IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION – GRAHAMSTOWN

Case no: 1466/2013
Case Heard: 13/10/2015
Date Delivered: 18/02/2016

In the matter between:

EASTERN CAPE PARKS AND TOURISM AGENCY PLAINTIFF

and

MEDBURY (PTY) LTD t/a CROWN RIVER SAFARI DEFENDANT

And

WILDLIFE RANCHING SOUTH AFRICA AMICUS CURIAE

JUDGMENT

SMITH J:

[1] The plaintiff instituted civil action against the defendant for the return of a herd of Cape Buffalo and their progeny which escaped from the Thomas Baines Nature Reserve ("the reserve") onto the defendant's property, between December 2010 and February 2011.

[2] The plaintiff initially claimed ownership of the reserve, but subsequently amended its particulars of claim to assert its *locus standi* on the basis that the management of the reserve had been assigned to it by the Premier of the province, acting in terms of section 41 of the Provincial Parks Board Act, 12 of 2003 (Eastern Cape). The parties have also subsequently agreed on a stated case in terms of which the following separated issues fall for decision:

(a) whether a certificate in terms of subsection (2)(a) of the Game Theft Act, 105 of 1991 ("the Act") is the sole prerequisite for the operation of subsection (1)(a) of the Act; and

(b) whether the common law must be developed in terms of sections 8(1) or 39(2) or 173 of the Constitution of the Republic of South Africa, 1996 ("the Constitution") to promote the spirit, purport and object of the Bill of Rights in the Constitution, specifically section 24 (b)(ii) thereof, to provide that wild animals which are sufficiently contained in a protected area, managed by an organ of state charged with the management thereof in terms of relevant nature conservation legislation in order to promote conservation, are *res publicae* owned by such organ of state.

[3] After the publication of the Rule 16A notice, the South African National Parks Board, the Department of Environmental Affairs and Wildlife Ranching South Africa were admitted as *amici curiae.* The former two entities, however, subsequently withdrew as *amici.*

The parties

[4] The plaintiff is the Eastern Cape Parks and Tourism Agency, a juristic person established in terms of section 10 of the Eastern Cape Parks And Tourism Agency Act, 2 of 2010 (Eastern Cape). It is the successor-in-law to the Eastern Cape Provincial Parks Board.

[5] The defendant is Medbury (Pty) Ltd trading as Crown River Safari, a duly registered company with limited liability. It is the owner of a property known as the Medbury Game Reserve which abuts the reserve.

[6] The *amicus curiae* is Wildlife Ranching South Africa, a voluntary association which represents the interests of some 200 members who actively engage in wildlife ranching and related activities. Its members control an estimated 20 million hectares of land used, *inter alia,* for wildlife ranching.

The stated case

[7] To avoid prolixity I do not cite the entire stated case, but will instead give a synopsis of those agreed facts which are relevant for the adjudication of the separated issues.

[8] The reserve was established during December 1980 by the Administrator of the then Province of the Cape of Good Hope, acting in terms of section 6(1) of the Nature and Environmental Conservation Ordinance 19 of 1974. After 1994 the reserve vested in the government of the Province of the Eastern Cape by virtue of the provisions of section 239 (1) (c) of the Interim Constitution.

[9] The management of the reserve was duly assigned to the Eastern Cape Parks Board in terms of section 41 of the Provincial Parks Board Act, 12 of 2003

during March 2003. The plaintiff became that board's successor-in-law on 1 July 2010 after its establishment in terms of the Eastern Cape Park and Tourism Agency Act.

[10] The reserve has since been managed by the plaintiff, who is an organ of state, and it is a provincial protected area as contemplated in the National Environmental Management Protected Areas Act, 57 of 2003.

[11] The common boundary between the reserve and the defendant's property includes part of the Settlers Dam. The plaintiff alleges that the dam formed a natural barrier between the two properties, except during the period of a protracted drought (about December 2010 to February 2011) when the levels of the dam were at a historical low. The plaintiff alleges further that during the course of its management of the reserve, it has enclosed the reserve sufficiently to contain the buffalo within its boundaries. That enclosure included fencing the boundary of the reserve, except for the common boundary formed by the dam. It contends that it was not necessary to fence off that part of the reserve because the water formed a natural barrier over which the buffalo would not have been able to pass under normal circumstances.

[12] During the period of the drought (and because of the extremely low levels of the dam) all the buffalo, except for one, escaped onto the defendant's property. When the drought was subsequently broken, the dam had risen to its usual levels, but the buffalo remained on the defendant's property. It is common cause that the plaintiff did not obtain a certificate of sufficient enclosure mentioned in section 2(2) (a) of the Act.

[13] Although the defendant disputes the correctness of these allegations, it has agreed that they must be assumed as correct for the purposes of the adjudication of the stated case.

[14] The plaintiff alleges that while the buffalo remained on the reserve they were owned by it because:

> "15.1. The buffalo were wild animals sufficiently contained on the Reserve by the plaintiff with the intention that they should remain its property;
>
> 15.2. in the alternative to paragraph 15.1 above:
>
> 15.2.1 the buffalo were wild animals sufficiently contained on a protected area of the sort described in paragraph 10 above (i.e. the Reserve);
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> 15.2.2 the reserve was managed by an organ of state (i.e the plaintiff) charged with the management thereof in terms of relevant nature conservation legislation (i.e. the legislation described in paragraphs 1.4 and 10 above) in order to promote conservation;
>
> 15.2.3 the common law must be developed by this court in this case in terms of section 8(1) and/or 39(2) and/or 173 of the Constitution to promote the spirit, purport and object of the Bill of Rights in the Constitution, specifically section 24(b)(ii) thereof, to provide that wild animals which are sufficiently contained on a protected area managed by an organ of state charged with the management thereof in terms of relevant nature conservation legislation in order to

promote conservation are *res publicae* owned by such organ of state"

[15] Mr *Breitenbach* accepted that if the ruling in respect of the separated issues goes against the plaintiff, the proper order would be to dismiss its action with costs, including the costs of two counsel.

Interpretation of section 2 of the Act

[16] Section 2 of the Act provides as follows:

"**2. Ownership of game**

(1) Notwithstanding the provisions of any other law or the common law –

(a) A person who keeps or holds game or on behalf of whom game is kept or held on land that is sufficiently enclosed as contemplated in subsection (2), or who keeps game in a pen or kraal or in a vehicle, shall not lose ownership of that game if the game escapes from such enclosed land or from such pen, kraal or vehicle;

(b) …

(2) (a) For the purpose of subsection (1) (a) land shall be deemed to be sufficiently enclosed if, according to a certificate of the Premier of the province in which the land is situated, or his assignee, it is sufficiently enclosed to confine to that land the species of game mentioned in the certificate.

(b) A certificate referred to in paragraph (a) shall be valid for a period of three years.

[17] The plaintiff contends that on a reasonable and contextual reading this section provides that a person who keeps or hold game on land which is in fact adequately enclosed, or covered by a certificate of sufficient enclosure as contemplated in subsection (2) (a), shall not lose ownership of that game if the game escapes from the land. In other words, the certificate of sufficient enclosure mentioned in subsection (2) (a) is not the only prerequisite for the

protection afforded against loss of ownership of escaped game, and a land owner who is able to establish through evidence that the game had in fact been sufficiently enclosed, is also entitled to the protection against loss of ownership. Mr *Breitenbach SC,* who appeared for the plaintiff together with Mr *Buchanan SC,* argued that the interpretation of these provisions contended for by the defendant, namely that the protection against loss of ownership only avails land owners when a certificate of sufficient enclosure had been issued (regardless of whether or not the land is in fact adequately enclosed), is absurd and would have consequences contrary to the intention of the legislature. He argued, in addition, that subsection (2) (a) is a deeming provision, and consequently if the legislature had intended to make subsection (1) (a) only applicable to land in respect of which a certificate of sufficient enclosure had been issued, the words "*shall be deemed"* in subsection (2) (a) would have been superfluous.

[18] With reference to the report of the South African Law Commission published during March 1990 (and titled *"Report on the acquisition and loss of ownership of game"),* Mr *Breitenbach* argued that section 2 of the proposed Bill did not contain a deeming provision, but merely provided protection against loss of ownership where land is sufficiently enclosed "*according to a certificate by the Administrator of the Province in which the land is situated", certifying that the land is sufficiently enclosed to detain the game in respect of which the enclosure was erected on that land."* According to Mr *Breitenbach* this clearly illustrates that the legislature did not simply accept the Commission's recommendations as to the effects of a certificate of sufficient enclosure.

[19] Mr *Smuts SC,* who appeared for the defendant, submitted that subsection (1) (a) of the Act protects ownership only if such game is kept or held on land that is sufficiently enclosed as contemplated in subsection (2) (a). The protection is thus not afforded generally in respect of "game" that is sufficiently enclosed, but only to those species which are specifically mentioned in the certificate contemplated in subsection (2) (a). He argued that is accordingly manifest that the protection against loss of ownership of escaped game only avails a land owner who had acquired the certificate of sufficient enclosure.

[20] Our law regarding the interpretation of documents, including statutes, was summarised as follows by Wallis JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] 2 All SA 262 (SCA), at paragraph 18:

> "The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in documents, be it legislation, some other statutory instrument or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in light of the ordinary rules of grammar and syntax, the context in which the provision appears; the apparent purpose to which it is directed in the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective and not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusiness-like results or undermines the apparent purpose of the document."

The learned judge, however, cautioned that:

> "Judges must be alert to, and guard against the temptation to substitute what they regard as reasonable, sensible or business-like for the words actually used. To do so in regard with statute or statutory instrument is to cast the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to preparation and production of the document."

[21] In *S v Toms; S v Bruce* 1990 (2) SA 802 (AD), at 807H-I, the then Appellate Division (per Smallberger JA) held that where the language of a statute is clear and unambiguous effect must be given thereto unless to do so:

> "…would lead to absurdity so glaring that it would never have been contemplated by the Legislature, or where it would lead to a result contrary to the intention of the Legislature, as shown by the context or by such other considerations as the Court is justified in taking into account…"

(cf: *Randburg Town Council v Kirksay Investments (Pty) Ltd* 1998 (1) SA 98 (SCA), at 107 B-D)

[22] When interpreted in accordance with the above mentioned legal principles, the clear and unambiguous language of section 2, in my view, compels the following construction:

(a) section 2(1)(a) of the Act protects ownership of game only when such game is held on land that is sufficiently enclosed as contemplated in subsection (2) (b);

(b) in terms of subsection 2 (1) (a) land is deemed to be sufficiently enclosed if according to a certificate issued by the Premier of the province in which the land is situated (or his or her assignee), it is sufficiently enclosed to confine to that land the species of game mentioned in the certificate;

(c) the protection against loss of ownership is thus not extended generally to land that is sufficiently enclosed, but only when the species of game mentioned in the certificate game is kept on land in respect of which the certificate has been issued; and accordingly

(d) the clear and unambiguous meaning of the wording of the section thus leaves no room for an interpretation that the certificate contemplated in subsection (2) (a) is not a prerequisite for the protection afforded to owners of game in terms of subsection (1) (a).

[23] Mr *Breitenbach* submitted that the contended absurdity that would result from such an interpretation arises from the fact that subsection (2) (a) is a deeming provision which creates a rebuttable presumption. If evidence is permissible to rebut the certificate, there is no reason why it should not be permissible to establish sufficient control in containment in the absence of a certificate, or so he argued. He submitted that it would thus be absurd to interpret the section in such a way that even where there is in fact sufficient containment, but no certificate had been issued, that the Act does not avail the owner of escaped game.

[24] Mr *Smuts* has, however, in my view correctly submitted that subsection (2) (a) does not constitute a deeming provision of something that is not in fact

what it purports to be. It simply means that if, for the purposes of subsection (1) (a), it is considered whether or not there is protection against the loss of ownership of escaped game, the certificate referred to in subsection (2) (a) is deemed to be the protective mechanism. It is thus not a deeming provision that can be rebutted by evidence.

[25] In addition, the certificate is clearly a practical mechanism to obviate the need for forensic investigation into the adequacy of fencing, and thus serves to avoid unnecessary disputes between land owners. A construction of the section which would allow rebuttal of the certificate by contrary evidence, or allow a land owner who had failed to obtain a certificate of sufficient enclosure to establish, through evidence, that the game were in fact sufficiently enclosed, would in my view distort and frustrate the objectives of the Act. Furthermore, the provisions of the Act had the effect of amending an existing common law rule and should thus "*not be interpreted so as to alter the common law more than it is necessary unless the intention to do so is clearly reflected in the enactment, whether by expression or by necessary implication."* (*Nebank Limited v National Credit Regulator* 2011 (4) All SA 131 (SCA), at paragraph 38). In my view the intention of the legislator was clearly to limit protection against loss of ownership only to circumstances where a certificate of sufficient enclosure had been issued in terms of subsection (2) (a) of the Act. When construed in this manner, the Act provides a practical and effective mechanism to protect compliant game owners against loss of ownership. The absurdity contended for by the plaintiff does accordingly simply not arise. The first separated issue is therefore decided in favour of the defendant.

Development of the common law

[26] The plaintiff contends for the development of the common law in terms of sections 8(1), 39(2), 173 or 24(b)(ii) of the Constitution to provide that wild animals which are sufficiently contained in a protected area managed by an organ of state charged with the management thereof in terms of relevant nature conservation legislation in order to promote conservation, are *res publicae* owned by such an organ of state. Those sections provide as follows:

Section 8(1):

> "The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state"

Section 39(2):

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of rights."

Section 173:

> "The Constitutional Court, Supreme Court of Appeal and High Court of South Africa have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

And Section 24(b)(2) of the Bill of Rights:

> "Everyone has the right –

(c) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that:

(ii) promote conservation"

[27] In terms of the common law wild animals are *res nullius* and ownership can only be acquired through occupation, namely capturing and exercising effective control over them with the intention to possess them. When, however, they manage to escape from the controlled environment they revert to their natural state and again become *res nullius*. The Act effectively amended this common law rule to the extent that protection is afforded against loss of ownership of those wild animals defined as "game", and in respect of which a certificate of sufficient enclosure had been issued.

[28] Mr *Breitenbach* submitted that the existing common law rule, when applied to wild animals which are sufficiently contained on protected areas managed by an organ state charged with the management thereof in terms of applicable nature conservation legislation, will undermine rather than promote the spirit, purport and object of section 24(b)(2) of the Constitution. He submitted furthermore that even though that common law rule had to some extent been ameliorated by the Act, the conceptualisation of that measure occurred before the commencement of the Constitution. The impact of that legislative measure on rights protected in terms of 24(b)(2) of the Constitution was consequently not considered. He argued furthermore that the protection against loss of ownership provided for by the Act also does not cover animals which do not fall under the definition of "game", such as reptiles, or other animals which although game, are not kept or held for commercial or hunting

purposes, but solely for nature conservation purposes. Effectively then the plaintiff contends for the development of the common law so as to provide that public nature conservation animals that escape from a protected area managed by an organ of state, remain the property of that organ of state.

[29] Mr *Smuts,* conversely, argued that the classification of wild animals as *res publicae* is inappropriate. He argued that the term "*res publicae"* refers to property which are *extra commercium*, rather than to animals which are susceptible to private ownership when controlled by individuals. He argued furthermore that the development of the common law contended for by the plaintiff could give rise to far-reaching delictual liability in respect of damage caused by animals that escape from national parks.

[30] And Mr *Dugmore,* who appeared for the amicus, submitted that the contended development of the common law will inevitably impact on legislation, without complying with due legislative processes. He argued that the plaintiff thus requires the court to assume a quasi-legislative role. He furthermore submitted that the plaintiff failed to provide an evidentiary basis for its assertion that the legal framework constituted by the common law and the Act is no longer consistent with constitutional norms and values, and to provide justification for the proposed differential treatment of the state in respect of ownership of wild animals through the development of the common law. He argued that the plaintiff has, in addition, failed to tender evidence regarding the practical consequences of the contended modification of the common law and the impact on the local game management and conservation industry. It has, in addition, also failed to proffer a workable definition for the concept of "sufficient

enclosure". He argued that these are all factors which would be more appropriately considered during the course of a legislative process.

[31] The principles applicable to the development of common law by our courts are as follows:

(a) the judiciary is bound in terms of section 39(2) of the Constitution, when developing the common law, to promote the spirit, purport and objects of the Constitution. (*K v Minister of Safety and Security,* 2005 (6) SA 419 (CC), at paragraph 15);

(b) the need to develop the common law arises when (i) a common law rule is inconsistent with a Constitutional provision or (ii) although not inconsistent with the Constitutional provision, it falls short of its spirit, purport and objects. (*S v Thebus and Another* 2003 (6) SA 505 (CC) at paragraph 28);

(c) section 39 (2) does not only binds courts where some "startling new development" of the common law is sought, but also in decisions which involve the incremental development of the rules of the common law. The overall purpose of that section is to ensure that our common law is infused with the normative values of our Constitution. (*K v Minister of Safety and Security* (supra), at paragraph 17); and

(d) courts must, however, remain vigilant against overzealous judicial reform. Thus when developing the common law a court is obliged to undertake a two staged enquiry namely: (i) *"It should ask itself whether, given the objectives of section 39 (2) the existing common law should be developed beyond the*

existing precedent" – if the answer to this question is no than *cadit quaestio*, if not then: (ii) *"the next enquiry should be how the development should occur and which court should embark upon that exercise."* (*City of Cape Town v South African National Roads Authority Ltd* 2015 (3) SA 386 (SCA), at paragraph 29).

[32] The plaintiff contends that the existing common law rule does not afford protection against the loss of ownership of wild animals falling outside the ambit of the Act, and must thus be harmonized to comply with the normative value system of the Constitution. Mr *Breitenbach* submitted that the contended disharmony arises from the fact that the wild animals are a national asset which is held by the state on behalf of, and for the benefit of the community.

[33] I am not convinced that on the facts of this case it is either necessary or appropriate to develop the existing common law rule. In my view the plaintiff has been unable to show that the rule is in conflict with any constitutional provision, or that it falls short of the spirit, purport, or objective of section 24 of the Constitution. First, the common law, as amended by the provisions of the Act, provide effective protection to an owner of land on which game had been sufficiently enclosed. All that is required of the owner is to obtain a certificate of sufficient enclosure mentioned in subsection (2) (a). The applicant has all along contended that the reserve had in fact been sufficiently enclosed to contain the buffalo. All that was therefore required of it was to apply for the certificate. It has failed to avail itself of this statutory protection and now instead impermissibly seeks development of the common law to obtain *ex post facto* protection.

[34] In my view the argument advanced by Mr *Breitenbach* to the effect that the existing common rule falls short of the spirit, purport and object of section 24 of the constitution because the protection afforded by the Act is limited to game only (and does not extend to other species of wild animals), is not one that is available to the plaintiff on the facts of this case. This matter is concerned only with Cape Buffalo, which it is common cause constitute "game" as defined in terms of the Act. In my view, even where in appropriate circumstances the extension of protection in respect of other species may require reconsideration of the existing common law rule, it would in any event be more appropriate for such required amendments to be effected through legislation, instead of development of the common law by the courts.

[35] Second, it appears that the plaintiff is in effect seeking a legislative amendment without following due processes. This was significantly also the view initially expressed on behalf of the Department of Environmental Affairs in its application for admission as *amicus curiae.* The following was stated in that application:

> "26. The ambit of the intervention which the department seeks to make is limited to the plaintiff's argument that this honourable court ought to develop the common law as it relates to wild animals in government protected areas.
>
> 27. The department contends that the development is not an appropriate remedy, the plaintiff fails to take into consideration the development will impact other legislation and further that the legislature is more appropriately tasked with determining whether the existing legislation requires an amendment."

[36] In an affidavit filed by the Director-General of the department, Nosipho Ngcwaba, explaining the reason for the department's withdrawal as *amicus curiae,* this stance was somewhat toned down, and the following was stated:

> "Another and important consideration of the department, in seeking to be heard, was the fact that it considered appropriate to follow a legislative law reform process which would, out of necessity, include a broad consultative process with all role players before any significant change is made with regard to the regime of wildlife ownership. The department is of the view that any legislative process and the development of the common law, does not have to be mutually exclusive. The department has already commenced the legislative process to consider the protection of high value species in protected areas managed by an organ of state.

[37] It is nevertheless clear that the implications of the existing common law rule (and the provisions of the Act) are being reviewed by the legislature. During the course of that legislative process the department will no doubt consult extensively with all role players regarding the implications of such legislative changes. The resultant statutory provisions will no doubt take account of various difficulties which may be caused by ill-advised changes to the common law, mentioned in the Law Commission's report and also during argument in this court. It is, in my view, thus inappropriate for this court to develop the common law to the extent contended for by the plaintiff without the benefit of sufficient evidence regarding the consequences of such an amendment, and in circumstances where an effective statutory remedy was available to the plaintiff. In the result I am of the view that the plaintiff has failed to make out a case for the contended development of the common law, and this issue must accordingly also be decided in favour of the defendant.

Order

[38] In the result the following order issues:

(a) The separated issues mentioned in paragraph 27 of the stated case are both decided in favour of the defendant;

(b) The plaintiff's action is dismissed with costs, including the costs of two counsel.

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SMITH J
JUDGE OF THE HIGH COURT

Appearances:

Counsel for Plaintiff	:	Advocate Breitenbach SC
Together with	:	Advocate Buchanan SC
Attorneys for Plaintiff	:	Netteltons Attorneys 118a High Street GRAHAMSTOWN 6140 Ref: Mr Hart
Counsel for Defendant	:	Advocate Smuts SC
Assisted by	:	Advocate Redpath
Attorney for Defendant	:	Wheeldon Rushmere and Cole 119 High Street GRAHAMSTOWN 6140 Ref: Mr Brody
Counsel for Amicus Curiae	:	Advocate Dugmore
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Ref: D Mili

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