000. Koppenol also referred to another agreement between the plaintiff and the company which was concluded orally in May 2000. In terms of this oral agreement, so Koppenol contended, the plaintiff appointed the company as its sole distributor of methyl bromide in South Africa while the company undertook to buy this chemical exclusively from the plaintiff. For the sake of convenience, I shall refer to the oral agreement as 'the sole supplier agreement'. Further terms of the sole supplier agreement relied upon by Koppenol were:

(a) The plaintiff agreed to pay commission to the company on sales of methyl bromide to third parties.

(b) The plaintiff's mark-up would not exceed nine percent on the landed costs of the chemical.

(c) 'Landed costs' would include the purchase price paid by the plaintiff to its overseas suppliers as well as freight, clearing, forwarding, and other charges for which the plaintiff would be responsible.

(d) The plaintiff would at all times make full disclosure of the purchase

price and other charges paid by it so that the company could monitor these costs.

[15] As to how the defendant (ie the close corporation) came into the picture, Koppenol contended that:

'On or about the 9th May 2001, I advised [the plaintiff's representative] that [the company] would cease trading due to legal action pending against it and that all the business of [the company] would be taken over by [the defendant].'

And that:

'it was agreed that all agreements between [the plaintiff] and [the company] would be transferred to [the defendant] as well as the outstanding debits in [the plaintiff's] books and the outstanding credits in [the company's] book … Thereafter all business would be concluded between [the plaintiff] and [the defendant]. A new credit agreement was also entered into between [the plaintiff] and [the defendant].'

[16] The new credit agreement referred to by Koppenol is obviously the credit agreement relied upon by the plaintiff in its particulars of claim. Koppenol did not say why it was necessary for this new agreement to be entered into if all agreements between the plaintiff and the company had already been transferred to the defendant.

[17] From the outset, however, so Koppenol alleged, the plaintiff

reneged on its undertaking to disclose its costs and other charges. Consequently, so Koppenol continued, the company only realised at a much later stage that the plaintiff had exceeded the agreed mark-up of nine percent by a considerable margin. Koppenol also relied on a further breach by the plaintiff of the sole supply agreement, constituted by the fact that it sold methyl bromide directly to a client of the company.

[18] The amount of the counterclaim is estimated by Koppenol to be 'at least' R590 492.50. From his explanation as to how this estimate is arrived at, it appears that the counterclaim comprises three parts. The first part is for an amount of R499 792.57, which is said to be the aggregate of the estimated amounts by which the plaintiff exceeded its agreed mark-up of 9%. In this court the argument was raised on behalf of the defendant, for the first time, that although Koppenol's allegations under this heading were couched in the form of a counterclaim, they also constitute a defence to the plaintiff's claim. This new argument gave rise to difficulties of its own. As indicated, the amount of the plaintiff's claim is not denied by Koppenol. The absence of such denial can hardly be reconciled with an intended defence that in terms of their contract, the plaintiff was not entitled to the amount claimed. The counterclaim is for repayment of amounts paid *indebite* whereas the defence proposed by

the new argument is a denial of liability for amounts which had not yet been paid. The two cannot be equated merely because both are founded on allegations of overcharging by the plaintiff. I find it unnecessary, however, to dwell on these difficulties for too long. As will appear from what follows, it makes little difference to the overall evaluation of the case whether the complaint that plaintiff had been guilty of overcharging is considered as a defence or as part of a counterclaim.

[19] The second part of the counterclaim contended for by Koppenol is for sales commission in an estimated amount of R118 200, which the company is alleged to have lost during March 2001 when the plaintiff sold methyl bromide directly to one of the company's customers. The third part of the counterclaim is for loss of profit in the sum of R22 500, which the defendant allegedly suffered during April 2002, when, as a result of the plaintiff's overcharging, it was unable to finalise a sale of methyl bromide to a potential customer.

[20] Somewhat intriguing is the fact that the total amount of the counterclaim, ie R590 492.50, is R50 000 less than the sum of its three constituent parts. For this discrepancy there was no explanation on behalf of the defendant, either on affidavit or in argument. However, as appears from what follows, it is plain that the defendant's case is afflicted

by ailments of a far more serious kind.

[21] The defendant's claim for repayment of overcharges (which represents by far the largest part of its counterclaim) is founded on allegations which are decidedly in conflict with the provisions of the credit agreement relied upon by the plaintiff, more particularly, with the stipulation in clause 1 of the 'general conditions', that the purchase price of goods sold and delivered pursuant to the credit agreement would be determined by the plaintiff's 'current price list on date of delivery, unless otherwise agreed upon in writing'. The price structure relied upon by the defendant as the basis for its counterclaim is admittedly not based upon any list price. Having regard to the proviso in clause 1, such deviation could be relied upon only if embodied in a written agreement. The plaintiff's insistence that this proviso is valid and enforceable, is clearly supported by the decisions this court, eg in *SA Sentrale Graanmaatskappy Bpk v Shifren en andere* 1964 (4) SA 760 (A) and, somewhat more recently, *Brisley v Drotsky* 2002 (4) SA 1 (SCA). In order to overcome this critical impediment, the defendant's counsel relied on a letter by Koppenol to the plaintiff in which he referred to 'an agreement on a cost price and 9% mark-up'. This argument, however, soon proved to be unsustainable. The first difficulty was that, on a proper

interpretation of the letter, it does not purport to be the written manifestation of an agreement or even the recordal of the terms of an agreement. On the contrary, its stated purpose was to establish a recordal of Koppenol's unilateral understanding of what he described as an oral agreement which was (allegedly) entered into nine months before. Secondly, the letter is dated 26 March 2000. It therefore predated the credit agreement relied upon by the plaintiff which was entered into on 9 May 2001. In these circumstances, it is obvious that the letter cannot be construed as a written agreement to deviate from the provisions of the subsequent credit agreement. When this objection to the written agreement argument became apparent, the defendant's counsel changed direction by relying on the defence of rectification. Though this deserves some credit for ingenuity, it is clear that the remedy of rectification is not one which easily lends itself to a fallback position by way of afterthought. It is a settled principle that a party who seeks rectification must show facts entitling him to that relief 'in the clearest and most satisfactory manner' (per Bristowe J in *Bushby v Guardian Assurance Co* 1915 WLD 65 at 71; see also *Bardopoulos and Macrides v Miltiadous* 1947 (4) SA 860 (W) 863 and *Levin v Zoutendijk* 1979 (3) SA 1145 (W) 1147H-1148A). In essence, a claimant for rectification must prove that the written agreement does not correctly

express what the parties had intended to set out therein. (See eg *Meyer v Merchant's Trust Ltd* 1942 AD 244 at 253.) In the opposing affidavit there is no suggestion whatsoever of any common intention different from the one recorded in clause 1 of the credit agreement. Consequently, the argument based on rectification cannot succeed.

[22] 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). Moreover, according to Koppenol, this claim arose during a period which preceded the advent of the defendant and primarily vested in the company. How it came about that the claim was transferred to the defendant is not clear from the opposing affidavit. Koppenol's sole reference to such transfer was the one quoted (in para 15) above which recorded an agreement between the plaintiff and the company 'that all outstanding debits in the plaintiff's books and outstanding credits in the company's books' would be transferred to the defendant. Since it is plain that the claim under consideration does not fall in either of these categories, it had, on Koppenol's version, never been transferred to the defendant.

[23] The third part of the counterclaim, for the relatively small sum of

R22 500, was for an alleged loss of profit. Unlike the claim for lost sales commission, this claim, according to Koppenol, arose after the defendant entered into the picture on 9 May 2001. However, this claim is again so devoid of any factual foundation that it is impossible to determine whether it can be said to be *bona fide* or otherwise.

[24] In the light of the aforegoing, I find myself in agreement with the alternative argument raised by the plaintiff in this court, namely 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). See the classic exposition by Colman J on behalf of the full court in *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) 228B-H.

[25] 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 (in para 11 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, and in any event, a 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 mere conjecture or speculation. On the material before the court, there is in my view no reason to think that the defendant's counterclaim has any merit. For these reasons I believe that summary judgment was rightly granted for the whole amount of the plaintiff's claim.

[26] The appeal is dismissed with costs.

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FDJ BRAND
JUDGE OF APPEAL

Concur:

HARMS JA
CAMERON JA
MTHIYANE JA
HEHER JA