THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No: 293/06
NOT REPORTABLE

In the matter between:

G A STRYDOM	**FIRST APPELLANT**
W D LA GRANGE	**SECOND APPELLANT**
v	
B J LIEBENBERG	**RESPONDENT**

Coram: Scott, Cachalia JJA et Kgomo AJA

Heard: 13 September 2007

Delivered: 25 September 2007

Summary: Vindicatory action for return of game over which plaintiff claimed ownership. Plaintiff's properties but not the game thereon sold to private persons. Held plaintiff entitled to claim the game, but not its value as it was not possible to apportion the value of the game between the purchasers of the properties.

Neutral citation: **This judgment may be referred to as *Strydom v Liebenberg* [2007] SCA 117 (RSA)**

JUDGMENT

CACHALIA JA

[1] The respondent instituted a vindicatory action in the Pretoria High Court against the first and second appellants for the return of a quantity of different species of game alleged to be on their properties or payment of the value of the game from the appellants jointly and severally. The High Court (De Vos J) ordered the appellants to return to the respondent all game on their properties and did not deem it necessary to deal with the respondent's claim for payment of their value. The appeal and cross-appeal, with the High Court's leave, is against this order. It will be convenient to refer to the parties as they were during the trial, as plaintiff and defendants.

[2] The relevant facts for the determination of this appeal are briefly the following. The plaintiff was the original owner of portions 11 and 14 of the farm Blaauwbank. He was also the sole shareholder and director of the company, Klein Bokkeplek Boerdery (Pty) Ltd, which owned portions 7 and 2 of the farm. The four portions are adjacent to each other. The plaintiff erected 'game proof' fencing around its perimeter thus creating since 1997 a 140 hectare rectangular unit. A cattle fence (non-game proof) divided the plaintiff's portions from those of the company.

[3] The plaintiff purchased a variety of species of game for the farm. This included 'rooibokke, waterbokke, blesbokke and rooihartebeeste'. He thus owned the game, valued in his February 2000 financial statement at R250 000. He conducted a game-hunting business through the company but retained ownership of the animals. He also hunted on the farm with his family and

occasionally with his friends. The game roamed freely over the four portions and through a cattle gate on the cattle fence.

[4] In 2001 the plaintiff placed the company in liquidation following its financial difficulties. The liquidator sold portions 2 and 7 to the first and second defendants respectively in November. It is clear from the plaintiff's evidence, and that of the auctioneer who conducted the sale, that the game was not included in the sale. And before us counsel for the defendants eschewed any suggestion that they had purchased any game as part of the agreement. Shortly after the defendants had taken occupation of the two portions the first defendant erected a fence between portions 2 and 7, effectively preventing the plaintiff any access to the game on portion 2. The second defendant also denied the plaintiff access to portion 7 thereby cutting him off from access to his game there as well.

[5] It was contended on behalf of the defendants that on the company's liquidation, and the liquidator's assumption of control over portions 2 and 7, the plaintiff lost ownership of the game because he no longer exercised control over the game there. The game thus, so they contended, became *res nullius* (ownerless). This contention is without merit. The game remained confined within the four portions that had been fenced and did not revert to their natural state. The liquidator made no claim to the game. And the fact that the plaintiff pledged the game as security for a loan of R500 000 from Absa Bank is the clearest indication that he did not relinquish ownership of the game.

[6] I return to the facts. During August 2003 the plaintiff sold his two portions (11 and 14) to Willem and Rudolf Brits. The agreement stated that they would assume ownership on the 15th; that the game currently on those portions would form part of the sale and that the plaintiff would erect, at his own

expense, a game fence which would separate portion 11 from the second defendant's property, portion 7. The plaintiff, however, erected the fence only afterwards.

[7] The significance of the date of delivery is this: If it occurred on the 15th as the defendants contend it did, then the game on portions 14, 11 and 7 would have intermingled and none could be identified as the plaintiff's. This is because the game roamed freely on these portions and through the cattle gate between portions 11 and 7 and it would thus not be possible to distinguish the game that remained on portion 7 from that on portions 14 and 11. If, however, delivery occurred at a later date, that is when the plaintiff erected the fence, he could distinguish the game of which the Brits's became owners from that which remained on portion 7 over which, he asserts, he never relinquished control. The plaintiff testified that he and the Brits's had agreed that delivery would take place when the fence was erected and it was accepted by them that the game they acquired pursuant to the sale was the game on portions 11 and 14 following the erection of the fence.

[8] In my view there is no basis for going behind the plaintiff's evidence on this aspect because the erection of the fence was the only practical way of effecting delivery of the game to the Brits's. The defendants argue that the plaintiff's evidence should have been disregarded because of its inadmissibility under the parol evidence rule. But this argument overlooks that the evidence relates to the issue of delivery, ie the passing of the ownership, not the enforcement of a contract. The plaintiff therefore remained the owner of the game on portion 7 after the fence was erected.

[9] The defendants contend, in the alternative, that they were bona fide possessors and were therefore entitled to the game's progeny after the erection of the two game fences between portions 2 and 7 and portions 7 and 11. And the

fact that, so they contend, the progeny is not capable of being distinguished from the original game also means that the plaintiff cannot succeed with its vindicatory action. The plaintiff's evidence, however, shows quite clearly that both defendants were aware that he had never relinquished ownership over the game. In the case of the first defendant this was made clear to him during the negotiations preceding his purchase of portion 2, and in the case of the second defendant when the game fence was being erected between portions 2 and 7. It is also improbable that the defendants could have believed that they had acquired ownership of the game by the simple expedient of purchasing their respective properties. They knew they had not purchased the game. They were aware, too, of its considerable value and the plaintiff's claim to ownership. In my view the evidence shows them not to have been bona fide possessors.

[10] In prayer 1 of the particulars of claim the plaintiff claimed delivery of the game referred to in para 4. Counsel for the defendants submitted that in the event this court upholds the plaintiff's right to vindicate his property the order of the court below must be amended to order the defendants to return only the specific game claimed in para 4 of the particulars of claim. I cannot agree with this submission. As the court below pointed out, prayer 1 was clearly a mistake. Paragraph 4 must be read with paras 8 and 10 of the particulars and with the evidence.[1] Read thus it is clear from the particulars of claim that the plaintiff's

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[1] 4.Te alle relevante tye was die eiser die eienaar van die volgende diere met die volgende markwaardes:

4.1	12 Roohartebeeste teen R3,000 stuk	R 36,000.00
4.2	8 Blesbokke teen R700 stuk	R 5,600.00
4.3	100 Rooibokke teen R500 stuk	R 50,000.00
4.4	10 Koedoes teen R1,500 stuk	R 15,000.00
4.5	35 Waterbokke teen R6,000 stuk	R210,000.00
4.6	4 Volstruise teen R1,500 stuk	R 6,000.00
	TOTALE WAARDE:	**R322,000.00**

5. . . .
6. . . .
7. . . .

8. Sedertdien het die eerste verweerder geen verdere diere van voormelde aard na Gedeelte 2 van die Plaas Blaauwbank gebring en vrygelaat nie, en die tweede verweerder het geen verdere diere van voormelde aard na Gedeelte 7 van die Plaas Blaauwbank geneem en vrygelaat nie.

action was aimed at securing from the defendants the return of *all* game on portions 7 and 2, not only those mentioned in para 4. The case was quite clearly conducted on this basis. The court below was therefore correct to make the order it did.

[11] In the cross-appeal the plaintiff asks for the value of the game based on an estimate of the number of game that is likely to be on the defendants' properties. The estimate was based on the plaintiff's records and expert testimony of the projected number of game on the two farms. The plaintiff's insurmountable difficulty is that neither he nor his expert provided any indication as to the exact numbers or even proportion of game on each of the two portions. The defendants do not own the portions jointly and can thus not be jointly liable for the value of any unreturned game. In these circumstances a court cannot apportion between the defendants any value for the game. The cross-appeal must therefore also fail.

[12] The following order is made:

The appeal and cross-appeal are dismissed with costs.

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9. . . .

10. In die vooropstelling is die eiser teenoor elkeen van die verweerders geregtig op lewering van alle diere van voormelde aard wat tans voorkom op gedeeltes 2 en 7 van die Plaas Blaauwbank 241, JQ Noordelike Provinsie.'

A CACHALIA
JUDGE OF APPEAL

CONCUR:

SCOTT JA
KGOMO AJA