12/6/2017.

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

REPUBLIC OF SOUTH AFRICA

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED.

12/6/2017
DATE

SIGNATURE

Date of hearing: 22 May 2017

Date of judgment: 12 June 2017

In the matter between:

Case number 2845/2017

GERTRUIDA MAGDALENA MOOLMAN Applicant

and

LIJANI BOERDERY (PTY) LTD First Respondent

JAN ALEXANDER MOKKEN Second Respondent

JUDGMENT

BRENNER, AJ:

1. In this opposed application for summary judgment, Gertruida Magdalena Moolman ("Moolman"), qua applicant, claims monetary payment from Lijani Boerdery (Pty) Ltd ("Lijani") and Jan Alexander Mokken ("Mokken"), qua second respondent, for plants sold and delivered.

2. At all material times hereto, Moolman, and her late husband before her, conducted the business of germinating and selling plants, as sole proprietors, under the name and style of Danman Boerdery. Danman Boerdery would take orders for certain plants to be germinated into seedlings, whereafter, they would be harvested and delivered to or collected by, purchasers. The plants in question included varieties of cabbage and lettuce.

3. The claims comprise three components, which include mora interest and costs, namely:

    a. Claim one: payment of the sum of R2 000 000,00;

    b. Claim two: payment of the sum of R1 203 155, 58;

    c. Claim three: payment of the sum of R624 913,00.

4. At inception of the hearing, Counsel for Moolman stated that she did not persist in summary judgment on claim three, this because the claim was for unliquidated damages.

5. Claim one is founded on a settlement agreement evidenced by a written offer made in a letter dated 29 May 2015 from Lijani's attorneys to Moolman's attorneys, and by the written acceptance thereof in a letter dated 17 September 2015 from Moolman's attorneys to Lijani's attorneys. I will refer to this below as "the settlement agreement".

6. In essence, the settlement agreement dealt with historical debt owed to Moolman's late husband. (Moolman's locus standi is traversed below). The material terms were:

a. Lijani acknowledged that it was liable to the estate of the deceased for payment of the sum of R3 550 944,79, for plants sold and delivered to it;

b. Lijani undertook to repay this amount over a period of 36 months, at the rate of R1 000 000,00 per annum.

7. The above debt was originally owing to Moolman's late husband, Daniel Jacobus Moolman, trading as Danman Boerdery ("the deceased"). On 30 January 2015, following his death on 14 January 2015, Moolman was appointed as the executrix in his estate.

8. On 4 March 2015, all the right title and interest of the estate of the deceased in and to claims against debtors was ceded, in writing, to Moolman, for a price of R500 000,00. Moolman also took over the business of the deceased and continued to trade as Danman Boerdery. The validity of this cession and the takeover of the business is not disputed by the respondents.

9. The operative wording of the offer letter is quoted below:

"4. Die bedrag wat aan die oorledene se boedel beskuldig is, is verskuldig deur Lijani Trust/Boerdery Eiendoms Beperk.

5. Die totale bedrag verskuldig volgens ons klient beloop R3 550 944,79.

6. Tydens u klient se laaste besoek aan ons klient het hyo ns klient meegedeel dat daar geen rente betaalbaar is nie.

7. Ons klient bied derhalwe aan om uitstaande bedrag oor 36 maande die boedel terug te betaal met die verstandhouding da tons klient ten minste 'n bedrag van R1 000 000 per jaar sal betaal."

10. The operative wording of the acceptance letter is quoted below:

" Ons rig ons skrywe aan u in ooreenstemming met ons instruksies.

Ons klient is bereid om u klient se aanbod te aanvaar ter betaling van R3 550 944,79 oor 'n tydperk van 36 maande met ten minste die bedrag van R1 000 000.00 betaalbaar per jaar/12 maande siklus."

11. The settlement agreement did not contain a term which dealt with the commencement date of the payments offered by Lijani. Nor does the

agreement contain an acceleration clause. However, at worst, and by necessary implication, the first instalment was due, owing and payable by 17 September 2016. Summons was served on 3 February 2017, post this date.

12. The second claim is based on two documents: a written order dated 13 August 2015, signed by Mokken on behalf of Lijani, and a document styled "Agreement between G Moolman Boerdery T/A Danman Boerdery and purchaser", again signed by Mokken on behalf of Lijani, on 5 October 2016. Both such documents contained terms of sale.

13. The transaction report of Moolman evidencing the calculation of the claim covers invoices raised from 13 June 2016 to 23 November 2016. It is plain that the written order dated 13 August 2015 covers orders placed until the written Agreement" document dated 5 October 2016 which, in my view, substituted the order document. Accordingly, the latter Agreement covers orders placed from 15 October 2016 and thereafter.

14. It is the terms of the Agreement which would apply to the order placed by Lijani in November 2016 which gave rise to its allegation that Moolman repudiated her obligations, and that Lijani suffered damages. Of which, more later.

15. In both documents, there is a suretyship provision. Mokken signed both documents. In the order document, immediately under Mokken's signature, it states that he binds himself in his personal capacity as surety and co-principal debtor for the liability of Lijani to Dan Man Boerdery. Immediately above his signature in the "Agreement" document, it states that the signatory binds himself as surety and co-principal debtor for the obligations of purchaser Lijani. In both documents, resort to litigation would result in a claim to payment of attorney and own client costs.

16. Clause 2 of the order document provides that the purchaser shall pay for all plants ordered, including seedlings planted but not collected, within 14 days from the date of delivery. In terms of clause 3, the purchaser is obliged to collect the plants on the date agreed for delivery, failing which,

the seller may charge a 5% increase per week on the price and reserves the right to sell the plants after two weeks from the agreed date of delivery. Clause 5 of the order document provides that, unless otherwise agreed in writing, the full purchase price is payable COD (Cash on delivery). In terms of clause 9, the liability of the seller for any damages or loss of whatsoever nature suffered by the purchaser would at all times be limited to the sale price of the plants delivered, the purchase price of the seed excluded.

17. Clause 7 of the Agreement document provides that the purchase price is due and payable on the collection date or delivery date (whichever is applicable) in respect of all plants ordered irrespective of whether such plants were in fact collected or delivery thereof accepted. At clause 17 there is a limitation of liability clause which states that the liability of the seller for any damages or loss of whatsoever nature suffered by the purchaser shall in any event at all times be limited to the purchase price paid for the goods.

18. In the particulars of claim, Moolman asserts that, between 13 June 2016 to 23 November 2016, invoices were raised for orders placed by Lijani. A resultant balance of R1 203 155,58 became owing. This balance takes account of a credit of R20 823,01 at 1 June 2016 and sporadic payments made by Lijani over the same period, totalling R310 296,84 in the aggregate.

19. In the affidavit opposing summary judgment, concerning claim one, Mokken avers on behalf of Lijani:

"It is admitted that the First Defendant was indebted to Mr Moolman in the amount of R3 550 944.79 as at 29 May 2015 as was recorded in Annexure "MO2" to the Plaintiff's Particulars of Claim".

20. Annexure "MO2" is the offer letter dated 29 May 2015 from Lijani's attorneys, which was accepted by Moolman's attorneys on 17 September 2015.

21. Concerning claim two, Lijani agrees having concluded an agreement with Moolman on 5 October 2016. No mention is made of the signed order document which preceded it.

22. Mokken asserts that his attention was never drawn to the suretyship provisions in the document, on the basis of which Moolman seeks to hold him personally liable for the debt. He asserts that he would never have signed same had this occurred. He does not assert that either document would not have been signed had it excluded the suretyship provision.

23. Significantly, however, Mokken does not deny that the sum of R1 203 155,58 is due, owing and payable by Lijani to Moolman. Nor is this claim denied in the letters generated by Lijani's attorney, which are attached to the papers in the application.

24. In terms of the Agreement, so it is alleged by Mokken, an order was placed with Moolman in November 2016, which contained no provision entitling Moolman to withhold supply of the seedlings if payment was tendered on delivery.

25. According to Mokken, during November 2016, Moolman refused to supply further seedlings. In a letter dated 23 November 2016 from Lijani's attorneys to Moolman's attorneys, demand is made for delivery of certain seedlings, which should have occurred by 21 November 2016. The letter goes on to say:

> *"My klient tender hiermee betaling van die volle verskuldigde bedrag van die gemelde groenteplantjies wat us moes aflewer op Maandag 21 November 2016, soos reeds hierbo gemeld verskyn dit teenoor week 47.*
>
> ***U moet die ooreenkoms hoeveelheid aan my klient lewer voor sluit van besigheid op Donderdag 24 November 2016, by gebreke waaraan my klient sal aanvaar dat u die ooreenkoms tussen uself en my klient verbreek het en sal my klient dan sy regs opsies hierin oorweeg."***

26. In a further letter dated 25 November 2016, Lijani's attorneys state:

> *"Geliewe kennis te neem dat geen plantjies afgelewer is by ons klient nie, en neem ons dus aan dat u die kontrak repudieer.*

Gevolglik tot die bogenoemde, repudieer ons klient die tender ten opsigte van betaling.

Neem asseblief verder kennis da tons klient se regte uitdruklik hier in voorbehou word, veral temn opsigte van 'n skadevergoeding eis."

27. A reply attached to the particulars of claim dated 25 November 2016 from Moolman's attorneys to Lijani's attorneys demands payment of the amount of R3 550 944,79 and R1 203 155,58 and states, inter alia, the following:

"10. Your client continues to take delivery and notwithstanding various promises for payment fails and/or neglects to either make payment of the million rand due in terms of the old debt or of the monies due in terms of the new plants supplied, resulting in an additional R1 203 155,58 becoming due and payable.

11. Notwithstanding its failure to pay any of the aforesaid, your client in last week advises our client that it has insufficient means to pay against the new payment date (being the date that it would be entitled to take delivery of the new batch of plants)."

28. Mokken does not attach any answer to the above letter. He notes in his affidavit, however, that Moolman never terminated the agreement to supply the seedlings on the ground of nonpayment and avers that she breached the agreement despite the fact that Lijani tendered to pay for the seedlings required in November 2016. He appears to brazenly ignore the historical debt for which Lijani was liable and which was substantial.

29. Mokken baldly avers that Lijani could not obtain the seedlings from any other supplier and was unable to plant the lettuce and cabbage seedlings.

30. In the result, Lijani allegedly suffered a loss of profit in the sum of R6 550 620,00, comprising R3 231 100,00 arising from its inability to plant and sell lettuce, and R3 319 520,00 arising from its inability to plant and sell cabbage. A two page schedule is attached which computes the loss of profit claimed by Lijani. Mokken proceeds to aver:

"Considering the amount owed by the First Defendant to the plaintiff and the aforesaid counterclaim, it is the Plaintiff that is indebted to the First Defendant in the amount of R2 999 675,21."

31. It is clear from the above concession that Lijani admits liability for payment of the sum of R3 550 944,79 but inexplicably disregards the claim for R1 203 155,58. These two amounts total R4 754 100,37. If one deducts the total debt to Moolman of R4 754 100,37 from the counterclaim of R6 550 620,00, the balance is R1 796 519,63, and not the amount of R2 999 675,21 as alleged by Mokken.

32. Rule 32(3)(b) of the Uniform Rules obliges a respondent in summary judgment proceedings to adduce a bona fide defence to the action by way of an affidavit which discloses fully the nature and grounds of the defence and the material facts relied upon therefor.

33. At page B1-223 of Erasmus, Superior Court Practice, the author states:

> *"If, however, the defence is averred in a manner which appears in all the circumstances to be needlessly bald, vague or sketchy, that will constitute material for the court to consider in relation to the requirement of bona fides."*

34. This much was stated in the case of **Breitenbach v Fiat SA (Edms) Bpk 1976 (2) SA 226 (T)**. At p228 the Court held as follows:

> *"It must be accepted that the subrule was not intended to demand the impossible. It cannot, therefore, be given its literal meaning when it requires the defendant to satisfy the Court of the bona fides of his defence. It will suffice.....if the defendant swears to a defence, valid in law, in a manner which is not inherently and seriously unconvincing."*

35. A further inciteful case is that of **Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture 2009 (5) SA 1 (SCA),** at paragraph 31:

> *"The summary judgment procedure was not intended to "shut a defendant out from defending", unless it was very clear indeed that he had no case in the action. It was intended to prevent sham defences from defeating the rights of the parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights. The rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of her/his day in court."*

36. Counsel for Moolman drew my attention to the case of **South African Land Arrangements CC and two others v Nedbank Limited 2015 ZASCA 88 dated 29 May 2015** in which, at paragraph 15, the SCA said:

"Where a counterclaim is put up as a defence, a full disclosure of the nature and grounds of the counterclaim as well as the material facts upon which a defendant relies must be made in order for it to be successful in a defence."

37. Reverting to the facts in casu, in regard to claim one, the sum of R1 000 000,00 of the total of R3 550 944,79 is, by necessary implication, at least due, owing and payable.

38. Regarding claim two, there is no dispute that the further liability, incurred post the death of the deceased and the takeover of Danman Boerdery by Moolman, of R1 203 155,58 is due, owing and payable.

39. Mokken has raised a bona fide and triable dispute based on iustus error concerning the claim which relies on the personal suretyships signed by him, and accordingly, summary judgment cannot be granted against him in his personal capacity.

40. The purported counterclaim fails to provide sufficient material facts to justify its constituting a bona fide and genuine defence to the claims by Moolman. It is bald, vague and sketchy.

41. Based on the factual matrix, and the Agreement which prevailed at the time Mokken placed the November 2016 order, it would have been absurd to expect Moolman to continue supplying seedlings at risk, in the light of a litany of broken promises to pay, and the historical track record of Lijani in regard to non-payment.

42. Albeit that a large portion was not yet due and payable, the total quantum of the debt owed by Lijani to Moolman as at November 2016 was substantial: R4 754 100,17.

43. Based on this fact, and, as mentioned above, an established track record of broken promises to pay existing debt, Moolman was entitled to harbour

the reasonable apprehension that Lijani would not honour its promise to pay for the batch of seedlings ordered in November 2016. This is fortified by the fact that Lijani's attorney makes no mention in the correspondence of how the payment would be made to Moolman against delivery of the seedlings ordered circa November 2016.

44. Moolman's conduct in declining to deliver further plants until Lijani had taken steps to pay historical debt did not constitute a breach of the agreement creating a basis for Lijani to claim damages from Moolman.

45. On the contrary, it was Lijani's numerous breaches and failure to pay substantial amounts for which it was liable which created the state of affairs which permitted Moolman to hold back collection or delivery of further seedlings to Lijani. In any event, even assuming its sustainability, which was not proved in the opposing affidavit, the counterclaim constitutes a claim for unliquidated damages.

46. Lijani was unable to prove a bona fide, genuine, prima facie defence on the merits in regard to the claims adumbrated below.

47. Based on the order document and the Agreement mentioned above, there is justification for costs on the attorney and client scale but not on the attorney and own client scale. The latter order is one which has the potential for undue prejudice to the affected party and is not warranted in casu.

48. The following order is granted, namely:

a. Summary judgment is granted in favour of the plaintiff against the first defendant for payment of the sum of R1 000,000,00, plus mora interest thereon at 10,25% per annum to date of final payment, and costs of suit on the attorney and client scale to date;

b. Summary judgment is granted in favour of the plaintiff against the first defendant for payment of the sum of R1 203 155,58, plus

mora interest thereon at 10,25% per annum to date of final payment and costs of suit on the attorney and client scale to date;

c. Regarding the balance of claim one, in the amount of R1 000 000,00, leave to defend is granted to the first defendant;

d. Regarding claim three, leave to defend is granted to the first defendant;

e. Regarding the total amounts of claims one, two and three, insofar as they pertain to claims against the second defendant, personally, in terms of the suretyships contended for by the plaintiff, leave to defend is granted to the second defendant;

f. To the extent to which leave to defend has been granted, costs shall be costs in the cause of the main action.

T BRENNER
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG
12 June 2017

Appearances

Counsel for the Applicant:	Advocate FW Botes
Instructed by:	Attorneys Langenhoven Pistorius & Prtnrs
Counsel for the Respondents:	Advocate van der Merwe
Instructed by:	Wynand du Plessis Attorneys