



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 194 OF 2016

**SAFERIDER MANAGEMENT SYSTEMS
LTD.....PLAINTIFF/APPLICANT**

- V E R S U S -

**SAFE RIDER VEHICLE TECHNOLOGIES (PTY) LIMITED1ST
DEFENDANT/RESPONDENT**

LEON DU PLESSIS 2ND DEFENDANT/RESPONDENT

RULING

1. Saferider Management Systems Ltd, the plaintiff/applicant herein took out the motion dated 22.07.2016 in which it sought for the following orders inter alia:

1. Pending the hearing and determination of this suit this honourable court be pleased to issue an injunction to restrain the respondents either by themselves, their servants, agents, employees or otherwise howsoever from publishing or causing the publication of defamatory and the damaging allegations against the applicant as threatened in the email authored by the 2nd respondent on 18/7/2016 or in any other manner whatsoever, and more particularly, the respondents be and are hereby restrained from publishing or causing the publication or circulation through the media or otherwise any information relating to the applicant's business.

2. Pending the hearing and determination of this suit this honourable court be pleased to issue an order directing the respondents either by themselves, their servants, agents, employees or otherwise howsoever to make a full disclosure of the applicant's clients to whom the defamatory and damaging statements against the applicant have been circulated and a further order directing the respondent's to equally circulate such applicant's clients an unqualified withdrawal of such statements.

3. The costs of the application be borne by the respondents.

2. The motion is supported by the affidavits sworn by Grace Carmel Matagaro. When served with the motion, the defendants filed the replying affidavit of Leon Du Plessis to oppose the application.

3. I have considered the grounds stated on the face of the motion and the facts deponed in the affidavits filed against and in support of the application. I have also considered the rival oral submissions made by learned counsels. It is the submission of the plaintiff/applicant that Safe Rider Vehicle technologies (PTY) Ltd, the 1st respondent herein, is a limited liability company registered in South Africa and carries on the business of exportation of motor vehicle management equipments such as speed limiters. They

also stated that it paid the 1st respondent a sum of USD.35,000/= for the supply of speed limiters but the 1st respondent has failed to supply the speed limiters nor refund the money. The applicant further stated that Leon Du Plessis, the 2nd respondent who is also a director of the 1st respondent is currently facing a criminal charge at Kiambu Law Courts for obtaining money by false pretences.

4. It is the submission of the applicant that as a result of the persistent demand for a refund of the money paid to the 1st respondent, the 1st respondent through the 2nd respondent has resorted to an elaborate scheme to scandalize the applicant by maliciously spreading false information to the applicant's clients to the effect that the goods supplied by the applicant are counterfeits and as a result the applicant has suffered irreparable loss in business terms and in its reputation. The applicant has further stated that the respondents have threatened to publish in the local dailies the false and malicious allegations to further tarnish and damage the name and reputation of the applicant. The applicant has beseeched this court to grant the orders sought in the motion.

5. The respondents denied the allegations made by the applicant by filing the replying affidavit of Leon Du Plessis. It is argued that the correspondences made by the 2nd defendant are not defamatory at all. The respondents averred that the applicant was their customer and distributor in Kenya for speed governors and recorders from 2014 until mid 2016 when the respondents terminated their business relationship because the applicant started trading in counterfeits which resemble their speed governors. The respondent accused the applicant of passing off counterfeit speed governors as genuine products while in reality it is not. The respondents further argued that the applicant attempted to copyright the 1st defendant's trademark of the speed governors but that was discovered in good time and was stopped. The respondents further stated that the applicant did not pay the 1st respondent USD.35,000/= in respect of invoices no. 101019 and 101020. The respondents stated that when no payment was forthcoming from the applicant they cancelled the invoice and deleted them from its records. The 2nd respondent also stated that he raised genuine concerns over the applicant's business conduct and instead of the applicant addressing those concerns, it made false allegations against him leading to him being arrested and charged with the criminal offence of obtaining by false pretences before Kiambu Law Courts. The respondents also annexed documents showing that they supplied the plaintiff/applicant the speed governors for all the invoices issued. The respondents are of the view that the civil and criminal cases instituted by the plaintiff against them are meant to frighten the 1st defendant/respondent from pursuing the plaintiff for outstanding payments and from pursuing the issue touching on counterfeits.

6. There is no doubt that the plaintiff and the 1st defendant had a business relationship. The plaintiff used to purchase speed governors from the 1st respondent and sell them to the local market. According to the applicant, its relationship with the 1st respondent went sour when the 1st failed to supply the speed limiters worth more than ksh. 3 million yet it had been paid for the same. It is said that the applicant was forced to report the issue to the police who acted upon the complaint by preferring a charge of obtaining by false pretences against the 2nd respondent. The plaintiff aver that the 2nd respondent wrote an email on 18.7.2016 whose contents were defamatory. The 2nd respondent is of the view that the email complained of was not defamatory since he was basically complaining that the plaintiff had brought to the market counterfeit goods. What emerges from the arguments from both sides is that the business relationship between the parties to this dispute has gone sour and rivalry has taken a centre stage.

7. Many questions have arisen which have to be determined in a trial. First, the question as to whether or not there are outstanding bills between the parties to settle must be interrogated.

8. Secondly, the question as to whether or not counterfeit goods have been poured into the market and by who must also be determined at the trial.

9. Thirdly the question as to whether or not the correspondences exchanged herein are defamatory will also have to be interrogated via a trial.

10. The principles to be considered in determining applications for injunction are well settled. It suffices

to refer to the case of **Giella =vs= Cassman Brown (1973) E.A 358** where the principles were restated as follows:

- i. An applicant must show a prima facie case with a probability of success.*
- ii. An applicant must show that he would suffer irreparable damage if the order is denied.*
- iii. When the court is in doubt the application should be decided on a balance of convenience.*

11. The question as to whether the applicant has established a prima facie case with a probability of success can be answered by looking at the material placed before this court. I have already considered in detail the arguments of both sides. The applicant's motion is based on the arguments that the respondents have published or may publish information which is defamatory. I have looked at the alleged material and it is clear in my mind that the respondents are saying that some speed limiters which are counterfeit using the 1st respondents trademark may have been poured into the market. In my view these allegations are serious. They may be true or false but can only be established at the trial. In my humble understanding, I do not think the applicant has shown a prima facie case with a probability of success.

12. The second principle to be considered is whether the applicant will suffer irreparable loss if the order is denied. The material placed before this court shows that the business in question is ascertainable and quantifiable in monetary terms. I am therefore not satisfied that the applicant will suffer irreparable loss.

13. This court is not in doubt, therefore I will not belabour to consider the principle of convenience.

14. In the end, I find no merit in the motion dated 22.7.2016. The same is dismissed with costs abiding the outcome of this suit.

Dated, Signed and Delivered in open court this 24th day of March, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant