NOT REPORTABLE

IN THE SOUTH GAUTENG HIGH COURT OF SOUTH AFRICA

JOHANNESBURG

CASE NO: 14177/2011

DATE: 2011-07-29

In the matter between

CATAI TRANSPORT SOLUTIONS (PTY) LTD **APPLICANT**

and

AIM GROUP (PTY) LTD **RESPONDENT**

Rei vindicatio alternatively payment – specialised equipment sold and delivered – respondent's defence in nature of counterclaims – requirements to be satisfied to order to stay applicant's claim and allow respondent to prove counterclaims in action - failure to show bona fide sustainable counterclaims – judgment granted in favour of applicant.

J U D G M E N T

VAN OOSTEN; J: In this application the applicant seeks an order against the respondent, by way of a *rei vindicatio,* for the return of certain vehicles and machinery (the equipment), in the alternative payment of the amount allegedly owing to it by the respondent resulting from the sale of the equipment. As the matter progressed it became apparent that the respondent had

sold all the equipment contrary to the reservation of ownership clause in the credit agreement in terms of which the equipment was sold. Nothing, however, turns on this aspect as the applicant is persisting in its alternative claim for payment only. No prejudice has resulted from the applicant's election and it does not have any bearing on the costs of this application.

The facts of this matter are the following: the applicant manufactured and sold the equipment, consisting of certain specialised vehicles, for the respondent in terms of a written credit agreement that had been concluded between the parties. The applicant alleges that the respondent is in arrears with the payment of the invoiced amounts. The applicant, in order to prove the quantum of its claim, in the founding papers, relies on a certificate of balance which is provided for in the agreement, signed by a director and chief executive officer of the applicant. In addition thereto, the applicant has annexed copies of all relevant invoices to the founding affidavit.

The applicant concedes that the amount stated in the certificate of balance, in fact, is incorrect and a final reconciliation of the amounts due has been made in the replying affidavit, which is the amount now claimed. The respondent's version concerning the amount of its alleged indebtedness must, however, also be considered before a final determination on the quantum of the applicant's claim can be made. It is, therefore, first necessary to deal with the respondent's version, after which I will revert to the quantum of the applicant's claim.

This brings me to the defences raised by the respondent. In a nutshell the respondent, one the one hand, denies any indebtedness to the applicant and on the other, relies on a number of defences all in the nature of a counterclaim.

The approach that I accordingly propose to adopt in deciding this matter is firstly, to consider the applicant's claim, and then, secondly, to determine whether the respondent has

shown a *bona fide* sustainable counterclaim, which if proved at the trial, will at this stage justify a stay of the applicant's claim. It is common cause that the respondent's counterclaims are incapable of determination on the papers as they stand and that an order for the referral thereof to trial would have to follow. But, there is this prior hurdle that the respondent needs to overcome and that is whether the respondent has shown *bona fide* sustainable counterclaims. I accordingly turn to consider that aspect.

As a point of departure, the respondent faces one, in my view, insurmountable obstacle in showing a sustainable defence and counterclaim. It arises from certain email correspondence, annexed to the papers,, and is the following: On 4 October 2010 the group financial manager of the respondent (Johann Kruger) sent an email to applicant's debtors and creditors manager (May-Ann Volschenk). Before I deal with its contents it is important to bear in mind that the email was sent after all the invoices making up the applicant's claim, but for one or two, had been delivered to the respondent and furthermore, that it was sent in response to a request by the applicant's credit manager, dated 1 October 2010, which reads as follows:

> *"Johan,*
>
> *Môre, kan ek asseblief vra wanneer julle gaan betaal en wat die bedrag sal wees groot asb, indien jy dalk vir ons solank 'n remittance kan stuur van wat julle gaan betaal en dalk wanneer sal ons dit regtig waardeer groot asb.*
> *Sien asb julle staat weer aangeheg vir einde September.*
>
> *May-Ann Volschenk"*

I pause to mention that the statement annexed and referred to, shows a balance owing in the sum of R857 059,10. The response to this email reads as follows:

> *"Hi Mary-Ann,*
> *Hierby aangeheg is die rekonsiliasie van julle Witbank rekening. Die betalings is geskeduleer soos in aangehegte spreadsheet vervat. Ons beplan betaling van R127 908.00 die betaling sal die week gedoen*

word. Ek het nog nie 'n staat, fakture en bewys van aflewering(s) julle Heidelberg rekening ontvang nie. Stuur asseblief dringend aan.
Groete
Johann Kruger."

The response is significant. It is irreconcilable with the defences now relied upon. In the answering affidavit, the said Kruger explains the email as follows:

"Annexure "K" to the applicant's founding affidavit (ie the email referred to above) does not purport to be an acknowledgement of debt. It merely confirms that I reconciled the invoices received from the applicant with the invoices reflected on the respondent's accounting system." *t*

I have difficulty in reconciling the explanation with the contents of the email. The email expressly conveys an undertaking to pay an immediate fixed amount as well as further payments in terms of the spreadsheet. If this had been a mere reconciliation as contended for, one would plainly not have expected the spreadsheet setting out scheduled payments, to have been annexed to the email. But it does not end there.

In the respondent's answering affidavit, Kruger, says nothing concerning the undertaking or the proposed payments referred to in his email. The offer of payments is clearly irreconcilable with either the version now proffered by the respondent or, as will become apparent, the counterclaims now relied upon. The email undoubtedly conveys an acknowledgement of indebtedness coupled with an offer to pay in instalments. The respondent's general stance, showing an intention to pay its indebtedness, already arose in an earlier email, dated 17 September 2010, in which a request was made for the increase of the respondent's credit limit with the applicant, from R350 000 to R1million, for the reason "sodat dit die uitstaande saldo sal dek".

The main counterclaim relied upon by the respondent is that certain items of the equipment sold and delivered to it, were defective. The respondent states that the costs of rectifying the defects amounted to some R125 000 in support of which it has annexed copies

of a series of invoices to the answering affidavit. A mere superficial examination of the invoices reveals a number of suspicious aspects. Some of them were made out as invoices to third parties (it is not explained by the respondent why this is so or how these were further dealt with) and others, appearing on the respondent's own letterhead, reflect grossly inflated amounts, including so-called mark-ups of between 37% and 487%. But it goes further.

There is nothing in the papers before me to show that the respondent communicated any of the alleged defects at any stage to the applicant. Furthermore, the following apparent improbability arises: assuming an amount of more than R164 000, according to the respondent’s invoices, having been expended in respect of alleged repairs of the defects by the time the October email was sent, one would have expected some reference to this in the email. It is plainly inconceivable that the respondent would not have raised this issue as well as the other defences now relied upon, in what it now prefers to call its "reconciliation" in the October email, which it must be remembered, pertinently addressed the payments of amounts that were due.

The further counterclaims relied upon by the respondent are an alleged loss of turnover, the applicant's breach of a confidentiality agreement, the applicant's copying of a design by "reverse engineering" and finally, late delivery of certain orders. None of these, however featured at any time in the interactions between the parties, from May 2010 to November 2010. Counsel for the respondent was unable to point to any reference to any of the counterclaims in any of the documents exchanged between the parties. On the contrary, at the stage when the alleged damages now relied upon for purposes of the counterclaims, had already occurred, the respondent, in the face thereof, offered to pay the full amount claimed by the applicant. This is my view seriously compromises the *bona fides* of the alleged

counterclaims. The allegations in regard to each of the alleged counterclaims reveal a glaring absence of material allegations to sustain the defences and are in general, vague, sketchy and argumentative. They lack substance and I am left with the inevitable impression that they were created much by way of an afterthought as a smokescreen in order to delay the inevitable, which is payment of the amount due to the applicant. For these reasons I am driven to the conclude that the respondent has failed to meet the first threshold of showing *bona fide* counterclaims.

The finding of course does not disentitle the respondent from pursuing its alleged claims against the applicant, but I am not satisfied that those justify a stay of the present proceedings in order to allow the respondent to prove its counterclaims. It follows that the applicant must succeed in its claim.

Reverting to the quantum of the applicant's claim, which as I have mentioned, was shrouded in some uncertainty. The applicant has disavowed further reliance on the certificate of balance. The reconciliation the replying affidavit shows that the applicant in its re-calculation of the amount due, has deducted certain credits in favour of the respondent for it to arrive at the final amount of R781 067,37. Counsel for the applicant, very properly asked for judgment in this amount, or in the alternative for the lesser amount reflected in the applicant's statement annexed to the October email.

In my view, there are no reasons for doubting the accuracy of the applicant's calculations. Nothing has been put before me to show that any of the applicant's calculations (except for the credits I have referred to) were at any time wrong. The respondent always trusted the applicant's calculations and in fact offered to pay the amount as had been calculated by the applicant. The certificate of balance, merely failed to take into account

certain credits. That in my view is of no moment. In view thereof there is no reason for not accepting the amount of R781 067,37 as having been duly proven.

In the result I grant judgment in favour of the applicant, against the respondent, for:

1. Payment of the sum of R781 067,37.

2. Interest on the amount in paragraph 1 above at the rate of 15,5 percent per annum from 6 April 2011 to date of final payment.

3. Cost of the application.

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FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

COUNSEL FOR THE APPLICANT	***ADV X STYLIANO***
APPLICANT'S ATTORNEYS	***RAMSAY WEBBER***
COUNSEL FOR THE RESPONDENT	***ADV EB CLAVIER***
RESPONDENT'S ATTORNEYS	***GILDENHUYS LESLIE INC***
DATE OF HEARING	***28 JULY 2011***
DATE OF JUDGMENT	***29 JULY 2011***

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