

SOUTH AFRICA / JUDGMENT

Poolman v Cordier and Others (2452/2016) [2017] ZANCHC 49 (10 March 2017) [2017] ZANCHC 49

COURT

Northern Cape High Court, Kimberley

BEFORE

Erasmus

CASE / FILE NUMBER

2452/2016

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IN

THE HIGH COURT OF SOUTH AFRICA
(NORTHERN
CAPE HIGHT COURT KIMBERLEY)

Case

number: 2452

/2016

Date heard: 10

/ 02 / 2017

Date delivered: 10

/ 03 /

2017

In the

application between:

HEINRICH
GEORGE POOLMAN
Applicant
and
PIET
SAGARIAS CORDIER
First
Respondent
ROBINCO
TWEE EN TAGTIG t/a
NOORD-KAAP
LEWENDE HAWE
(Reg.

No: 2000/017134/07)
Second Respondent
DUVENHAGE
& VAN DER MERWE INC.
Third
Respondent

Coram: Erasmus,
AJ

JUDGMENT

ERASMUS, AJ

[1] Applicant approached this Court on an urgent basis on Thursday 10 November 2016 and a rule nisi was issued calling on the respondents to show cause on 9 December 2016 why the following relief should not be made final:

1.1 that the second respondent be ordered to pay all nett proceeds in relation to the sale of 221 head of cattle in dispute, and which cattle were to be sold at auction on 10 November 2016, into the trust account of the third respondent;

1.2 that the third respondent, pending the finalisation of the dispute between the applicant and the first respondent regarding the cattle, keep the proceeds in his trust account, until such time as the dispute is resolved by a Court, alternatively by the order of a mutually agreed arbitrator, in the further alternative, by way of a signed settlement agreement;

1.3 the first respondent is directed to pay the costs of this application on a scale as between attorney and client; and

[2] The first respondent gave notice of his intention to oppose the application on 1 December 2016. On 9 December 2016 the rule nisi was extended to 10 February 2017 by mutual consent.

[3] The applicant stated the purpose of this application to be the protection of his interests pending cumbersome and financially

straining litigation between himself and the first respondent.

[4] The dispute which lies at the heart of this application pertains to the ownership of the cattle and the amounts due and owing to the applicant in terms of a written agreement of sale of cattle, entered into on 1 November 2013 ('the 2013-agreement'). In terms of this agreement the applicant sold cattle to the first respondent and payment was to be made in instalments until the

outstanding amount was settled in full, with reservation of the applicant's right of ownership until the full purchase price

had been paid.

- [5] According to the applicant the first respondent had not paid the full purchase price. It is the case of the first respondent that he had paid the full purchase price and that ownership of the cattle had passed to him.
- [6] The dispute that led to the application is an alleged agreement entered into by the parties on 3 November 2016, in terms of which the applicant agreed to the sale of 221 head of cattle at auction on 10 November 2016, subject thereto that the proceeds of the sale would be paid into the trust account of the applicant's attorneys and not be paid out until the main dispute pertaining to the earlier sale of cattle has been settled. It is the applicant's case that the first respondent has reneged on the agreement of 3 November 2016 by approaching the second respondent in an effort to seize the proceeds of the sale of the cattle on 10 November 2016.
- [7] The first respondent raised three points in limine, to wit urgency, material non-disclosure in an ex parte application and the late filing of the replying affidavit of the applicant. In argument before me, the applicant persisted with the second point only.
- [8] With reference to *South African Airways Soc v BDFM Publishers (Pty) Ltd and Others*[1], it was submitted on behalf of the first respondent that the applicant had in effect approached the Court on an ex parte basis and had not disclosed all the material facts and that, as a result thereof, the application should be dismissed.
- [9] The facts of this matter are clearly distinguishable from the case referred to above. There is no evidence that Matlapeng AJ had been misled in respect of either service or non-disclosure of material facts.
- [10] In this matter service of the application papers had been effected on the attorney of the first respondent, albeit on very short notice. The first respondent's attorney had been informed per e-mail correspondence on 9 November 2016 at 14:16 that, should the first respondent not confirm by 16:00 that the proceeds of the sale would be paid into the trust account of the applicant's attorneys, the applicant would approach the Court on an urgent basis for the appropriate relief. It appears from the notice of motion where and when the application was to be made. The sale of the cattle was to take place on 10 November 2016 at 12:00 and the granting of the order had thus not been overtaken by events.
- [11] The background to the application, and more specifically the dispute pertaining to the amount owing in respect of the 2013 agreement and the history that led to the events of 3 November 2016 and thereafter, appear from the founding papers and correspondence attached to the founding affidavit.[2] It appears from the founding papers that the applicant disputed having agreed to be bound or to abide by the findings of the auditor and that the first respondent's indebtedness to the applicant was in dispute.

- [12] I disagree with the submission that a failure of the applicant to disclose details of other pending actions or disputes constituted a failure to disclose material facts. Although a substantial portion of the first respondent's answering papers comprise a long history of several other disputes, I deem the reference thereto a digression from the dispute that forms the subject of this application. The other disputes between the parties have a long and protracted history which I do not deem necessary to repeat herein and involve, inter alia, the lease of agricultural land and, what was referred to as 'a butchery agreement'.
- [13] The first respondent had neither deemed it necessary to set the matter down for reconsideration in terms of Rule 6(12)(c) of the Uniform Court rules, nor had he anticipated the return day. He only filed a notice of opposition on 1 December 2016. The short service in this matter does not justify a discharge of the rule nisi and dismissal of the application. The points in limine must therefore fail.
- [14] According to the first respondent the relief sought by the applicant constitutes final relief and, so it was submitted, the applicant had not made out a case for such relief. It was also argued before me that the relief sought is a Mareva injunction and that the applicant had not made a case in this regard.
- [15] On behalf of the first respondent it was submitted that there was no basis in law upon which the applicant can insist on 'security'

for the amount which the applicant alleges he is indebted to him. If the applicant's contention is found to have any merits, then on that same contention the first respondent would be entitled to keep the proceeds from the sale of the cattle pending the finalisation of the actions which he has instituted against the applicant.

- [16] A final interdict resolves the issues between the parties, while an interim interdict is a provisional order designed to protect the rights of the complaining party pending an action or application to be brought by him to establish the respective rights of the parties.
- [17] A Mareva injunction is a species of an interim interdict compelling a respondent/defendant to refrain from dealing freely with his assets to which the applicant can lay no claim.[3] The purpose thereof is to prevent the intended defendant, who can be shown to have assets and who is about to defeat the plaintiff's claim or dissipating assets, from doing so. To be successful, the applicant must show that the respondent is wasting or secreting assets with the intention of defeating the claims of creditors.
- [18] The applicant in this instance had neither attempted to make out a case for a Mareva injunction, nor had his counsel argued the matter on that basis. I do not agree with the submissions on behalf of the first respondent that the relief constitutes a Mareva injunction or that the relief sought is final in nature.
- [19] The relief sought was framed as an interim interdict to protect the proceeds from the sale of cattle which forms the subject of the earlier agreement between the parties. The purpose of the application was to protect the rights of the applicant, pending an action in which the

contractual rights of the parties in respect of the 2013-agreement of sale stand to be determined. An interdict, as sought by the applicant, may be granted to prevent the disposal of money. The money in casu is identifiable, as it is held by the second respondent and is earmarked as a particular fund to which the applicant claims to be entitled. The money was received as proceeds of the sale of the cattle and is destined for a designated purpose, to wit the payment of the debt of the 2013-agreement.[4]

[20] The legal requirements for an interim interdict[5] are that the applicant must show

20.1 that he has a prima facie right to the relief even though this right might be open to some doubt;

20.2 a well-grounded apprehension of irreparable harm if the interim relief is not granted and he ultimately succeeds in establishing the right;

20.3 that the balance of convenience favours the granting of the interim relief; and

20.4 that he has no other satisfactory remedy.[6]

[21] These requisites must be considered in conjunction with one another when considering whether to exercise discretion in favour of granting the interim relief and requires a preliminary assessment of the merits of the applicant's case.[7]

[22] The approach to be followed in establishing whether an applicant has established the requirements were set out in *Spur Steak Ranches Ltd and Others v Saddles Steak Ranch, Claremont and Another*: [8]

"In determining whether or not the applicants crossed the threshold, the right relied upon for a temporary interdict need not be shown by a balance of probabilities, it is enough if it is prima facie established though open to some doubt."

The proper approach is to take the facts set out by the applicants together with any facts set out by the respondents, which the

applicants cannot dispute, and to consider whether having regard to the inherent probabilities the applicants should, not could, on those facts obtain final relief at the trial.

It is also necessary to repeat that although normally stated as a single requirement, the requirement for a right prima facie established,

though open to some doubt, involves two stages. Once the prima facie right has been assessed, that part of the requirement

which refers to the doubt involves a further enquiry in terms whereof the Court looks at the facts set up by the respondent in

contradiction of the applicants' case in order to see whether serious doubt is thrown on the applicant's case and if there is a mere contradiction or unconvincing explanation, then the right will be protected. Where, however, there is serious doubt then the applicant cannot succeed."

[23] It is common cause that the parties had entered into the 2013-agreement and that, in terms thereof, the applicant would remain

the owner of the cattle until the full purchase price had been paid.

[24] From the correspondence[9], it appears that the first respondent's indebtedness and in particular the amount due and owing in respect of the 2013-agreement,

lay at the heart of the dispute between the parties. The applicant had proposed the debatement of relevant accounts by way of private

arbitration, but the first respondent was not amenable to such proposal and the parties have been unable to arrive at a sensible

resolution to the dispute.

[25] It appears further from the correspondence that the calculations of the first respondent's auditor differed vastly from the applicant's calculation of what was due and owing by the first respondent. As far back as 10 February 2016[10] the applicant had stated that he had not agreed to be bound by the calculations of the auditor. The parties had merely agreed that a certain Mr van der Walt be appointed as independent accountant to investigate the respective documents and accounting systems of the parties and that the said accountant would be requested to finalise the calculations before or on 24 February 2016. From this letter it further appears that the first respondent was not entitled to sell any adult animals as ownership had not passed to the first respondent.

[26] It also appears from a letter of the applicant's attorneys dated 8 March 2016[11] that the calculations by the auditor had not been accepted as correct. From paragraph 14 of this letter it appears that the first respondent's accountant had not interacted with the applicant and that the intention was that he merely had to prepare a summary which could be used as a point of departure for negotiations.

[27] The first respondent was aware that the applicant disputed the amount which the auditor had allegedly determined to be outstanding in respect of the sale of the cattle in terms of the 2013-agreement. According to the applicant, as at 31 August 2016, the amount of R832,310.22 was still due and owing in respect of the 2013-agreement. This was in fact the dispute that had to be resolved and which had led to the agreement between the respective attorneys on 3 November 2016.

[28] The dispute as to whether the parties had concluded the agreement of 3 November 2016 is inextricably linked to the earlier agreement pertaining to the sale of certain cattle during September 2016.

- [29] On 23 August 2016, prior to finalisation of the eviction proceedings in terms of which the first respondent was evicted from certain agricultural land, the first respondent's attorneys requested permission from the applicant's attorneys to sell 75 head of the cattle as the first respondent had allegedly obtained decent offers for the cattle. After negotiations between the attorneys of the parties, the applicant had agreed to the sale subject thereto, inter alia, that the proceeds of the sale be paid into the trust account of the first respondent's attorneys and certain other conditions.[12]
- [30] A dispute arose as the cattle had been sold for less than the agreed price and only half of the proceeds had been paid into the trust account of the first respondent's attorneys. The details of the dispute appear from correspondence between the attorneys.[13] The applicant's attorneys had specifically placed on record that the applicant would not concede to any further sale of cattle.
- [31] In the answering affidavit the first respondent alleged that there had been a misunderstanding between the parties on 31 August 2016 and that the undertaking made in August 2016 had not been to hold the full proceeds of the sale of cattle in trust, but only to hold sufficient money to cover the outstanding amount as calculated by the auditor in terms of the agreement. It was specifically denied that there had been an agreement that the full purchase price would be held in trust. Given the correspondence between the attorneys of the parties and the events leading up to 3 November 2016, this version appears to be improbable.
- [32] The first respondent had to vacate certain agricultural land on 15 November 2016, subsequent to a settlement of the dispute pertaining to the lease of agricultural land. As this date approached, the attorney of the first respondent, as had happened in August 2016, contacted the applicant's attorneys and stated that the first respondent wanted to sell 221 head of cattle at an auction scheduled for 12:00 on 10 November 2016.
- [33] The applicant's attorneys confirmed that this would be in the best interest of both parties. In the light of earlier events during August and September 2016, the applicant's attorney had insisted that the proceeds be paid into his trust account pending a solution to the dispute regarding the cattle.
- [34] According to the applicant, the first respondent confirmed that this was in order and, based upon this agreement, the applicant agreed that the cattle could be loaded and transported to the auction to be sold. The applicant's attorney of record had confirmed the agreement in writing, but never received a response from the first respondent's attorney. He accepted that all was in order.

- [35] It then came to the attention of the applicant's attorney that the first respondent and his attorney had approached the second respondent with the instruction that the proceeds of the sale of the cattle were to be paid to the first respondent. The applicant's attorney contacted the first respondent's attorney on 7 November 2016. The attitude of the first respondent's attorney was then that the cattle had been paid in full and that they had the right to insist on payment of the proceeds of the sale.
- [36] In a letter dated 7 November 2016[14] the first respondent's attorneys averred that the cattle had been paid in full. According to the applicant this letter was received on 9 November 2016.
- [37] In reply, the applicant attached a copy of a letter[15], addressed to the second respondent, informing it about the dispute and instructed the second respondent to pay the full proceeds of the sale into the trust account of the applicant's attorneys. A copy of this letter appears also to have been sent under cover of an e-mail dated 7 November 2016 at 11:42 to the first respondent's attorney.
- [38] The applicant's attorneys responded to the first respondent's letter[16] on the same day via e-mail communication.[17] He set out the previous agreement and the applicant's discontent with the fact that the first respondent and his attorney
- had reneged the earlier agreement by approaching the second respondent for payment of the proceeds of the sale. The attorney was
- requested to confirm before 16:00 on 9 November 2016 that the second respondent would honour the earlier agreement, failing which the High Court would be approached for further relief. The first respondent had not responded to the allegations contained in the e-mail of applicant's attorney dated 9 November 2016. [18]
- [39] It is against this background that the first defendant's version should be viewed. He denied that the parties had
- entered into an agreement on 3 November 2016 in the terms, as averred by the applicant. The first respondent further contended that the purpose of the 3 November 2016 agreement was only to provide as much security as to make provision for the first respondent's
- indebtedness to the applicant, as found by the auditor, and that his stance pertaining to the ownership of the cattle had been conveyed to the applicant and his attorney prior to 3 November 2016.
- [40] According to the first respondent the full purchase price had been paid and ownership of the cattle had passed to him and the acceptance by the applicant's attorney that an agreement had been concluded was misplaced. The undertaking[19] by the first respondent was only in respect of the outstanding amount to be determined by the auditor and to which the parties had agreed to be bound. According to the auditor the outstanding amount was approximately R148,000.00. It has always been the first respondent's stance that the cattle

had been fully paid for and that he was entitled to the proceeds of the sale of the cattle.

[41] The version of the applicant pertaining to the history of the dispute and more specifically the agreement of 3 November 2016, as borne out by the correspondence between the attorneys of the parties, is more probable. The events of September 2016 led to the applicant's insistence that the proceeds be paid into his attorney's trust account. If the first respondent's attorney held in trust an amount in excess of what, according to the first respondent, had been owing to the applicant, it is highly improbable that his attorney would have approached the applicant's attorney on 3 November 2016 to discuss an undertaking.

[42] The first respondent had not taken issue with the written recordal of the terms of the August 2016 agreement by the applicant's

attorney and his follow-up letter of 1 September 2016. He had also not dealt with the exact terms of the agreement of 3 November

2016 and what had been discussed between the attorneys on that day.

[43] I agree with the submission on behalf of the applicant, that the first respondent had bound himself to the agreement of 3 November

2016 which entailed that the full proceeds of the sale of cattle be paid into the trust account of the applicant's attorneys,

pending finalisation of the dispute in respect of the 2013-agreement.

[44] On the papers, I am satisfied that the first respondent had not cast sufficient serious doubt on the applicant's averments which lead me to conclude that the applicant will not succeed if proven at a trial. The applicant has thus shown a prima facie right, even though it might be open to some doubt.

[45] Having accepted that the applicant has shown, on a balance of probabilities that the parties had concluded the agreement of 3 November 2016, it follows that the first respondent had bound himself in full appreciation of the facts and had considered the respective interests of the parties. The agreement had been reached as a reasonable measure to strike a balance between the conflicting interests of the parties. The attempt by the first respondent to divert the full proceeds of the sale of the cattle to himself constituted grounds for the entertainment of a reasonable apprehension that the applicant's rights would be detrimentally affected if the interim interdict is not granted.[20]

[46] As submitted on behalf of the applicant, the first respondent had accepted, at least by implication, that the applicant had insisted on the agreement to prevent irreparable harm. Any prejudice to the first respondent would be temporary, as he would receive any balance of the proceeds of the sale of the cattle, should it be found due and payable to him under the 2013-agreement. I am thus satisfied that the balance of convenience favours the granting of the interim interdict.

[47] In respect of the requirement that the applicant had to show that he has no alternative remedy, it should be kept in mind that the alternative remedy should be found to be adequate in the circumstances, should be ordinary and reasonable and should grant

similar protection.[21] This requirement should also not be viewed in isolation, but in conjunction with the other requirements when exercising my discretion whether or not to grant the interim interdict. The interim interdict is in my view the most reasonable and effective procedure in the circumstances of this case.

[48] Having taken into consideration all the evidence placed before me, I am satisfied that the proceeds of the sale of the cattle should be preserved until the dispute about the sale of the cattle in terms of the 2013-agreement has been resolved. I am satisfied that the applicant has made out a case for the confirmation of the rule nisi in this matter.

[49] As correctly conceded on behalf of the applicant, the applicant should be required to institute action within a specified period

failing which, the rule should lapse. I am entitled to impose such conditions and deem a period of three weeks from date of this order to be fair to both parties.

[50] No arguments were advanced on behalf of the first respondent as to why costs should not be awarded to the successful party. It was argued on behalf of the applicant that, should he be successful, the first respondent should be ordered to pay the costs of the application on a punitive scale because the conduct of the first respondent amounted to frivolous and vexatious litigation. I disagree and find that the nature of the application and conduct of the first respondent do not warrant a punitive cost order.

I make the following order:

1 PARAGRAPHS 1.1 AND 1.2 OF THE RULE NISI ISSUED ON 10 NOVEMBER 2016 UNDER CASE NUMBER 2452/16 ARE CONFIRMED, SUBJECT THERETO THAT THE APPLICANT INSTITUTE ACTION WITHIN THREE (3) WEEKS OF THE DATE OF THIS ORDER FAILING WHICH, THE ORDER SHALL LAPSE.

2 THE FIRST RESPONDENT IS ORDERED TO PAY THE APPLICANT'S TAXED OR AGREED COSTS OF THE APPLICATION ON A SCALE AS BETWEEN PARTY AND PARTY.

SL ERASMUS

ACTING JUDGE

NORTHERN CAPE DIVISION

On behalf of the Applicant: Adv WA van Aswegen oio Duncan & Rothman Inc.

On behalf of the Respondent: Adv P Zietsman SC and Adv R van der Merwe oio Hugo Mathewson & Oosthuizen

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- [1] 2016
- (2) SA 561 (GJ)
- [2] Annexure 'HG3', 'HG4', 'HG5', 'HG10' and 'HG13' to the founding affidavit
- [3] Knox D'Arcy v Jamieson 1994(3) SA 348 at 371-372
- [4] Nieuwoudt v Maswabi 2002 6 SA 96 (O)
- [5] Setlogelo v Setlogelo 1914 AD 221 at 227; Webster v Mitchell 1948 (1) SA 1186 (W) at 1188-1189
- [6] Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton 1973(3) SA 685 (A) at 691F; Gool v Minister of Justice and Another, 1955
- (2) SA 682 (C) at 687 – 8; Ferreira v Levin NO; Vryenhoek v Powell NO 1995(2) SA 813 (W) at 817I-818B and 824I-J
- [7] Olympic Passenger Service (Pty) Ltd v Ramlagan 1957(2) SA 382 (D) at 383C-G
- [8] 1996(3) SA 706 (C) at 714E-G
- [9] Annexure 'HG4' to the founding papers and 'M5' to the answering affidavit
- [10] Annexure 'M5' to the answering affidavit
- [11] Annexure 'L' to the answering affidavit
- [12] Annexures 'HG5' – 'HG7' to the founding affidavit
- [13] Annexures 'HG4' and 'HG8' - 'HG10' to the founding affidavit
- [14] Annexure 'HG13' to the founding affidavit
- [15] Annexure 'RA1' to the replying affidavit
- [16] Annexure 'RA13' to the founding affidavit
- [17] Annexure 'HG14' to the founding affidavit
- [18] Annexure 'HG14'
- [19] As set out in annexure 'HG13'
- [20] Janit v Motor Industry Fund Administration (Pty) Ltd 1995(4) SA 293 (A) at 304H-J; V & A Waterfront Properties (Pty) Ltd v Helicopter and Marine Service (Pty) Ltd 2004 2 All SA 664 (C) par [18]
- [21] Chapman's Peak Hotel v O'Hagans [2001] 4 All SA 415 (C) at 420

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