

SOUTH AFRICA / JUDGMENT

Mackey NO and Another v Snyman NO and Others (3302/2016) [2017] ZAECHGC 80 (6 July 2017)

[2017] ZAECHGC 80

COURT

Eastern Cape High Court, Grahamstown

BEFORE

N G Beshe

CASE / FILE NUMBER

3302/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION, GRAHAMSTOWN)

CASE

NO.: 3302/2016

In

the matter between:

RODGER

JOHN MACKEY

N.O. First

Applicant

GUSTAV

BERNHARD AUGUST GERDENER N.O. Second

Applicant

[In

their capacities as trustees of the Mackey Trust, IT 1522/05]

And

JOHANNES JACOBUS SNYMAN

N.O. First

Respondent

ADELE SNYMAN

N.O. Second

Respondent

GIDEON JOUBERT DU PLESSIS

N.O. Third

Respondent

[In their capacities as trustees

for the time being of
Uluxolela Trust, IT267/99]
OOS VRYSTAAT KAAP OPERATIONS
LTD Fourth
Respondent
ABSA BANK
LIMITED Fifth
Respondent

JUDGMENT

BESHE, J:

- [1] Applicants seek an order restraining the respondents from alienating or encumbering Portion 13 of farm Badspruit 1 Maletswai Municipality, Aliwal North, Eastern Cape, pending the finalisation of an action to be instituted within 30 days or such reasonable period as the court may direct, for an action for specific performance alternatively damages suffered by the applicants.
- [2] First and second applicants are trustees for the time being of Mackey Trust. They are cited in such capacity.
- [3] First and second respondents are businessman and woman respectively of Zuidersee farm, Aliwal North. Third respondent is described as a major male auditor also of Zuidersee farm, Aliwal North. Fourth respondent is a company with limited liability with its registered address or main place of business situated at 19 Dan Pienaar Street, Ladybrand, Free State Province.
- [4] Fifth respondent is Absa Bank Limited. First to third respondents are trustees for the time being of Ukuxolela Trust. It is alleged that fourth and fifth respondents are holders of duly registered mortgage bonds which Ukuxolela Trust caused to be executed and registered over Portion 13 of Farm Badspruit 1 (the property).for this reason, applicants allege, fourth and fifth respondents have a direct and substantial interest in this matter.
- [5] Applicants' case as would appear from first applicant's affidavit is essentially the following:
- On the 23 December 2015, the applicants' trust submitted an offer to Ukuxolela Trust in respect of the property in question for the amount of R7 500 000.00. On the 16 January 2016 first applicant enquired whether Ukuxolela will accept the offer. First respondent indicated he could not consider the offer properly as he was still dealing with the loss of his mother who had recently passed away. On the 27 January 2016 he observed first respondent driving in a BMW motor vehicle on the property with an unknown male person. He also observed that his presence (first applicant's) was a source of great discomfort to first respondent. First applicant later heard from his neighbour Mr Pieter Jacobs that someone from Barkley had called to enquire about the farm in question (the property) expressing a desire to purchase it. The

affidavit purportedly deposed to by Mr Jacobs is unsigned.

[6] On the 28 January 2016 first respondent admitted to first applicant that he was trying to transfer a water licence in respect of Badspruit 2 to the property. Applicants had apparently entered into a deed of sale in respect of that property as well and were of the view that it came with the water licence. First respondent indicated that the transfer of the water licence to Badplas 1 was done in order that Ukuxolela Trust can get a better price from a third party. According to first applicant, first respondent realising that he has been caught out, indicated that Ukuxolela Trust would accept applicants' trust's offer.

[7] First applicant informed first respondent that as a consequence of his dishonesty regarding the transfer of the water licence, the original offer for R7 500 000.00 was no longer open for acceptance. On the 29 January 2016 the two trusts entered into a written

agreement of sale in respect of the property for R6 000 000.00.

[8] Applicants contend that this offer was duly accepted by Ukuxolela. However on the 30 May 2016, the Ukuxolela Trust repudiated the agreement of sale, which repudiation was rejected on behalf of the applicants' trust. Applicants contend that an agreement of lease was entered into between the parties in terms of which the applicants' trust was entitled to rent the farm in question for one year or up until the date of registration of transfer of the property into the name of the applicants' trust. Applicants

contend that respondents tried to cancel the deed of sale through an amended lease agreement. Applicants are adamant that a valid and binding agreement of sale was entered into between the parties and that they therefore have a right to specific performance from the respondents' trust.

[9] According to the applicants, the financial affairs of the Ukuxolela Trust are not known to them. Should the action for specific fail, their alternative prayer for damages and in the event of being successful their victory will be rendered hollow if respondents

trust's financial position is precarious as they think it is.

[10] It is applicants' contention that should the relief they seek not be granted, they will suffer irreparable harm. Given that if the respondents' trust is allowed to alienate / encumber or transfer the property to a third party or parties, such party or parties will have a further claim against the respondents' trust and thereby increase their liabilities.

[11] In resisting the granting of the relief sought, the following is contended by the respondents:

Contrary to what is alleged by the applicants, respondents state that they gave an undertaking to the applicants along the lines of the relief they seek in this matter upon receipt of this application.

[12] Respondents put the acceptance of the offer by them in dispute alleging that the said offer had lapsed. First respondent denies that during January 2016 he had telephonic conversation with first applicant during which he told the latter of his mother's

passing. What he does confirm is a meeting in January 2016 during which first applicant made an oral offer to rent a portion of the farm in question. Respondents deny that the sighting of the BMW vehicle in the farm in question had anything to do with the sale of the property. First respondent alleges that the BMW vehicle was there for the purpose of viewing by two of its occupants, of two farms that were scheduled to be sold by way of auction.

- [13] First respondent who deposed to the opposing affidavit alleges that on the same day that he received the founding papers in respect of this application, he also received a telephone call from first applicant who advised him that he had delivered a new offer to purchase for R6 000 000.00. He denies that this stemmed from a discussion about the transfer of a water licence. According to first respondent the transfer of the water licence in question has been an ongoing process from 2006. That it had nothing to do with getting a better price from a third party as alleged by the first applicant.
- [14] First respondent goes on to explain why their case is that the applicants' offer was conditional upon being accepted by the respondents and why they contend the offer lapsed or that there was no valid acceptance thereof. I do not think it is necessary to detail those reasons.
- [15] The other reason there can be no valid sale acceptance to be spoken of, according to the respondents, is that the sale of the farm in question was conditional upon the purchaser notifying respondents' trust's attorneys in writing, that the purchaser has secured finance for the transaction. According to the respondents this condition was also not met. Respondents allege that applicants conceded that the sale could not proceed and to that end instructed their attorneys to prepare a "cancellation agreement".
- [16] In reply, applicants contend that it is irrelevant for purposes of this application whether there was a delay in the acceptance of the offer to purchase. They insist that a valid binding agreement was entered into between the parties.
- [17] I share applicants' view that these proceedings are not about determining whether or not there was a valid offer and acceptance in respect of the property concerned. What is required of this court in the present proceedings is to determine whether the applicants have met the requirements for interim relief, pending the institution of an action for specific performance alternatively damages. It is during that action that the court will grapple with the question of whether or not there was a binding agreement of sale between the parties. The requirements of interim interdict are:[1]
- (a) A prima facie right;
 - (b) A well-grounded apprehension of irreparable harm should the interim relief not be granted and the final relief be granted;
 - (c) A balance of convenience in favour of the granting of the interim relief; and
 - (d) The absence of any other satisfactory remedy.

- [18] It is trite that for purposes of an interim interdict, the right claimed need not be a clear right, it need not be established beyond reasonable doubt. It is enough if there is a prima facie right, even though it may be open to some doubt. There is contestation between the parties in this matter as to whether or not there was a valid agreement of sale. Applicants contend the existence thereof. I am of the view that applicants have placed a sufficient basis to establish a prima facie right in the form of a valid agreement of sale albeit open to some doubt. This by implication leads to the next requirements for an interim interdict, being a well-grounded apprehension of irreparable harm and balance of convenience, should the applicants succeed in their action for specific performance. Clearly, in the event of applicants succeeded in establishing their right to specific performance, if the property concerned has been alienated or encumbered in any way, it will not be easy to enforce specific performance. Even if this can be ameliorated by an award for damages, that may not be the same as when specific performance may have been possible.
- [19] Accordingly, I am of the view that the applicants have made out a case for the relief they seek. There will be an order in the following terms:
1. First, second and third respondents are interdicted and restrained from directly or indirectly alienating and / or encumbering Portion 13 of the farm Badspruit 1, Maletswai Municipality, Aliwal North, Eastern Cape Province, pending the finalisation of an action to be instituted within thirty (30) days from date of this order for specific performance, alternatively damages suffered by the applicants.
 2. First, second and third respondents are ordered to pay the costs of this application.

N G BESHE

JUDGE OF THE HIGH COURT

APPEARANCES

For the Applicants : Adv: S Tsangarakis

Instructed by : NEVILLE BORMAN & BOTHA

22 Hill Street

GRAHAMSTOWN

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For the Respondents : Adv: C Snyman

Instructed by :

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119 High Street

Ref.: Mr Brody/Glyn/S19368

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Date Heard : 20 April 2017

Date Reserved : 20 April 2017

Date Delivered : 4 July 2017

[1] Setlogelo v Setlogelo 1914 AD 221 at 227.

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