

SOUTH AFRICA / JUDGMENT

Mackey N.O and Others v Gerhard Olivier Boerery (Pty) Ltd and Another (3535/2018) [2018] ZAECGHC 137 (28 December 2018) [2018] ZAECGHC 137

COURT

Eastern Cape High Court, Grahamstown

BEFORE

M Roberson

CASE / FILE NUMBER

3535/2018

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO:3535/2018

Reasons available: 28/12/2018

In the matter between

RODGER JOHN MACKEY N.O.

1ST APPLICANT

GUSTAV BERNHARD AUGUST GERDENER N.O.

2ND APPLICANT

DANIEL CORNELIUS PRINSLOO N.O.

3RD APPLICANT

(in their capacities as Trustees for the time being

of the Mackey Trust IT1522/05)

and

GERHARD OLIVIER BOERERY (PTY) LTD

RESPONDENT

GROOTPAN PLASE (PTY) LTD

INTERVENING PARTY

REASONS FOR ORDER

ROBERSON J:-

[1] On 21 December 2018 I made the following order:

[1] The order granted ex parte on 23 November 2018 is rescinded.

[2] The applicants are to pay the costs of the main application.

[3] There is no order as to the costs of the application to intervene.

[2] I indicated that reasons were to follow which they now do. I shall refer to the applicant as the Trust, to the respondent as Boerdery, and to the intervening party as Grootpan.

[3] It is common cause that the Trust and Boerdery concluded a lease agreement in terms of which the Trust leased to Boerdery the property known as Badspruit for the period 1 March 2018 until 1 February 2028. Badspruit was to be occupied for the purpose of running farming activities. The rent was payable in various instalments from 31 March 2018 until 30 September 2019, and thereafter payment was to be made on every 31st of March and 30th September, six months in advance. From March to August 2018 R100 000.00 was to be paid at the end of each month.

R600 000.00 was to be paid on 30 September 2018, 31 March 2019 and 30 September 2019.

[4] On 23 November 2018 the Trust brought an ex parte application in this court, on an urgent basis, seeking the following order:

“2. A rule nisi be issued calling upon the Respondent to show cause, if any, to the above Honourable court on 11 December 2018 why a final order in the following terms should not be granted:

2.1 that the Respondent be interdicted and restrained from directly and/or indirectly alienating and/or removing any movable assets from the Farm Badspruit, No 1, the remaining extent of Langverwacht Farm No. 6, and Portion 4 of Rietpoort Farm, No. 67, district Aliwal North (hereinafter referred to as “the farm”);

2.2 that the Sheriff of this Court be authorised and directed to forthwith attach so much of the movable assets of the Respondent which may be found on the farm in perfection of the Applicants’ tacit common law hypothec in security for the Applicants’ claim for arrear rental in the amount of R920 000.00, as well as costs of the proposed action to be instituted by the Applicants against the Respondent for the recovery of such rental amount within 30 (thirty) days of this order; and

2.3 that the Respondent be ordered to pay the costs of this application.

3. that prayer 2.1 and 2.2 above serves as an interim interdict with immediate effect pending the finalisation of this application.

- [5] The order was granted that day.
- [6] In the founding affidavit, deposed to by the first applicant (Mackey) the Trust alleged that Boerdery had failed to make rental payments in the total sum of R920 000.00. Notice was given to Boerdery to remedy the breach and on failure to do so, the Trust cancelled the lease by letter dated 21 November 2018. In his affidavit Mackey
- stated that before the lease was cancelled, he contacted Boerdery's director, Gerhard Olivier, to discuss payments. They negotiated but a final agreement could not be reached. Mackey annexed an email from Olivier sent on 9 October 2018, in which Olivier proposed a schedule of payments different from that contained in the lease.
- [7] Mackey also annexed to his affidavit a list of items which he alleged had been brought onto Badspruit by Boerdery and over which he said that the Trust had a tacit hypothec. This list included tractors, a lowbed and other farming equipment.
- [8] Mackey maintained that the matter was urgent because the lease having been cancelled, Boerdery would probably remove the movables from Badspruit without delay. He also maintained that if Boerdery was given notice of the application and the normal time limits were observed, Boerdery would have time to remove the vehicles.
- [9] The Sheriff attached most of the movables contained in the Trust's list.
- [10] Boerdery opposed the application on the return day, 11 December
2018. By this time Grootpan had also launched its application to intervene, claiming that it was the owner of the attached property.
- [11] Olivier deposed to the answering affidavit in the main application. The main ground of defence was that an addendum to the lease agreement had been concluded, the terms of which materially altered the terms relating to payment of rent. The addendum recorded that rent for the months of March to June 2018 had been paid. Rent for July 2018 was to be paid on or before 16 October 2018. Rent for August 2018 was to be paid on or before 31 October 2018.

Thereafter what had been six monthly payments of R600 000.00 was amended to R100 000.00 up to February 2019. Thereafter

R600 000.00 was to be paid at six monthly intervals up to February 2020. This addendum was signed by Mackey on behalf of the Trust on 16 October 2018 and forwarded by him to Olivier for signature. Olivier claimed that he signed the addendum on 1 November 2018 and scanned and emailed it to Mackey that day. He annexed a copy of the addendum which reflected that it had been so signed by Mackey and Olivier. Olivier also annexed a copy of a whatsapp message he sent to Mackey at 20h29 on 1 November 2018 in which he said that he had sent the email. A whatsapp conversation on 2 November 2018 reflected that Mackey said that he had not received the email as at 10h43 but that he had received an email at 16h09.

- [12] In support of his allegation that the addendum had been emailed to Mackey on 1 November 2018, Olivier annexed an affidavit from Ms Jacqueline Breeze who is employed at Jetline, Pretoria. She stated that Olivier is a regular client and that on 1 November 2018 he requested her to scan and email a document which was an addendum to a lease agreement concluded between an entity in which Olivier is involved and a Trust. Olivier signed the addendum in her presence and requested her to scan and email the document to rodger@bfn.co.za. She complied with the request. Given the bulk of work completed at Jetline on a daily basis, it cannot retain all records of emailed correspondence. However Breeze confirmed that the scanned document is still on her computer in a folder for Olivier's documents.
- [13] Olivier said that although he had signed the addendum, the following day, 2 November 2018, he requested his attorneys to prepare another addendum to propose to Mackey. He signed this addendum which was sent to Mackey by Olivier's attorneys. This addendum provided that in place of the second advance payment of R600 000.00, monthly payments would be made. On 22 November 2018 the Trust indicated that the second addendum was not acceptable.
- [14] Olivier expressed the view that by cancelling the lease, the Trust was repudiating the agreement, which repudiation Boerdery did not accept. Olivier also tendered payment of the sum of R400 000.00 which he said was owing in terms of the addendum.
- [15] In response to Olivier's allegations regarding the addendum, Mackey maintained that Olivier had not signed and returned the addendum which he had forwarded to Olivier on 16 October 2018. Prior to 1 November 2018 Mackey sent reminders to Olivier to return the signed addendum. On 30 October 2018 Olivier told him that he wanted to include further clauses to eliminate uncertainty. Olivier informed Mackey on 1 November 2018 that he had sent him an email. On 2 November 2018 Mackey received an email from Boerdery's attorneys together with an addendum amended in accordance with Boerdery's proposals. Mackey did not sign this addendum because he was not satisfied with it. The email which Mackey said he had received as per the whatsapp conversation on 2 November 2018, was the email from the attorneys. The only agreement therefore, according to Mackey, was the lease agreement.
- [16] On 8 November 2018 Mackey received an email from Boerdery's attorneys telling him that payment could only be made once they received a signed contract. A portion of this email is as follows:
- "Soos u reeds kennis dra en telefonies bevestig het, kan betaling eers geskied sodra ons 'n getekende kontrak het."*
- [17] In support of his allegation that the first addendum had not been signed and returned to him by Olivier, Mackey annexed an affidavit from Mr Bartel Viljoen who is employed at Networking Computing Consultants, Bloemfontein. At Mackey's request, he prepared a report from his server concerning emails sent to Mackey's email address on 1 November

2018. According to Mackey, the report does not reflect the email from Olivier allegedly sent on 1 November 2018.

[18] Other than a reference to negotiations with Olivier (see paragraph

[6] above), Mackey made no reference whatsoever to the first addendum in his founding affidavit. Mackey's explanation for not disclosing the addendum in his founding affidavit was that the negotiations between the parties had not culminated in an agreement.

[19] It was submitted on behalf of Boerdery that, this being an ex parte application, the circumstances of the addendum should have been disclosed. It was not in dispute that Mackey had signed the addendum and forwarded it to Olivier.

[20] Erasmus Superior Court Practice at D1-61 – D1-62 states the following, with reference to various authorities:

“Good faith is a sine qua non in ex parte applications. If any material facts are not disclosed, whether they be wilfully suppressed or negligently omitted, the court may on that ground alone dismiss an ex parte application. The court will also not hold itself bound by any order obtained under the consequent misapprehension of the true position. Among the factors which the court will take into account in the exercise of its discretion to grant or deny relief to a litigant who has been remiss in his duty to disclose, are: the extent to which the rule has been breached; the reasons for the non-disclosure; the extent to which the first court might have been influenced by proper disclosure; the consequences, from the point of doing justice between the parties, of denying relief to the applicant on the ex parte order; and the interest of innocent third parties such as minor children, for whom protection was sought in the ex parte application.”

[21] In my view the existence of the first addendum was a material fact. It was signed by Mackey and forwarded by him to Olivier. Mackey had been told by Olivier that the addendum had been emailed to him on 1 November 2018, with the implication that Olivier had signed it. In my view it was not for Mackey to decide for himself that because

he was of the view that there was no agreement, there was no need to mention the addendum in the founding affidavit. If the

existence of the addendum and Olivier's whatsapp that he had sent the email on 1 November 2018 had been disclosed to the court hearing the ex parte application, it would in all likelihood have insisted that notice be given to Boerdery, and would not have been prepared to dispense with notice.

[22] In any event the grounds for bringing the application ex parte and as a matter of urgency were in my view somewhat flimsy. There was the bald statement that the movables would be removed

without delay because the lease had been cancelled. The lease was cancelled by letter dated 21 November 2018. The second

addendum was declined by Mackey on 22 November 2018. At this time the Trust knew that Boerdery was represented by attorneys who communicated directly with Mackey. The email of 8 November 2018 from Boerdery's attorneys presumably referred to the second addendum but it also showed that there was communication between Mackey and Boerdery's attorneys concerning payment of rent other than in terms of the lease. In these circumstances the fear that the movables would be removed without delay, or that Boerdery would remove them if it got wind of the application, was in my view based on flimsy grounds.

- [23] Once Boerdery had an opportunity to present its case, a dispute of fact emerged in the papers concerning the existence or otherwise of an agreement in terms of the first addendum. Certain factors were mentioned by Mackey with regard to the probabilities but at this stage I was of the view that, and as was submitted on behalf of Boerdery, the dispute could not be resolved on the papers. There was no basis at this stage to reject the evidence of Breeze which supports the allegation that Olivier did sign the addendum on 1 November 2018 and that it was emailed to Mackey.
- [24] It is so that on Boerdery's own version it owed R400 000.00. However the Trust brought the application based on the terms of the lease agreement without disclosing the circumstances of the addendum. It did so ex parte, as a matter of urgency, when it knew that Boerdery was represented by attorneys in relation to negotiations and payment. The Trust should not be able to take advantage of its order obtained in such circumstances.
- [25] For all the above reasons, I rescinded the order obtained ex parte and ordered the applicant to pay the costs of the main application.
- [26] It followed that the application to intervene fell away and insofar as it was necessary to do so, I made no order as to the costs of that application.
- [27] I intended to include in my order that the costs of the application include the costs reserved on 11 December 2018, when the matter was postponed to 14 December 2018. Paragraph [3] of my order is amended by the addition of the words "such costs to include the reserved costs of 11 December 2018". The date of hearing of the application is also incorrectly recorded as 13 December 2018. An amended order will accordingly be issued.

J M ROBERSON

JUDGE OF THE HIGH COURT

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