

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 2135/2013

In the matter between:-

FOLOTSI TRANSPORT CC

Applicant

and

A J SCHOLTZ t/a A & E LOGISTICS

Respondent

HEARD ON:

6 JUNE 2013

DELIVERED ON:

11 JUNE 2013

JUDGMENT

MOCUMIE, J

[1] The applicant, Folotsi Transport CC approached this Court on 31 May 2013 on an urgent basis for the return of a Nissan diesel truck which belongs to it. Mr Moeketsi Billy Folotsi is the owner of the applicant. This application came before **Mhlambi AJ** without prior service or notice to the respondent. On the same day **Mhlambi AJ** granted a rule *nisi* ordering the respondent to return the truck immediately to the respondent. The rule *nisi* was returnable on 27 June 2013.

[2] On 4 June 2013 the respondent filed a notice in terms of Rule 6(12)(c) for reconsideration of the application and

simultaneously a notice that the return date would be anticipated in terms of Rule 6(8) of the Uniform Rules of Court on 6 June 2013. On 4 June 2013 after hearing counsel for both parties, I amended the order granted by **Mhlambi AJ** to direct that the truck be kept by the Sheriff of this Court pending the finalisation of the main matter between the parties.

- [3] On 6 June 2013 the parties argued the matter before me. In its opposing papers, i.e. opposing affidavit and supplementary opposing affidavit, the respondent alleged that there was an agreement between the parties that entitled it to the use and possession of the truck. The respondent further contended that the rule *nisi* should be discharged because:
- (a) The applicant failed to disclose certain material facts to the Court when it launched the application on an *ex parte* basis.
 - (b) The respondent's version, applying the approach as set out in **Plascon-Evans Paint Ltd v Van Riebeeck Paints (Pty) Ltd** 1984 (3) SA 623 (A) at 634 as is practice in proceedings of this nature, was more probable.
- [4] It is common cause that the applicant represented by Mr Folotsi and the respondent represented by Mr Albrecht Johannes Scholtz concluded an oral agreement in November 2012 in which the applicant placed the truck at the disposal

of the respondent for use in the course of his services in the transportation of goods and materials in certain terms and conditions.

- [5] The applicant alleged that the respondent was to use the vehicle for a trial period of one month, it being anticipated that the parties might extend the usage period if the parties so agreed. The remuneration payable by the respondent for the use of the truck will be calculated according to the kilometers covered over the said period. The respondent will be responsible at his own costs to maintain the truck during the period of use and ensure that it operated within the parameters of the law; and should the respondent breach any of the terms and conditions set out, the applicant will be entitled to cancel the agreement and repossess the truck.
- [6] The applicant further alleged that the truck was delivered to the respondent on 1 December 2012. After a month Mr Folotsi, went to the offices of the respondent at Bainsvlei. The latter instead sought indulgence to extend the trial run until the end of January 2013 as business had been slow in December. He, Mr Folotsi, agreed to the extension.
- [7] He alleged that at the end of January 2013, he phoned Mr Scholtz on numerous occasions without success. He even went to the respondent's premises where he did not find Mr Scholtz or the truck. Mr Scholtz could not be found either telephonically or at the premises since January 2013 until May 2013 when he, Mr Folotsi was informed by a person

named Sam that the truck was on its way to Port Elizabeth. He then arranged with the Traffic Department to impound the truck. The truck was impounded on its way to Port Elizabeth on 7 May 2013 where it was kept until its release to the respondent on 15 May 2013.

- [8] On the basis that he was the legal owner of the truck and that the respondent had failed to comply with the terms and conditions of the agreement, he cancelled the agreement as he was entitled to and approached this Court to return the truck.
- [9] In his opposing affidavit, Mr Scholtz, on behalf of the respondent, gave a completely different version. He agreed that there was an oral agreement concluded between the applicant and respondent during November 2012, but on different terms and conditions as set out by the applicant.
- [10] He averred that the agreement between the parties, as Mr Folotsi did not have a starting capital, was that:
- 10.1 He would operate the truck and arrange for business and Mr Folotsi will share in profits on the basis that he, Mr Scholtz, will bear the initial expenses such as employing a new driver, making certain changes to the truck for purposes of long distance transportation;
 - 10.2 He, Mr Scholtz, will be entitled to 10% of the turnover and as soon as profit was made, the applicant will get the remainder of the profit on a 50/50 basis;

10.3 It was foreseen that the applicant would receive a profit after a period of approximately four months as business was not easy to come by;

10.4 The agreement was for one year which could thereafter be renewed.

[11] During March 2013 Mr Folotsi approached him, he showed him all the expenses he had incurred, such as buying new tyres, paying for break down due to the failure of the truck's system.

[12] In his view, Mr Folotsi became unhappy that he was not receiving any income as he anticipated. He met with Mr Folotsi on two occasions when Mr Folotsi came to his premises until the truck was impounded by the Traffic Department on 7 May 2013, which was subsequently released to him on 15 May 2013 through his attorney's intervention.

[13] Mr Scholtz further alleged that on 24 May 2013, four days before the urgent application was launched, his attorneys received a telephonic call from Mr Compene, who suggested on behalf of the applicant, that the parties meet to try to resolve the dispute between them. The round table was scheduled for 29 May 2013. On 28 May 2013 Mr Compene called Mr Scholtz's attorney to cancel the meeting.

[14] The applicant instead had approached another attorney, unknown and without notifying the respondent and they

approached this Court as they did on 31 May 2013. Mr Scholtz and his attorney were not aware that the applicant had changed attorneys until on 3 June 2013 when Mr Scholtz, through his attorney, received the court order ordering him to return the truck. The effect of the order was to remove the truck from the respondent's possession.

[15] In his replying affidavit, Mr Folotsi, changed his version and alleged as the respondent had asserted in its opposing affidavit that the truck was to be used by the respondent on condition that the respondent was to pay for the expenses of the vehicle such as diesel expenses for the trial period and after such expenses were deducted by the respondent he, Mr Folotsi, was to share on a 50% basis in the net profit for the month of December 2012.

[16] This meant, according to him, that he had to share in the profit from the beginning of the trial period, December 2012. He averred further that because he did not know or "was not familiar with the respondent" and wanted to ascertain for himself whether the business was profitable, he would not have been agreeable to conclude a long term agreement with the respondent for the use of his truck. The only agreement he had with the respondent was for a trial period of one month, extended for a further [unspecified] period after which he could have considered the conclusion of a long term agreement.

- [17] He admitted that he met with Mr Scholtz in January 2013 and agreed to a further extension of the trial period. The trial period was extended as he stated with reluctance on his part as Mr Scholtz still had to provide him with figures of the income the truck generated.
- [18] In his replying affidavit, he admitted that during March 2013 he indeed visited Mr Scholtz at the applicant's premises, but it was to collect the vehicle which Mr Scholtz refused to release but promised to pay a certain amount into his Standard Bank account, which amount was never paid.
- [19] He maintained that he made numerous attempts to contact the respondent, but could not reach him. As a result he reported the truck stolen at Park Road Police Station, that's how it was impounded on 15 May 2013. He contended that despite the respondent's continued use of his truck during and beyond the trial period, he did not receive any remuneration and that he deemed the oral agreement to be terminated.
- [20] Mr Reinders, on behalf of the respondent submitted that had **Mhlambi AJ** been made aware of the true position that:
- (i) the applicant and respondent were in constant communication through their respective attorneys until the applicant deemed it fit to approach the Court on 31 May 2013, and

- (ii) there was a round table meeting arranged on 21 May 2013 to resolve the disputes which had arisen, which the applicant abandoned and instead came to Court without notifying the respondent,

Mhlambi AJ would not have granted the application on an urgent basis.

[21] There are two reasons why this application should be dismissed. The first is that the applicant failed to make a full disclosure of the true facts in its *ex parte* application. The second reason is that this matter must be decided on the facts as stated by the respondent, and on those facts the applicant is not entitled to relief.

[22] Where an applicant does not make full disclosure in *ex parte* applications the court, apprised of the true facts, has a discretion to set aside the former order. **Schlesinger v Schlesinger** 1979 (4) SA 342 (W) at 349 A-B. In **Powell N.O. and Others v Van der Merwe and Others** 2005 (5) SA 62 (SCA) Southwood AJA said:

“[75] In my view, this approach should apply equally to relief obtained on facts which are incorrect because they have been misstated or inaccurately set out in the application for the order...”

[76] The purpose of rigorously applying the rule and setting aside the decision to authorize the warrant is not to punish the director as was stated by the Court below. It is to maintain the legality of the process...”

[23] The applicant seeks an order that its vehicle be returned to it. That implies that the contract between the parties is confirmed as cancelled. Where the applicant seeks final relief, it can only be granted if the facts as stated by respondent, together with the admitted facts in the applicant's affidavit, justify such an order **Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd** 1957 (4) SA 234 (C) at 235 E-G. The disputes raised by the respondent do not appear to be far-fetched or clearly untenable, and cannot be rejected on the papers **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984 (3) SA 623 at 634I-635C. Having considered both versions and applying the **Plascon-Evans** approach I am inclined to accept the respondent's version which, in essence is not disputed by the applicant and is more probable than that of the applicant. I do not have to consider whether the respondent's version is true or not in these proceedings. Whatever is in dispute can and may be dealt with in a trial or action should the applicant wish to proceed in that fashion.

[24] In the result I make the following order:

ORDER

1. The rule *nisi* granted on 31 May 2013 is discharged.
2. The applicant to pay the costs of this application.



B.C. MOCUMIE, J

On behalf of applicants: Adv J.J.F Hefer
Instructed by:
Botha Hefer Inc.
BLOEMFONTEIN

On behalf of defendants: Adv S. Reinders
Instructed by:
P Schuurman
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BCM/sp/wm