

SOUTH AFRICA / JUDGMENT

Bester v Labella Imports CC (1444/2011)

[2011] ZAFSHC 105 (24 June 2011)

[2011] ZAFSHC 105**COURT**

Free State High Court, Bloemfontein

BEFORE

E. M. Kubushi

CASE / FILE NUMBER

1444/2011

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FREE STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC OF SOUTH AFRICA

Case No.: 1444/2011

In the matter between:

LEON CARL BESTERApplicant

and

LABELLA IMPORTS CCRespondent

HEARD ON: 17 APRIL 2011

DELIVERED ON: 24 JUNE 2011

KUBUSHI, AJ

INTRODUCTION

[1] This application was before the court on an urgent basis and was dismissed for lack of urgency. The applicant, inter alia, prayed for an order in terms of the following:

1.1 That the sheriff of the court be authorised and ordered to attach a blue Ford Mustang Shelby GT500 Supersnake (the motor vehicle) in the possession of the respondent or wherever it may be found and to hand it over to the applicant;

1.2 That the respondent be ordered, in case the motor vehicle is not in his possession or control, or if not found by the sheriff not to be in his possession or control, to inform the sheriff of where the said motor vehicle is and the particulars of the person who is in possession thereof;

1.3 That the applicant be ordered to pay an amount of R715 000 to the respondent within 14 days after the delivery of the motor vehicle to the applicant;

1.4 That the respondent be ordered to pay the costs of this application;

1.5 Further and/or alternative relief.

[2] The respondent opposed the application on the following basis:

2.1 That the applicant failed to join the South African Revenue Service (SARS) as a party to the proceedings. According to the respondent the amount which the applicant had tendered was due and payable to SARS and such payment was a condition precedent for the release of the motor vehicle.

2.2 That as the applicant was in fact seeking specific performance of the agreement concluded he failed to make out a case for the terms of the agreement to encapsulate it. The applicant failed to allege in his founding affidavit that the parties had agreed that the applicant would be afforded 14 days after the date of delivery of the motor vehicle to pay the tax to the respondent or to anyone.

2.3 The application is premised on the postulate that the applicant is the owner of the motor vehicle. The respondent argued that it is not so, as he acted as a consignee when he imported the motor vehicle and did not import the motor vehicle in the name of the applicant as his agent.

The application has now been brought in the normal way before this court.

[3] In a letter dated 4 April 2011, which is three days after the hearing of the urgent application, the respondent's attorneys informed the applicant's attorneys that the vehicle has been sold. The applicant's attorneys in response to that letter requested, in a letter dated 7 April 2011, the respondent's attorneys to provide them amongst others, with the particulars of the purchase agreement of the motor vehicle and the particulars of the motor vehicle. In a letter to the applicant dated 7 April 2011 the respondent refused to provide the applicant with the requested information.

[4] On the 10 June 2011 the applicant filed a replying affidavit. The replying affidavit raised issues which placed some of the facts in the respondent's

opposing affidavit in dispute. As a result thereof applicant applied for an order referring the factual disputes to trial. The main issues raised which were in dispute were:

4.1 Who is responsible for duties, storage and taxes;

4.2 Who repudiated the agreement;

4.3 Who is the owner of the motor vehicle – did the respondent act as an agent of the applicant or as consignee.

- [5] In addition to the factual disputes the applicant's replying affidavit also raised a new and further relief whereby the respondent should be ordered to provide the applicant with the following information: the exact details of the vehicle, as well as its whereabouts; including but not limited to, the name of the person or entity to whom the vehicle was sold, the date on which the vehicle was sold, where delivery took place, to whom on behalf of the third party (purchaser) delivery was effected, the physical address of delivery and the contact particulars of the third party and/or the third party agent.
- [6] The respondent's counsel on the other hand, argued for the dismissal of the application and based his contention on two grounds. Firstly, that since the respondent had disposed of the motor vehicle there was no longer any dispute between the parties and the application has become mute. Secondly, that the respondent's replying affidavit raised a new cause of action of a mandamus – requesting the court to order the respondent to provide the applicant with certain information. The applicant, as per the respondent's counsel, failed to comply with the requirements of the mandamus.

At the hearing of the application the applicant was represented by Adv Gilliland and the respondent by Adv Grobler. Both counsels addressed me only on the issues stated in paragraphs 3 – 4 supra.

ISSUES

- [7] I now have to determine whether or not the disposal of the motor vehicle by the respondent rendered the application mute, and if not, whether there are factual disputes in this matter that will necessitate the referral of this matter to trial. I also have to decide whether or not the respondent should be compelled to furnish the applicant with the information as set out in paragraph five supra.

APPLICANT HAS NO CLAIM AGAINST THE RESPONDENT

- [8] The respondent's counsel contended that the disposal of property to another person was a complete defence and as such the disposal of the motor vehicle by the respondent rendered the applicant's claim mute. He argued that a claim can only be made against a person who is in possession. He referred me in this regard to the case of *LEAL & CO V WILLIAMS* 1906 TS 554 and to *AMLER'S PRECEDENT OF PLEADINGS* 5ed p409.
- [9] The appellant's counsel in counter argument stated that there is no where in the papers where it is stated that the vehicle has been sold. According to him, the respondent was being dishonest and he found it improbable that she was able to sell the vehicle in two days time. He contended further that this aspect had not become mute because the applicant had put the right to dispose of the motor vehicle in dispute. According to him, this was a factual dispute that must be referred to trial.

[10] In considering this aspect I assumed that the motor vehicle was disposed of. The decided case which the respondent's counsel referred me to, in my opinion, did not come to the assistance of the respondent. According to the judgment in that case, for a disposal of possession to be a complete defence it must be a bona fide disposal. In the instance, my opinion is that, the disposal of possession by the respondent could not have been bona fide since at the time of the disposal there was a dispute. The applicant further submitted that the respondent acted dishonestly in disposing the motor vehicle well knowing that there was a pending action in respect thereof. I agree with this submission. The respondent's disposal of the motor vehicle with the full knowledge that the applicant was claiming delivery thereof was, in my view, mala fide. In PHILIP ROBINSON MOTORS (PTY) LTD V NM DADA (PTY) LTD 1975 (2) SA 420 (A) case wherein the applicant also claimed delivery of a motor vehicle, the court at 428C held that the respondent acted mala fide in disposing of the motor vehicle whilst being aware of the applicant's resolute and persistent claim.

[11] The court at 428B held also that:

"if respondent had been bona fide, it would have been a simple and reasonably prudent precaution, in view of all that had gone before,

to telephone the appellant and ask whether the coast was clear: ..."

Similarly, in the instance, the respondent should have done the same. The respondent was aware that the applicant was claiming delivery of the motor vehicle and the applicant had even tendered payment of the outstanding taxes. Despite all that, she sold the motor vehicle without any reference to him. My finding on this aspect is that the disposal of the motor vehicle does not render the application mute and prima facie does not provide a complete defence as suggested by the respondent's counsel.

REFERAL TO TRIAL

[12] The applicant's counsel, submitted that factual disputes have arisen which have the effect that the application cannot be properly decided on affidavit. He contended that such disputes arose after the respondent filed her opposing affidavit. According to counsel, the disputes of fact arose in respect of the following issues:

12.1 The total contract price. The applicant contended that the amount of R735 000 was the total contract price inclusive of all taxes. The respondent, according to the applicant, falsified an e-mail (Annexure "LMB1") dated 23 April 2010 which the respondent alleged it informed the applicant about the payment by him of the extra things like demurrage, duties and taxes. According to the applicant's

counsel the e-mail that the applicant received from the respondent bearing the same date and time of delivery, did not have this extra information;

12.2 The ownership of the motor vehicle. The applicant contended that the respondent had no right to sell the motor vehicle as he was the owner of the motor vehicle. He maintained that the respondent acted as his agent when acquiring the motor vehicle. The respondent argued that she was the owner of the motor vehicle and was therefore entitled to dispose of it. According to her, when acquiring the motor vehicle, she acted

as a consignee and not as an agent of the applicant;

12.3 Cancellation of the agreement. The appellant submitted that the respondent had no right to cancel the contract and to sell the motor vehicle. The respondent argued that the contract had been validly cancelled and that the contract between the parties had clearly contemplated the cancellation of the contract.

[13] The respondent's opposition to refer the application to trial is contained in paragraph 6 *supra*.

[14] I have already concluded that the disposal of the motor vehicle by the respondent does not render this application mute. My view on the request for a mandamus by the applicant is that, this is a separate cause of action which must be dealt with separately from the main application. The application does not turn on it and I will deal with it later. Based on my conclusions in paragraph 14 above, I am therefore satisfied that the issues raised by the applicant in paragraph 12 above, are indeed factual disputes which cannot be resolved on the papers before me. Where facts are in dispute the court has a discretion as to the future course of the proceedings. Rule 6 (5) (g) of the Uniform Rules of Court provides that:

"Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as to it seems meet with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the foregoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for him or any other person to be subpoenaed to appear and be examined and cross examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise."

[16] The sub-rule sets out three different courses which the court may adopt: it may dismiss the application with costs or order the parties to go to trial or order oral evidence in terms of the rules. The court may dismiss an application if the applicant should have realised when launching the application that a serious dispute of fact, incapable of resolution on papers, was bound to develop. See *ROOM HIRE CO (PTY) LTD v JEPPE STREET MANSIONS (PTY) LTD* 1949 (3) SA 1155 at 1168. I am satisfied with the applicant's counsel's explanation that the applicant could not reasonably have foreseen that a serious dispute of fact, incapable of resolution on the papers was bound to develop. He contended that at the time when the application was moved the applicant had no knowledge of the extra information contained in annexure "LMB 1" and also that at that time the respondent had not sold the motor vehicle. My view is that I cannot at this stage dismiss the application but must refer it for viva voce evidence.

[17] In the exercise of its discretion under the sub-rule the court must select the most suitable method of employing viva voce evidence for the determination of a dispute. See ROOM HIRE CO (PTY) LTD v JEPPE STREET MANSIONS (PTY) LTD at 1162 above. In the instance, the applicant requested an order referring the matter to trial and the issues to be referred to trial have been defined as appears from paragraph 12 above. There being no reason before me to persuade me otherwise I conclude that this application must be referred to trial.

REQUEST FOR INFORMATION

[18] The applicant argued that the respondent has consistently failed to provide the applicant with confirmation that the motor vehicle had been imported, the whereabouts thereof and the particulars of the motor vehicle; including the relevant references and source documents pertaining to the payable taxes. According to him there is no reason why the respondent should refuse to divulge the particulars of the purchaser of the motor vehicle to him. He relied on section 32 (1) (b) of the Constitution and section 50 of the Promotion of Access to Information Act, Act 2 of 2000, as the legislation that established his right to the information he required.

[19] Section 32 (1) (b) of the Constitution provides that everyone has a right of access to any information that is held by another person and that is required for the exercise or protection of any rights. Section 50 of the Promotion of Access to Information Act provides that a culture of transparency and accountability in, amongst others, private bodies should be fostered by giving effect to the right to access to information and the exercise and protection of rights should, by granting effective access to information, be actively promoted. Being an existing juristic person the respondent is a “private body” as defined in section 1 of this Act.

[20] The applicant contended further that in the event the matter is referred to trial, it will be necessary for him to join the purchaser of the motor vehicle to these proceedings and, obtain an order preventing the dissipation and/or encumbrance of the motor vehicle pending finalisation of the trial.

[21] According to the respondent’s counsel the applicant is now applying for a mandamus. To do so, the applicant must satisfy the requirements of a mandamus, namely, that:

21.1 he has a clear right to claim this relief from the respondent;

21.2 an injury was actually committed or reasonably apprehended; and

21.3 there is no similar protection by any other remedy.

[22] He submitted that the applicant has not satisfied any of the requirements in that:

22.1 the applicant has not proffered, not even in the replying affidavit, any evidence as to any right entitling him to the information. He contended that the Promotion of Access to Information Act, on which the applicant relied for a statutory right to information as being of no assistance to the applicant at this stage. The applicant must first comply with the requirements of the Act, and if he is not successful, he can then approach the court.

22.2 the applicant failed to indicate to the court what irreparable harm he will suffer should the court fail to come to his aid. He maintained this as being due to the fact that the respondent had already provided the applicant with the whereabouts of the motor vehicle by disclosing that it was at City Deep.

22.3 there were vast alternative remedies at the disposal of the applicant which he failed to follow before approaching court for relief. According to him the Promotion of Access to Information Act, enquiries at the registering and licensing authorities are some of the avenues which are available to the applicant to find this information.

[23] I agree with the submissions by the respondent's counsel, the applicant is applying for a mandamus and for him to succeed in his request for this order he must show on the papers that on a balance of probabilities he has a clear right, that his apprehension of damage to that right being caused by the respondent's acts is a reasonable apprehension in the circumstances and that no other adequate remedy is available. The court in ALLIANCE CASH & CARRY (PTY) LTD V COMMISSIONER SOUTH AFRICAN REVENUE SERVICE 2002 (1) SA 789 (TPD) at 795I – J stated as follows:

“It must be borne in mind that the appellant in this matter applies for mandamus, ie mandatory interdict. The applicant must therefore establish a clear right, an injury actually committed or reasonably apprehended and the absence of similar protection by any other ordinary remedy (Setlogelo v Setlogelo 1914 AD 221 at 227)”

[24] In my view the applicant failed to establish each of these requirements. Although the applicant had in terms of section 32

(1) (b) of the Constitution and section 50 of the Promotion of Access to Information Act as quoted in paragraph 19 above, established his right to the information required, he however failed to prove to this court a clear right which he seeks to protect. Whether the applicant has a right is a matter of substantive law and whether that right is clearly established is a matter of evidence. In order to establish a clear right the applicant had to prove on a balance of probabilities that right which he seeks to protect. There is no evidence to that effect before me. See CRYSTAL HOLDINGS (PTY) LTD V THE REGIONAL LAND CLAIMS COMMISSIONER

[2008] 1 All SA (N) at 260g.

[25] The applicant has shown no actual injury committed or a reasonable apprehension of injury as there is no such evidence before me. The applicant must have proven some other act actually done showing interference with his right or a well grounded apprehension that acts of the kind will in future be committed by the respondent. See JONES & BUCKLE 9ed Volume 1 at p93 and CRYSTAL HOLDINGS (PTY) LTD V THE REGIONAL LAND CLAIMS COMMISSIONER supra.

[26] The applicant has other remedies available to protect his alleged rights – the procedure prescribed in terms of the Promotion of Access to Information Act, is one such procedure as stated by the respondent’s counsel. In the ALLIANCE CASH & CARRY (PTY) LTD case supra, Spoelstra J at 795 when considering the case of VAN NIEKERK V PRETORIA CITY COUNCIL 1997 (3) SA 339 (T), that was referred to him in argument, stated as follows:

“I do not understand this statement to convey that a party to legal proceedings has at all times free access to this Court as soon as he maintains that in terms of the Constitution he has a right to information from the State.”

Spoelstra J, went further to say at 793J:

“Had the appellant availed itself of the remedies, the present proceedings would in all probability have been unnecessary and could have been avoided.”

[27] In my view, the applicant adopted a wrong procedure to access the information from the respondent. His counsel conceded as much when he submitted to this court that if he had been responsible for the drafting of the papers he would have applied for an interim relief. Chapter 3 of Part 3 read with Chapter 2 of Part 4 of the Promotion of Access to Information Act sets out a detailed procedure which must be followed to access information in the records of private bodies. This is the procedure that the applicant ought to have followed. Under the circumstances I find myself constrained to can grant this order.

COSTS

[26] The applicant prayed that the respondent be ordered to pay the costs of the application. The respondent on the other hand prayed for an order against the applicant on an attorney and client scale. It is trite that the costs of the suit be awarded to the successful party. In the instance the judgment is substantially in favour of the applicant. The court has however a discretion in awarding the costs. Its discretion is wide, unfettered and equitable. See INTERNATIONAL EXPORTS (PTY) LTD V FOWLES 1999 (2) SA 1045 (SCA). My view is that the costs of this application should be determined at the trial.

ORDER

[27] In the circumstances I make the following order:

IN RESPECT OF THE ORDER FOR REFERRAL TO TRIAL

27.1 The applicant is ordered to proceed by way of trial for the enforcement of his claim.

27.2 The notice of motion shall stand as a simple summons.

27.3 The opposing affidavit shall stand as a notice of intention to defend.

27.4 The applicant shall deliver a declaration to the respondent within four weeks from the date of this order.

27.5 The Uniform Rules dealing with further pleadings, discovery and the conduct of trials shall thereafter apply.

IN RESPECT OF THE ORDER FOR THE REQUEST OF INFORMATION

27.8 The order is dismissed.

27.9 Costs of the application to be determined at the trial.

E. M. KUBUSHI, AJ

On behalf of the applicant: Adv. J. G. Gilliland

Instructed by:

De Klerk & Marais Inc

BLOEMFONTEIN

On behalf of the respondent: Adv. S. Grobler

Honey Attorneys

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Prepared on 10 October 2026 · Esheria