

SOUTH AFRICA / JUDGMENT

Cordier v Poolman (1489/2019) [2019] ZANCHC 31 (23 July 2019) [2019] ZANCHC 31

COURT

Northern Cape High Court, Kimberley

BEFORE

Phatshoane

CASE / FILE NUMBER

1489/2019

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IN THE HIGH COURT OF SOUTH
AFRICA,
NORTHERN CAPE DIVISION,
KIMBERLEY

Case

No: 1489/2019

Reportable/Not
reportable

In

the matter between:

PIET
SAGARIAS CORDIER
APPLICANT
and
HEINRICH
GEORGE POOLMAN
RESPONDENT

Heard: 12 July 2019

Delivered: 23 July 2019

JUDGMENT

Phatshoane J

[1] On 12 July 2019 Piet Sagarias Cordier, the applicant, approached this Court on an urgent basis for an order substantially in the following terms:

1.1 That Mr Heinrich George Poelman, the respondent, be interdicted, pending the finalisation of the action instituted by the applicant in this Court under Case No:1483/2016, from removing and/or taking possession of and/or selling and/or advertising the hunting of and/or permitting the shooting of any game situated on the two farms known as:

1.1.1 The Remainder of Farm Marthasdale Number 10, Barkley West District, Northern Cape, and

1.1.2 Farm Helpmekaar, Barkley West District, Northern Cape.

1.2 That the respondent remove any and all advertisements and or notices advertising the hunting of the aforementioned game.

[2] The applicant and the respondent are involved in various litigation in this Court. The present application is related to the action

instituted by the applicant under Case No1483/16 on 12 July 2016 in which he claims against the respondent payment of an amount of R200 000.00, interest on that amount, and costs.

[3] During April 2014 at Kuruman the applicant and the respondent entered into a verbal agreement in terms of which the applicant purchased from the respondent game as follows: 30 Oryx, 28 Blesbucks, 26 Springbucks, four Impala and two Ostriches in the amount of R200 000.00. There are disputes of fact between the parties on whether the purchase price was to be paid in instalments; whether the applicant has paid the full purchase price; and whether the ownership of the game would pass upon the full and final payment of the purchase price.

[4] The applicant alleges that on 11 April 2016 he made the final payment in the amount of R35 000.00 but because of the protracted litigation and animosity between them the respondent barred him from selling and/or loading and/or hunting and/or collecting the game he purchased from the aforesaid two farms. The respondent's stance is that he did not tender delivery of the game because the applicant did not pay the balance of the purchase price which would have vested him with the ownership.

[5] Significantly the applicant avers that by prohibiting him from dealing with the game, the respondent has repudiated the contract. Therefore, he elected to cancel same on 04 April 2014 and instituted the claim for damages against the respondent, referred to earlier.

- [6] Almost three years later following the institution of the action, on 04 July 2019, the applicant received a flyer showing that the respondent advertised hunting packages for the game in the Kuruman and Danielskuil areas where a hunter could buy two Oryx, one Blesbuck and one Springbuck to hunt for a combined amount of R12 500.00. The advertisement triggered the filing of the present application. The applicant says that to the best of his knowledge the only game on the farms belong to him. His impression is that the advertised game are his and fears that it will be sold and hunted to his prejudice.
- [7] On the same date that the applicant received the advertisement his attorneys directed a letter to the respondent's attorneys, Duvenhage

Van Der Merwe Attorneys, expressing the applicant's discontentment that the respondent had offered hunting packages for the game which belonged to the applicant on the same farms in respect of which he had been barred from hunting. In reply, the respondent's attorneys drew the applicant's attention to his particulars of claim where he pleaded that he cancelled the sale agreement for the game and opted to claim damages. Their view was that in light of this the respondent had unencumbered right to hunt on the farms.

- [8] The applicant contends that should the respondent allow the game to be hunted, even assuming that he indeed cancelled the contract, the security he holds for his claim, in the form of the game, will be dissipated. He says that if the game is protected against dissipation by means of an interdict he will be able to attach and sell it through an auction or private treaty to recover the purchase price he paid and the attendant litigation costs incurred in pursuing the claim. The counter argument by the respondent is that the applicant is not entitled to hold as security the property which does not belong to him.

The point in limine

- [9] The respondent explained that the Heinrich Poelman Trust, IT 11738/97 (the Trust) is the owner of the farms. He intimated that a vast spectrum of the game species, which belong to the Trust, roam the farms. These includes Kudu, Gemsbuck, Blesbuck, Impala, Springbuck, Warthog, Duiker, Steenbuck and Ostriches which he manages with the other two trustees for the benefit of the Trust beneficiaries.
- [10] The game in dispute, according to the respondent, form but a small fraction of the multitude game on the farms. He argued that the Notice of Motion casts the net very wide that it will effectively prohibit him and the Trust to derive any income from the hunting activities. He contended that the Trust has a direct and substantial interest in the relief sought and therefore a necessary party to these proceedings. The applicant's failure to join the Trust as a respondent amounts to non-joinder which is fatal to this application, the argument continued.
- [11] The applicant conceded that the prayers sought in the Notice of Motion, as presently formulated, may have a far-reaching effect. However, he argued, that the game on which this application has a bearing has been identified in his papers. He submitted that the broader

application of the prayers can be remedied by restricting the operation of the interim interdict solely to the game in dispute in the action. That way, he contended, the Trust would be eliminated as a party with substantial interest in the outcome of this application as it would not be affected by the modified order. It is not necessary to belabour the issue as, in my view, if the order as initially sought is amended as proposed it would curb any potential prejudice that may be suffered by the Trust.

The question of urgency

[12] Rule 6(12)(b) requires of an applicant who approaches the Court on an urgent basis to set out explicitly the circumstances rendering the matter urgent, and the reasons why it will not be afforded substantial redress at a hearing in the ordinary course. I take the view that the application is sufficiently urgent. All the necessary affidavits have been exchanged between the parties to enable the Court to adjudicate upon the anti-dissipation relief sought.

The interim interdict

[13] The requirements for an interim interdict are trite. In order to succeed with the application the applicant must show (a) that he/she has a prima facie right even though open to some doubt; (b) that there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he/she ultimately succeeds in establishing the right; (c) that the balance of convenience favours the granting of interim relief; and (d) that the applicant has no other satisfactory alternative remedy available.

[14] The applicant contends that he has a 'clear right' because he is the rightful owner of the game. The immediate difficulty with this proposition is that, on his own version as contained in the founding affidavit, he cancelled the agreement in terms of which he purchased the game from the respondent and instituted an action claiming damages. In his amended particulars of claim filed in the action he pleads:

'10 Weens die verweerder se versuim om toestemming te verleen aan die eiser om die wild te skiet, het verweerder die mondelingse koop-ooreenkoms gerepudieer.

11 Die Eiser aanvaar die verweerder se repudiasie van die mondelingse koop-ooreenkoms soos deur die partye gesluit op of ongeveer 04 April

2014. Na aanleiding van die verweerder se repudiasie soos voormeld het Eiser die mondelingse Koop-ooreenkoms tussen die eiser en die verweerder gekanselleer, alternatiewelik, kanseller die Eiser die mondelingse koop-ooreenkoms tussen die eiser en die verweerder hiermee.' (My own emphasis)

The respondent pleads as follows in reply:

'The defendant denies that he repudiated the oral agreement and denies that the plaintiff was (and is) entitled in law or in fact to cancel the oral agreement.'

- [15] It is not necessary for present purposes to decide on the validity of the applicant's alleged cancellation as it may be an issue for determination at the hearing in due course. The notice of a decision to cancel the contract may be communicated in a summons or an application. [1] Cancellation extinguishes the obligation(s) arising from the contract.[2] Once the innocent party has cancelled a contract, he or she can no longer enforce it and vice versa.[3] Whether or not an innocent party has made an election to cancel is a question of fact to be decided on the evidence.[4]
- [16] The issue of the alleged cancellation of the contract need not be traversed at any great length. The point is that the applicant did not claim specific performance in the form of delivery of the game in the action; he merely sought restitution, that is, he be reimbursed the purchase price he alleges he paid to the respondent together with interest. He can therefore not claim to be having a clear right. In any event, there is a dispute between the parties on whether he paid the full purchase price which would have entitled him to ownership of the game. Motion proceedings were not designed to resolve disputes of fact. An applicant who seeks final relief on motion must accept the version of his opponent in the event of a conflict, unless the latter's allegations do not raise a real or bona fide dispute of fact, or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers.[5] In my view, it cannot be said that, on the papers as they stand, the respondent's version, that the applicant has not paid the full purchase price, is palpably false and falls to be rejected.
- [17] The current position is that the Trust owns the bulk of the game on the farms and engages in hunting activities in order to derive an income for the benefit of the Trust beneficiaries. The respondent explained that if the numbers of the game are not controlled the farms will suffer irreparable harm in the form of over-grazing, which will have an adverse effect on the lease agreement the trust has with its tenants who are cattle farmers. Having said this, I am persuaded that the balance of convenience does not favour the applicant. In my view, he will not suffer any greater harm than the respondent should the interdict not be granted. By his own ipse dixit, he chose not to keep the contract alive until the respondent had counter-performed. As a consequence of this, I am unable to discern any logic in preventing the respondent from dealing with the game.
- [18] To buttress his argument that the security he holds for his claim, in the form of the game, will be dissipated the applicant relies on the inference he drew that the respondent is either acting maliciously, disingenuously or is in financial strain which factors necessitate the sale of the game. Apart from this inference, which is not supported by any evidence, nowhere in the founding affidavit does the applicant say that the respondent will be unable to satisfy any judgment of this Court should an adverse order be made against the respondent in the action. Neither is the applicant saying that execution against any of the respondent's assets will be impossible. In the final analysis, it is axiomatic that the applicant has an alternative remedy in the form of a claim for damages which he has already instituted against the respondent.

[19] On the whole, I am driven to the conclusion that this application is ill- fated as it falls far short of the requirements for interim relief pending the outcome of the action. Therefore, it stands to be dismissed. There is no reason why costs should not follow the result on party and party scale. In the result I make the following order.

Order:

1. The application is dismissed with costs.

MV Phatshoane J

APPEARANCES:

FOR THE APPLICANT: Adv Ploos Van Amstell

Instructed by Hugo Mathewson & Oosthuizen Inc.

FOR THE RESPONDENT: Adv Eillert

Instructed by Duncan & Rothman Inc.

[1] LAWSA, Third Ed, Vol 9, at 325 para 425

[2] LAWSA, Third Ed, Vol 9, at 276 para 385

[3] LAWSA, Third Ed , Vol 9, at 313 para 418

[4] Peters and others NNO v Schoeman and others [2001] 1 All SA 155 (A) at 160 para 12; 20011 SA 872 (SCA).

[5] Minister of Home Affairs v Ruta 2018 (2) SA 450 (SCA) at 453 para 15

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