



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case no: I 1548/2016

In the matter between:

STANLEY MUKARU

PLAINTIFF / RESPONDENT

and

HORST RICHARD GOSSOW

DEFENDANT / APPLICANT

Neutral citation: *Gossow v Mukaru* (I 1548/2016) [2017] NAHCMD 99 (27 March 2017)

Coram: OOSTHUIZEN J

Heard: 4 August 2016

Rule Nisi: 22 September 2016

Extended: 9 December 2016

Delivered: 27 March 2017

Flynote: Urgent ex parte application – lessor and lessee – perfecting hypothec of landlord over movables of the lessee.

Summary: Respondent instituted action for upliftment of a veterinary ban (caused by applicant) preventing respondent to move his livestock from a portion of a farm leased from applicant. Applicant counterclaimed for arrear rentals and subsequently instructed Veterinary office in Otjiwarongo to “open” farm Niederungsfelde (to uplift ban), but almost immediately brought urgent ex parte application to perfect applicant’s tacit hypothec over movables of respondent on the said farm.

ORDER

Having heard counsel for the applicant/defendant and counsel for the respondent/plaintiff –

IT IS ORDERED THAT:

1. The rule nisi (order 2) and orders 1, 3 and 4 of 4 August 2016 are confirmed.
 2. Costs to be costs in the main action in case number: I1548/2016.
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RULING

OOSTHUIZEN J:

Facts

[1] On 4 August 2016 the applicant brought an urgent application on an ex parte basis against the respondent, seeking an order on an interim basis for an attachment of the respondent’s livestock currently kept on a portion of the farm Niederungsfelde, No 45, Otjiwarongo district.

[2] This application was brought in respect of arrear rental owed to the applicant by the respondent.

[3] The application is premised on the right of security a lessor have over the movables of a lessee on the leased premises. It is a tacit hypothec over movables brought onto the leased premises by the lessee. The lessor can only perfect such hypothec in respect of arrear rental by obtaining a court order through judicial process.

Background

[4] The respondent and the applicant concluded an oral lease agreement during October/November 2010, alternatively April 2011, which lease agreement related to a portion of the farm Niederungsfelde, No 45 Otjiwarongo district, which farm consist 8 identifiable camps (allegedly 1402 hectares in extent)

[5] It is common cause that such a lease agreement is in existence and that respondent is in arrears with his rental obligations. The outstanding amount of the rental is highly disputed. According to the applicant it is more than half a million Namibian Dollars and according to the respondent it is less than N\$ 80 000.00.

[6] However, the rent was payable at the end of each month. According to the applicant the monthly rental was payable by the respondent to Cenored for the plaintiff's benefit and in settling of the plaintiff's electricity account in respect of farm Neulehmutz No 513. Respondent was a senior accountant at Cenored at all relevant times and say for that reason he would not enter into the payment terms alleged by the applicant, as it may amount to corruption.

[7] The applicant further states that he only became aware of the respondent's failure to pay the rentals as agreed sometime during August/September 2015 when the applicant received a Summons from Cenored instituting action against him for the payment of the arrear electricity account in respect of farm Neulehmutz.

[8] As a direct result thereof, the applicant attempted to secure his rights in approaching the State Veterinarian's office in Otjiwarongo during or about December 2015 and by requesting them to close the farm. That was done in order to prevent the respondent from removing any or all his livestock from the farm in order for the applicant to have security for payment.

[9] Subsequently, in light of the farm being closed, the respondent had instituted action against the applicant to uplift the ban over Farm No. 45 Niederungsfelde, Otjiwarongo district.¹

[10] The applicant had uplifted the ban on 2 August 2016², after receiving advice from his legal practitioners that his action of December 2015 is not the lawful way of perfecting a tacit hypothec.

[11] It is common cause that respondent does not want to be restrained in how to run his farming business and to earn money from his livestock.

[12] It is common cause that respondent has instituted action against the applicant for the upliftment of the ban on the movement of his livestock from farm Niederungsfelde.

Court Order of 4 August 2016

[13] The following court order was issued –

'Having heard **Mr Strydom**, counsel for the applicant and having read the documents filed of record –

IT IS ORDERED THAT:

¹ Pleadings Bundle, page 7.

² See Interlocutory Bundle, page 26.

1. The applicant's non-compliance with the rules of this honourable Court relating to service and forms and authorizing the applicant to bring this application on an urgent *ex parte* basis as contemplated in Rule 73(4) of the Rules of Court is condoned.
2. That a rule *nisi* does hereby issue calling upon the respondent (and/or any other party which may have an interest) to show cause, if any, on or before **THURSDAY, the 22nd of SEPTEMBER 2016** why an order in the following terms should not be granted:
 - 2.1. Authorizing and directing the Deputy Sheriff for the district of Otjiwarongo to attach the following movable property to wit:
 - 2.1.1. All head of cattle currently kept on a portion of the farm Niederungsfelde, No 45 Otjiwarongo district consisting of 8 identifiable camps specifically earmarked for lease purposes to the respondent (hereinafter "the leased premises");
 - 2.1.2. All head of small stock (both sheep and goats) currently kept on the leased premises;(hereinafter referred to as the "*movable property*") in confirmation of the applicant's lessor's tacit hypothec over the aforementioned movable property pending the resolution of the applicant's action referred to in paragraph 3 *infra* and further to complete stock lists in respect of the movable property, encapsulating the registered stock brands and stock numbers appearing on the movable property (by way of ear tags and stock brands);
 - 2.2. Further authorizing and directing the Deputy Sheriff for the district of Otjiwarongo to hold such movable property under attachment pending the resolution of the applicant's action referred to in paragraph 3 *infra*;

- 2.3. Interdicting and restraining the respondent from transferring or hypothecating or encumbering or removing from the farm Niederungsfelde No 45 Otjiwarongo district, the aforementioned movable property pending the resolution of the applicant's action referred to in paragraph 3 *infra*;
 - 2.4. Directing the respondent to pay the costs of the application, alternatively ordering that the costs of this application be costs in the cause of the main action as contemplated in paragraph 3 *infra*.
 3. Ordering that sub-paragraphs 2.1 to 2.3 *supra* shall operate as an interim order with immediate effect pending the resolution of the applicant's current action prosecuted in this honourable court under case number I1548/2016 wherein the applicant (as plaintiff in reconvention) is suing the respondent for arrear rentals.
 4. Ordering that the movable property be released only on security being furnished to the applicant to the satisfaction of the Registrar of this Honourable Court for any judgment, including interest and costs, which may be given against respondent in the said action.
 5. Authorizing the applicant to bring this application on facsimile copies and further authorizing and directing the Deputy Sheriff for the district of Otjiwarongo to serve facsimile copies of this order and application on the respondent, his legal practitioners of record Messrs Kangueehi, Kavendji Inc. as well as the State Veterinarian's office, Otjiwarongo and the movable property set out herein before.
 6. Directing that any person having an interest which may be affected by this order obtained *ex parte*, may deliver notice of application by him or her for leave to oppose, supported by an affidavit setting out the nature of that interest and the grounds on which he or she desires to be heard.
 7. Directing that any person against whom an order is granted *ex parte* may anticipate the return date on delivery of not less than 24 hours' notice.'

[14] On 22 September 2016 the following order was issued –

'Having heard **Mr Strydom**, counsel for the applicant and **Ms O'Malley**, counsel for the defendant and having read the documents filed of record –

IT IS ORDERED THAT:

1. The return date is extended to 9 December 2016 at 10h00.
2. Applicant/defendant shall file his replying affidavits on or before 18 October 2016.
3. Indexing and pagination to be done on or before 31 October 2016.
4. Applicant/defendant shall file his heads of argument on or before 16 November 2016.
5. Respondent/plaintiff shall file his heads of argument on or before 30 November 2016. '

[15] On 9 December 2016 the court heard oral arguments.

Conclusion

[16] The perfection of the applicant's tacit hypothec, in the circumstances, was inherently urgent.

[17] The concurrent action instituted by the respondent wherein the applicant counterclaims the arrear rentals cannot be used to say that there is an existing lis before the court between the same parties and concerning the same matter which prevent applicant from perfecting his hypothec, as it will defeat the object of the

applicant's tacit hypothec (applicant's right to secure his interest in what might be found to be due to him by respondent) and render it worthless.

[18] The common law accorded the applicant (lessor) this specific right in circumstances where a lessee is in arrears with his rental and also provides that the right must be judicially perfected to be effective.

[19] There is no alternative remedy similar to what applicant sought as of right.

[20] The rule nisi (order 2) and orders 1, 3 and 4 of 4 August 2016 are confirmed.

[21] Costs to be costs in the main action in case number: I 1548/2016.

GH Oosthuizen
Judge

APPEARANCES

PLAINTIFF/RESPONDENT: Ms Harases
From Kangueehi & Kavendjii Inc., Windhoek

DEFENDANT/APPLICANT: Mr Strydom
Instructed by Engling, Stritter & Partners, Windhoek