IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No.: 1268/2007

In the case between:

SEHAPI EDWIN MOTLOUNG Applicant

and

HONDA AUTO BLOEMFONTEIN 1st Respondent
(FERDIE SMITH)

AUTO SHOP 2nd Respondent

JUDGMENT: MILTON, AJ

HEARD ON: 17 MAY 2007

DELIVERED ON: 31 MAY 2007

---

[1] **INTRODUCTION**

1.1 On the 28th March 2007 the applicant approached the Court on an urgent basis to obtain a rule *nisi* wherein the following order was made against both respondents.

1.1.1 The applicant's vehicle with registration number DCT861FS, Fiat Strada, be returned to applicant with immediate effect.

1.1.2 The vehicle be returned with the alarm system in good working order.

[2] **APPLICANT'S CASE**

2.1 Applicant took his vehicle to the first respondent on the 6th March 2007 to have the clutch repaired. The applicant is the owner.

2.2 A week later on applicant's inquiry, the first respondent confirmed that the clutch was repaired but the vehicle had a problem in starting – there seemed a problem with the alarm system.

2.3 Applicant went to investigate and found the bonnet open and a mechanic working on the vehicle, who told the applicant that he tried to connect the alarm but it failed to start.

2.4 Applicant then activated the immobilizer after which the vehicle started. The mechanic told him that they had been struggling to start the vehicle, although it had started previously. He was told him to pay for the repairs to the clutch which the applicant did immediatly.

2.5 The manager informed the applicant that he could take his car but there was a blipping sound which indicated something was wrong with the alarm system.

2.6 Applicant and the manager inspected the vehicle and both saw wires hanging loosely.

2.7 Applicant refused to take delivery of the vehicle.

2.8 There was nothing wrong with the vehicle when it was taken to first respondent for the clutch repair.

2.9 The manager asked where the alarm had been fitted and the applicant informed him at second respondent. The former then said he would take the vehicle there.

2.10 Two days later the second respondent informed applicant that the security box had been tampered with.

2.11 The first respondent denied that his employees had tampered with the alarm.

2.12 On the 16th March 2002 the first respondent informed applicant that he must pay for the alarm repairs. Applicant refused since he had not instructed first respondent to take the vehicle to second respondent and he had not fiddled with the vehicle's alarm system.

2.13 The application was brought on an urgent basis since the applicant needs his vehicle to practise as an advocate, and he travels extensively and the vehicle was now in possession of the second respondent. The applicant does not know what steps second respondent will take to recover his costs.

IN REPLY

2.14 Applicant denies that he was never told earlier that the vehicle cut out on the test drive – this was only ascertained later.

2.15 The alarm system was in working order since it had recently been installed and was still under guarantee.

2.16 Applicant attaches an affidavit by Mr. Shuping who confirms that the alarm system was under guarantee but since the alarm had been tampered with it was no longer covered thereby.

[3] **RESPONDENT'S CASE**

3.1 The applicant's vehicle was brought into his business and the clutch was repaired.

3.2 The alarm system of the applicant's vehicle was giving a problem.

3.3 It is denied that the first respondent or any of there employees worked on the alarm system or the wiring. The first respondent denies further that any wires were lying loose. After applicant was told that the car would not start the applicant then activated the immobilizer and it started. First respondent is not sure why it would not start again after the applicant activated the immobilizer.

3.4 First respondent avers that the vehicle was able to be taken for a test drive. The immobilizer at that stage did not prevent the vehicle being started. However after driving for 10 minutes the vehicle cut out and the vehicle had to be towed back to the shop. Thereafter they could not succeed to start the vehicle again.

3.5 The vehicle was inspected and only one loose wire was hanging – but the vehicle was received with that loose wire.

3.6 Applicant refused to take possession of his vehicle.

3.7 Their only instructions were to repair the clutch.

3.8 The vehicle was taken to second respondent with applicant's knowledge only to identify the problem and the first respondent specific instructions were not to repair the vehicle since applicant had not instructed him to do so. If it needed repairing the second respondent would have to arrange that personally with applicant.

3.9 First respondent was never liable to pay any costs to the second respondent.

3.10 First respondent admits that he told applicant that he (applicant) must pay the repairs to the alarm system. First respondent avers that second respondent told him that applicant himself had given the instructions to second respondent to repair the vehicle. In reply applicant attaches an affidavit of Mr. Shuping, an employee of second respondent, however he does not deal with this crucial aspect.

3.11 The vehicle was not in the first respondent possession when applicant brought the application.

3.12 Applicant demands that the vehicle's alarm system must be repaired by first respondent but that was not their instructions.

[4] **FACTS NOT IN DISPUTE**

4.1 First respondent received applicant's vehicle to have the clutch repaired. An applicant paid for the repairs.

4.2 First respondent took possession of the vehicle.

4.3 The alarm system become faulty while on the respondent's premises.

4.4 First respondent took the vehicle to second respondent to have the system accessed at.

4.5 Second respondent repaired the faulty alarm system.

4.6 Applicant and first respondent both refuse to pay the repairs.

4.7 At the time of the interim order was obtained, the vehicle was in the possession of the second respondent.

4.8 The interim order was also applicable to the second respondent, who chose not to oppose the application.

[5] **FACTS IN DISPUTE**

5.1.1 Whether the alarm system of the applicant's vehicle was tampered with whilst in possession of the first respondent.

5.1.2 Who must be held responsible for payment of the repairs to the alarm system?

5.2 It is clear from the papers that the respondent denies touching or tampering with the alarm system and the applicant avers the alarm system was in perfect working order before it went in for the clutch repairs.

5.3 The first respondent avers that they clearly told the second respondent that they were not to repair the system – only look at the problem and they would not be liable for any costs thereof. First respondent's case is that the applicant himself instructed the second respondent to repair the alarm. This was introduced by hearsay evidence and not confirmed by Shuping, who did have an opportunity in the papers to address this issue, but failed to do so.

[6] **LEGAL POSITION**

6.1 To obtain a final order the applicant must prove as set out in **<u>SETHOGELO v SETLOGETO</u>** 1914 AD 221.

6.1.1 <u>A clear right</u>. From the applicant's evidence it is not clear what substantive law he is relying on to establish his right – he makes no clear case out for contractual or delictual basis. Mr. Gilliland on behalf of the first respondent argued that it was probably based on *depositum*. I disagree, and am of opinion that applicant attempts to make out a case of delict.

To succeed he must prove on his founding affidavit that:

6.1.1.1 his vehicle's alarm system prior to the vehicle being handed to the first respondent was in good working order.

6.1.1.2 the alarm system was damaged by the first respondent and/or his employees.

6.1.2 *Injury* actually committed or a reasonably apprehended. Applicant has made out a case that this vehicle was of utmost importance to practise as an advocate and lose of income was imminent.

6.1.3 Absence of similar protection by any other ordinary remedy. Mr. Gilliland on behalf of the first respondent argued that applicant's request namely the return of a vehicle with the alarm system in working order is strange. His contention is that the applicant should rather have brought a action for damages alternatively an interim order to obtain the vehicle pending the institution an action for damages.

I do not find the applicant's relief sought strange, if the applicant can make out a clear case on a delictual basis, I do not think he would succeed on contract or *depositum* as he has laid no basis therefore. Further I do not think the alternative relief suggested by Mr. Gilliland would be enforceable against the second respondent who at the time of the application was in possession of the vehicle and had a definitive defence – one of retention.

6.2 A final order can only be granted if no dispute on the facts material. A dispute arises when a party denies material allegations.

6.3 It is then accepted that final interdicts should only be granted in motion proceedings if the facts stated by the respondent’s together with the admitted facts in the application affidavit justify such an order.

See **PLASCON-EVANS PAINTS LTD v VAN RIEBEECK PAINTS (PTY) LTD** 1984 (3) SA 623 AD on 634, the following was said:

> ¡°In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact.”

and in **SOFFIANTINI v MOULD** 1965 (4) SA 150 (ED CD) on 154 G – H:

> ¡°It is necessary to make a robust common sense approach to a dispute on motion as otherwise the effective functioning of the court can be hamstrung and circumvented by the most simple and blatant

stratagem. The court must not hesitate to decide an issue of fact on affidavit merely because it may be difficult to do so. Justice can be defeated or seriously impeded an delayed by an over fastidious approach to a dispute raised in affidavits."

6.4 I raised my concern during court that there appears to be a dispute of facts. The dispute goes to the root of the applicant's cause of action (though somewhat vague). To succeed with a final order where there is a dispute as to the facts, it should only be granted if the facts are stated by the respondent's together with facts admitted by the applicant's affidavit.

See **STELLENBOSCH FARMERS WINERY (PTY) LTD v STELLENVALE WINERY (PTY) LTD**1957 (4) SA 234 (C).

The first respondent denies having tampered with the alarm system in any way. This is in direct conflict to the case that applicant attempts to make out and it is clear that their versions differ radically.

6.5 There is also a large vacuum in the events that followed after the applicant paid for the clutch repairs and left the first respondent's premises. Neither party address these aspects. Applicant lays no basis in his application why second respondent is cited, or what transpired that second respondent eventually repaired the alarm system and what the amount of the repairs was. First respondent's documents does not deal with this either.

6.6 Second respondent chose not to oppose the matter seemingly to avoid costs but has lost his retention by intervention of the rule *nisi* order. I would have thought that applicant might have attached a confirmation affidavit specifically dealing with the instructions that was received by them and more particularly by whom. Applicant does, in reply attach an affidavit by Mr. Shuping an employee of the second respondent, but sadly does not address the above or even expound exactly what was found to be wrong with the security box and what was done to cause it.

This would all have been helpful facts to assist the court to decide if the first respondent denial is real and *bona fide* or just a blatent denial to cause a factual dispute and prevent a final order being obtained.

6.7 Where a court cannot award a final order as a result of a real dispute of facts, the court has a discretion to refer the matter for oral evidence.

I cannot find on the respondent's papers that the allegations or denials are so far fetched that they are untenable and can therefore reject the respondent's version. Both parties versions should probably be tested under cross-examination.

6.8 However, the reality is that the applicant is now *de facto* in possession of the vehicle, the first respondent has been paid for the repairs regarding the clutch, and the second respondent has lost retention by legal intervention. The latter chose not to enter into appearance and is therefore not contesting the outcome of the final order. The second respondent is the only party that would seemly suffer damages which he can recover by means of issuing summons. In the light of the above, I do not deem it practical to refer the matter for oral evidence since the material is not worth the coat.

6.9 The court has a discretion to refuse a final order if there is factual and legal justification therefor. See **CANDID ELECTRONICS v MECHANISE BUYING SYNDICATE** 1992 (2) SA 459 CPP.

There is however a factual justification in this matter, since there is a dispute, which dispute the applicant was aware of from the moment the requested his vehicle, the dispute being clearly, who caused the damage to the alarm system and who would be liable for payment thereof. To refer the matter at this stage for oral evidence would be a further waste of costs.

6.10 In the light of the above the order is as follows:

6.10.1 The rule *nisi* is discharged with costs.

D. MILTON, AJ

On behalf of the Applicant: Adv. B. S. Mene

Instructed by:
Du Toit Bomela
BLOEMFONTEIN

On behalf of the 1st Respondent: Adv. J. G. Gilliland
Instructed by:
Rossouws Attorneys
BLOEMFONTEIN

/em