IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

WESTERN FLYER CYCLES (PTY) LTD ..... Appellant

and

TELTRON (PTY) LTD ..... Respondent

Coram: JOUBERT, VAN HEERDEN, NESTADT, KUMLEBEN JJA

et FRIEDMAN AJA.

Hearing: 9 November 1989

Delivered: 1 December 1989

J U D G M E N T

JOUBERT JA:

This is an appeal on two questions of law submitted to this Court in the form of a special case in terms of Rule 5(4)(i) of the Rules of this Court, leave to appeal having been granted by the Court a quo.

For the purposes of this appeal it is necessary to summarize in brief the relevant background facts of the case. In doing so it will be convenient to refer to Western Flyer Cycles (Pty) Ltd as the "appellant" and to the respondent as "Teltron (Pty) Ltd".

During September 1982 at Johannesburg the appellant entered into a verbal agreement, which it mistakenly believed it had entered into with Canoco (Pty) Ltd, in regard to two copier machines. The precise nature and terms of the agreement are not relevant to the present case save for stating that a warranty was furnished to the appellant according to which the copier machines would provide copies of clearly legible and high quality. The two copier

machines were delivered to the appellant during March 1983 but the latter claimed that they did not conform to the warranty. During March 1984 the appellant instituted an action in the Witwatersrand Local Division against Canoco (Pty) Ltd for payment of R20 344-38 for breach of the warranty. At a pre-trial conference held on 22 October 1985 attorney Richard Treisman disclosed that he had at all relevant times represented both Canoco (Pty) Ltd and Teltron (Pty) Ltd and that the latter had entered into the verbal agreement with the appellant. On that date the appellant for the first time became aware of the fact that it had apparently contracted with Teltron (Pty) Ltd. Acting on this information the appellant obtained a postponement of the trial on 5 November 1985 for an opportunity to apply for the joinder of Teltron (Pty)Ltd. The application for the joinder of Teltron (Pty) Ltd was served on 20 November 1985 at the registered address of Teltron (Pty) Ltd which was also the registered address of Bromain Trading (Pty) Ltd.

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On 4 December 1985 a power of attorney was filed by Teltron (Pty) Ltd to defend the appellant's action. It was accompanied by a resolution adopted by its Board of Directors to defend the action.

On 9 December 1985 attorney Richard Treisman informed the appellant's attorneys that Teltron (Pty) Ltd did not intend to oppose the application for its joinder. The following day an order was granted in the Witwatersrand Local Division joining Teltron (Pty) Ltd as second defendant in the appellant's action. Pleadings were then exchanged between the parties and duly filed. The plea of Teltron (Pty) Ltd was filed on 21 February 1986. No mention was made therein of the fact that the appellant's claim had become compromised.

I shall in due course explain the matter of compromise with reference to Bromain Trading (Pty) Ltd.

It is appropriate to mention at this stage the rather strange history of the name of Teltron (Pty) Ltd

which, unbeknown to the appellant until 10 September 1987, was changed from time to time in an almost chameleon-like manner viz.

1. On 24 March 1950 Saul Pincus (Pty) Ltd was incorporated which changed its name on 10 November 1966 to Teltron (Pty) Ltd.

2. On 28 January 1983 Teltron (Pty) Ltd changed its name to Teltron Holdings (Pty) Ltd which traded at all relevant times as "Teltron".

3. On 26 September 1984 Teltron Holdings (Pty) Ltd changed its name to Bromain Trading (Pty) Ltd which traded at all relevant times as "Teltron".

4. On 7 May 1986 Bromain Trading (Pty) Ltd changed its name back to Teltron (Pty) Ltd and continued to trade as "Teltron".

I now turn to refer to the compromise proceedings involving Bromain Trading (Pty) Ltd. By October

1985 the latter was liable to be wound up under the provisions of the Companies Act 61 of 1973 (the"Act"). Macsteel Commercial Investments (Pty) Ltd as creditor submitted on 30 October 1985 an offer of compromise (the "Bromain offer of compromise") in terms of sec 311(1) of the Act. On 5 November 1985 Bromain Trading (Pty) Ltd applied ex parte in the Witwatersrand Local Division for an order directing meetings to be held of its creditors to consider the Bromain offer of compromise. Such meetings were held on 3 December 1985. The Bromain offer of compromise was sanctioned by an order of Court on 17 December 1985 and thereafter duly registered in terms of sec 311(6) of the Act. The appellant was, however, at all relevant times unaware of the terms of the Bromain offer of compromise, its submission, the meeting of the creditors and its sanction by an order of Court. Nor was the appellant aware of the fact that it was a creditor of Bromain Trading (Pty) Ltd.

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At a further pre-trial conference held on 10 September 1987 Teltron (Pty) Ltd for the first time advised the appellant of the existence of the Bromain offer of compromise. Teltron (Pty) Ltd also indicated to the appellant that if the trial Court found that it was a creditor of the appellant then the latter's claim was compromised by the Bromain offer of compromise.

On 15 September 1987 Teltron (Pty) Ltd served on the appellant a notice of its intention to amend its plea in order to provide for a defence that the appellant's claim against it had become extinguished by the terms of the Bromain offer of compromise. On the following day Teltron (Pty) Ltd filed another power of attorney which "ratifying and adopting any action already taken by my Attorney in defending this action, and further authorising my Attorney to continue defending the action instituted against Teltron (Pty) Ltd by the Plaintiff." The appellant's reaction was to give on

17 September 1987 notice of its objection to the proposed amendment.

When the trial of the appellant's action commenced on 18 September 1987 in the Witwatersrand Local Division before WEYERS J Mr Joseph on behalf of Teltron (Pty) Ltd moved the proposed amendment of the plea without any supporting affidavits. Mr Kruger on behalf of the appellant opposed the proposed amendment. WEYERS J allowed the amendment, granted a postponement of the trial and ordered Teltron (Pty) Ltd to pay the wasted costs on an attorney and client scale. Since the granting of the amendment of the plea forms the basis of the first question of law raised in the stated case I shall revert to it more fully hereinafter.

Teltron (Pty) Ltd on 25 January 1988 amended its plea in terms of the order of court, dated 18 September 1988. On 3 February 1988 the appellant filed its replication to the amended plea. The replication raised the defence

of estoppel, viz that Teltron (Pty) Ltd was estopped from relying on the Bromain offer of compromise as a defence to the appellant's claim.

The trial of the action on the merits was heard by VAN SCHALKWYK J in the Witwatersrand Local Division. During the course of the trial Canoco (Pty) Ltd was permitted to withdraw from it. The trial then proceeded against Teltron (Pty) Ltd as sole defendant. Schmal and Campbell-Russel testified as expert witnesses on behalf of the appellant and Teltron (Pty) Ltd respectively. On 25 February 1988 VAN SCHALKWYK J held that the appellant had succeeded in proving the warranty and a breach thereof by Teltron (Pty) Ltd. The appellant had failed, however, to prove that Teltron (Pty) Ltd was estopped from relying on the Bromain offer of compromise which had compromised the appellant's claim. He accordingly granted absolution from the instance. Teltron (Pty) Ltd was ordered to pay the appellant's costs up to and including 17 September 1987 whereas the appellant was to pay the costs of Teltron (Pty) Ltd as

from 17 September 1987 until 25 February 1988.

The two questions of law raised in the stated case are:

1. Whether or not Teltron (Pty) Ltd was entitled to the amendment of its plea granted by WEYERS J.

2. Whether or not Teltron (Pty) Ltd was estopped from raising the offer of compromise as a defence against the appellant's claim.

As regards the first question of law I have already stated supra that on 15 September 1987 Teltron (Pty) Ltd served on the appellant a notice of its intention to amend its plea while the appellant on 17 September 1987 gave notice of its objection to the proposed amendment. The hearing of the trial had been set down for 18 September 1987 before WEYERS J. At the commencement of the hearing Mr Joseph on behalf of Teltron (Pty) Ltd moved the proposed amendment of the plea without supporting affidavits or other admissible evidence. The proposed amendment

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did not relate to the mere formal corrections of obvious mistakes in the plea. It sought the introduction of a far-reaching defence. An inordinate delay of more than 18 months had occurred since Teltron (Pty) Ltd filed its plea on 21 February 1986. There had been ample opportunity for an amendment of the plea before the notice of the proposed amendment was given on 15 September 1987 and before commencement of the hearing of the trial on 18 September 1987. In the circumstances it was incumbent on Teltron (Pty) Ltd, in seeking the indulgence to amend its plea, to explain the apparent unreasonable delay in making the application for the proposed amendment. All Mr Joseph did was to suggest that it was due to an oversight on the part of Teltron (Pty) Ltd. That was not good enough. Moreover, it was hearsay. There was no admissible evidence adduced in support of the application to explain the undue delay on the part of Teltron (Pty) Ltd. It follows that WEYERS J failed to exercise a proper discretion in the circumstances by

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allowing the proposed amendment. The correct order would have been to have dismissed the application with costs. That is the answer to the first question of law raised in the stated case. In view of this answer it becomes unnecessary to consider the second question of law raised in the stated case, since the amendment of the plea, which sought to introduce the Bromain offer of compromise as a defence against which the estoppel was directed, should not have been granted.

It is common cause that the amount of R20 344-38 constitutes liquidated damages.

When the application for leave to appeal to this court was granted by VAN SCHALKWYK J, costs of the application were ordered to be costs in the cause. At the instance of the appellant, who employed two counsel for the purpose of the application for leave to appeal, VAN SCHALKWYK J reserved the question involving the costs of two counsel for determination by this Court. In this Court reasons have not

been advanced to justify the costs of two counsel in the event of the appeal succeeding.

In the result the following orders are granted:

1. The appeal succeeds with costs. Such costs are to include the costs of the application for leave to appeal to this Court on the basis of one counsel only.

2. The following order is substituted for the order, dated 18 September 1987, amending the respondent's plea:

"The application is dismissed with costs."

3. The following order is substituted for the order of the Court a quo:

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"(a) Payment of the sum of R20 344-38

(b) Interest on the said sum of R20 344-38

a tempore morae

(c) costs of suit, including the qualifying fees of the witness Schmal."

C. P. JOUBERT JA

VAN HEERDEN JA

NESTADT JA Concur

KUMLEBEN JA

FRIEDMAN AJA