SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 20609/2014

Not Reportable

In the matter between:

RALPH WERNER KÖSTER **APPELLANT**

and

ARCHIBALD NORVAL **RESPONDENT**

Neutral citation: *Köster v Norval* (20609/14) [2015] ZASCA 185 (30 November 2015)

Coram: Ponnan, Majiedt, Pillay JJA and Van der Merwe and Baartman AJJA

Heard: 02 November 2015

Delivered: 30 November 2015

Summary: Sale – by non-owner – obligations – required to deliver vacua possessio only and to warrant against eviction – not obliged to transfer ownership – appeal dismissed.

ORDER

On appeal from Western Cape Division of the High Court, Cape Town (Van Staden AJ sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Pillay JA and Van der Merwe AJA (Ponnan and Majiedt JJA and Baartman AJA concurring)

[1] By the middle of February 2004, Mr Archibald Norval, the respondent, was the holder of or entitled to all the shares in Flexivest 6 (Pty) Ltd (Flexivest). Flexivest owned land, game and farming equipment. The respondent wished to dispose of the whole of his interest in Flexivest for a consideration of R8,5 million. On 18 February 2004, he entered into two written agreements in respect thereof with Mr Ralph Werner Köster, the appellant. In terms of the first of these agreements, the respondent sold all the issued shares in Flexivest to the appellant or his nominee for the purchase price of R6,5 million. This agreement recorded that the assets of Flexivest consisted of fixed property, that is farmland, as well as farming equipment listed in an annexure to the agreement. In terms of the second agreement, the respondent sold the game listed in an annexure attached thereto, to the appellant for the purchase price of R2 million. The contract provided that the purchase price was payable five years after the date of the agreement and provided that the appellant was not liable for the payment of interest on the purchase price. It is clear from the evidence that the sole reason for the separate agreement in respect of the game was to accommodate the appellant’s request for a five year interest free extension of the date of payment of the purchase price. In return the respondent obtained the right

to the occupation of the house and farmyard on the farm Nooitgedacht for the period of five years.

[2] The provisions of the sale agreement in respect of the Flexivest shares were duly given effect to. The purchase price was paid and the shares were transferred to the appellant's nominee, the Mimosa Lodge Trust IT 613/2003. However, despite the effluxion of the period of five years, the appellant refused to make payment of the purchase price of R2 million in respect of the game.

[3] The respondent accordingly issued summons in the Western Cape Division of the High Court. The court a quo (Van Staden AJ) gave judgment in favour of the respondent for payment of the amount of R2 million, mora interest on that amount calculated from 29 April 2009 to date of payment and costs of suit. It, however, granted leave to the appellant to appeal to this court.

[4] As we have said, the respondent was not the owner of the game. In his particulars of claim he nevertheless pleaded that he had performed all his obligations in terms of the deed of sale in respect of the game. This was in accordance with our law. It is trite that it is not a requirement for a valid contract of sale that the seller must be the owner of the thing sold. In *Alpha Trust (Edms) Bpk v Van der Watt* 1975 (3) SA 734 (A) 743H-744A, Botha JA summarized the legal position as follows:

'Dit is duidelik dat vir 'n geldige koopkontrak volgens ons reg geen vereiste is dat die verkoper van die koopsaak eienaar daarvan moet wees nie. Ofskoon dit die doel van die koopkontrak is dat die koper eienaar van die verkoopte saak moet word, is die verkoper egter nie verplig om die koper eienaar daarvan te maak nie. Hy moet die koper slegs in besit stel en hom teen uitwinning vrywaar. Dit beteken dat die verkoper daarvoor instaan dat niemand met 'n beter reg daartoe die koper wettiglik van die verkoopte saak sal ontneem nie, en dat hy, die verkoper, die koper in sy besit van die saak sal beskerm.'

G R J Hackwill, *Mackeurtan's Sale of Goods in South African*, 5th ed states:

'As has been indicated elsewhere, although the parties to a contract of sale usually contemplate a transfer of ownership in the thing sold, this is not an essential feature of the contract, and sales by non-owners are quite permissible.' (p 23, para 3.1.1.)

'The delivery required of a seller is the delivery of undisturbed possession (*vacua possessio*)

coupled with the guarantee against eviction. It is not necessary that the seller should pass the ownership, for the implied engagement of the seller is a warranty against eviction and not a warranty of title, but he must divest himself of all his proprietary rights in the thing sold in favour of the purchaser.' (p 66, para 6.2)

(See also De Wet & Van Wyk, *Kontraktereg en Handelsreg*, 5th ed, vol 1 p 329.)

[5] In the court a quo, it was common cause that delivery of possession of the game had been made to the appellant. The game was on Flexivest's land at the time of the sale and remained on the land at all relevant times thereafter. In the absence of custom, trade usage or agreement to the contrary, the obligation of the seller is to put the goods at the disposal of the buyer at the place where they were at the time of the sale (see *LAWSA*, p 51 para 62 and p 54 para 65). This rule applied in this instance and this is exactly what took place in this instance. It is clear from the evidence of both respondent and Mr van Velden, the attorney who testified on behalf of the appellant, that the game was made available and placed at the disposal of the appellant as the game remained on the land. The appellant did not testify. He did not plead that he was evicted nor was there any evidence that any person with a better title had sought to lay claim to the game.

[6] The appellant sought to avoid the inevitable conclusion that he is liable for payment of the purchase price of the game, by pleading as follows:

'2.2 The following were tacit, alternatively implied terms of the Deed of Sale (Annexure "A"):

2.2.1 the Plaintiff was the owner of the game listed on "aanhangsel A";

2.2.2 the Plaintiff was capable of transferring ownership in the game to the Defendant;

2.2.3 delivery of the game would be effected by the Plaintiff to the Defendant with the intention of transferring ownership in the game, and delivery would be taken by the Defendant with the intention of accepting ownership in the game.'

[7] In response to a request for further particulars for trial, the respondent denied the contents of paragraph 2.2.1 above, but admitted the contents of paragraphs 2.2.2 and 2.2.3. In our judgment these admissions constitute errors of law and the respondent is not bound by them. There is a clear distinction between an implied term and a tacit term of a contract. An implied term is a rule of the law that is applicable to such contracts unless validly excluded by the contract itself. As we have pointed out, it is certainly not a

term implied by law that the seller is obliged to transfer ownership of the merx to the purchaser. A tacit term, if it exists, must be found by necessary implication in the unexpressed intention of the parties. (See *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 531-532.) From this flows the rule of the law that no tacit term can be imported into a contract in contradiction of the express terms of the contract. (See *Robin v Guarantee Life Assurance Co Ltd* 1984 (41 SA 558 (A) at 567A-F). The express terms may also exclude the possibility of importing tacit terms even when the express terms do not expressly deal with the matter. The sale agreement in respect of the game contained detailed provisions, was efficacious and complete and there is no necessary implication that the parties' unexpressed intention was that the respondent was obliged to transfer ownership of the game.

[8] In any event, Mr Velden testified:

'Ja. --- Maar daar was definitief wild op die plaas.

. . .

En u aanvaar dat hierdie wild vir R2 miljoen verkoop is en gekoop is deur u kliënt: daaroor het ons geen problem nie? --- Die wil[d] was verkoop vir R2 miljoen. Daar was 'n ooreenkoms aangegaan met mnr Norval vir die aankoop van die wild vir R2 miljoen, dis korrek.

Goed. Ek sê u het geen probleem daarmee dat hierdie wild vir R2 miljoen aangekoop is nie. Dit is nie die probleem nie? --- Nee. Daar was 'n koopkontrak met mnr Norval vir R2 miljoen.

Ja. --- Daar was 'n ooreenkoms, ja.

. . .

Ja. Goed. So ons kan nou seker wees die wild wat hier ter sprake is, is definitief gelewer; ons moet net vasstel wie het dit gelewer. --- Ja. Mnr Norval kon dit nie lewer nie want hy het nie eiernaarskap gehad nie. So die enigste ander instansie wat kon gelewer het, is Flexivest, maar kon Flexivest gelewer het indien hy nie verkoop het nie? So die wild was op die grond van Flexivest.

. . .

Goed. Nou met hierdie skets wat u nou vir die Hof gee en die agtergrond, is ek nog steeds nie by die antwoord nie. Ek wil weet: die R2 miljoen wat vir die wild betaal moes word – want ons is dit eens: Hierdie wild op bl 13 is gekoop deur u kliënt vir R2 miljoen. --- Dit is gekoop vir R2 miljoen, dis korrek.

En hy het dit nooi[t] betaal nie. --- Hy het dit nie betaal nie.'

It was thus undisputed that: (a) there was an agreement between the parties in respect of

the sale of the game; (b) the game was on the farm at the time of the sale, and as a consequence there had been delivery in terms of our law; and (c) despite delivery there was no payment for the game. It must thus follow that the defence raised by the appellant is contrived and disingenuous.

[9] In the result the following order is made:
The appeal is dismissed with costs.

R Pillay
Judge of Appeal

C H G Van der Merwe
Acting Judge of Appeal

APPEARANCES:

FOR APPELLANT:	J Muller SC Instructed by: Lombard & Kriek Attorneys, c/o MacGregor Stanford Kruger, Cape Town Webbers Attorneys, Bloemfontein
FOR RESPONDENT:	Mr S W W J Van Der Sandt Instructed by: Hanekom & Bester Attorneys, c/o Mauritz Briers, Cape Town McIntyre & Van der Post Attorneys, Bloemfontein