REPUBLIC OF SOUTH AFRICA

REPORTABLE Case no: 334/96

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between:

KATE'S HOPE GAME FARM (PTY) LIMITED — Appellant

and

TERBLANCHEHOEK GAME FARM (PTY) LIMITED — Respondent

Court: Mahomed CJ, Vivier, Olivier, Scott JJA et Streicher AJA

Date of Hearing: 18 August 1997

Date of Judgment: 10 September 1997

JUDGMENT

OLIVIER JA

The parties to this appeal are two companies. The respondent is the owner of the farm Terblanchehoek and controls the juristic entities owning the adjoining farms Alletta and Humie. The appellant is the owner of the farm Kate's Hope, which is separated from Terblanchehoek by the Njelele River. The official boundary between the two farms is the middle of the river, which in times of drought runs dry, but in good years has a strong flow of water. There is at present, for the reasons explained hereunder, no fence between the two farms. It is this fact which gave rise to the present litigation.

The farms are situated in the north of the Republic, near the Limpopo River and between Messina and the Kruger National Park. Because of the commonly acknowledged beauty of the area, the pristine and varied flora, the abundant game, bird and fish life, and the nature

of the topography, an extensive block of farm land in the area, including Terblanchehoek, Alletta, Humie and Kate's Hope, was proclaimed the Phillip Herd Private Nature Reserve in 1967. The legal implications of this proclamation have not been canvassed in the appeal before us and need not concern us.

In January 1992 a written "constitution" for a voluntary association known as the Phillip Herd Private Nature Reserve Association ("the Association") came into being. It was signed by one Liebenberg "for Terblanchehoek, Humie and Alletta" and one Skellern, the director of the appellant, but in his personal capacity. The main purpose of the agreement was to form a large game farm through the pooling of individual farms, with the intention of promoting wild-life conservation. One consequence of the agreement was that an existing fence along the Njelele River, between Kate's Hope and Terblanchehoek, was

removed to allow the unimpeded movement of game,

It appears from the affidavits filed on record in the motion proceedings culminating in this appeal that the harmony among signatories was short lived: Skellern, chairperson of the appellant, resigned from the Association on 12 May 1992, and Kate's Hope was withdrawn from the pool.

This withdrawal has led to a dispute regarding the erection of a fence between Kate's Hope and Terblanchehoek.

Because the official boundary runs down the centre of the Njelele River, where it is impossible or impractical to erect a fence, the respondent proposed a give-and-take line between the two farms, i.e. part of the fence to be erected on Terblanchehoek and part on Kate's Hope, with the fence crossing the river in two places, thus balancing the loss to each farm with the gain from the other. Skellern on behalf of

the appellant refused this request.

In August 1994 the respondent gave notice to the appellant of its intention to invoke the procedure prescribed by s 16 of the Fencing Act, 31 of 1963, ("the Act").

Section 16 reads as follows:

16. Give-and-take line.

(1) Where a dividing line between any two holdings is formed by a watercourse or river (not being of such a nature as to form a natural barrier for stock) or range of hills, outcrops of solid rock or kopjes, along which it is impracticable or inexpedient to erect a fence, the owners concerned may agree on a fair give-and-take line as a dividing line to be fenced in accordance with this Act, and, in default of agreement, any such owner may claim that the matter shall be determined as a dispute in accordance with the provisions of the Second Schedule.

(2) Any give-and-take line so agreed on or determined, shall be deemed to be the boundary line for the purposes of this Act but shall not otherwise affect the titles to such holdings.

The material clauses of the Second Schedule provide the

mechanism for constituting a Board to determine a give-and-take line should the owners be in disagreement.

The hearing of the dispute in terms of the Act by the Board commenced on 8 May 1995, the presiding chairperson being Mr EP Luiters, a magistrate for the district of Messina.

Shortly after the commencement of the meeting, however, the appellant raised as a defence in limine, that s 16 of the Act was not applicable at all, there being an agreement as regards a boundary line between the two properties. This agreement, according to the appellant, is to be found in paras 5.10 and 9.7 of the constitution of the Association.

The appellant's case was that although Skellern had resigned as a member of the Association on 12 May 1992 the said provisions of the constitution were nevertheless still applicable to the appellant and the

respondent by virtue of the original agreement.

The Board, confronted with this argument, decided that it did not have the jurisdiction to decide the issue and the hearing was postponed so as to enable the parties to approach the court, which they did. The respondent launched motion proceedings in the then Transvaal Provincial Division in which it moved for an order:

(3) declaring that the constitution relating to the Phillip Herd Nature Reserve dated 25 January 1992 to have been cancelled, alternatively to be of no further force and effect;

(4) declaring that s 16 of the Fencing Act no 31 of 1963 as amended applies to the farms of Terblanchehoek and Kate's Hope and that the Board constituted in terms of s 16 is entitled to proceed with the hearing in accordance with the provisions of s 16. Alternatively to Prayer 2.

3. ordering the chairperson of the Board constituted in terms of s 16 read with the Second Schedule to the Act to proceed with the relevant hearing on the basis that the constitution of the Phillip Herd Private Nature Reserve dated 25 January 1992 had been cancelled, or alternatively, was of no force and effect. After the exchange of founding, answering and replying affidavits, the matter was argued before Preiss J. On 10 October 1995 he granted an order in favour of the respondent (then applicant) in accordance with prayer 2. Costs including the costs attendant upon the employment of two counsel were also granted in favour of the present respondent.

Subsequent to the refusal by Preiss J, leave to the appellant to appeal to this Court was granted by the Chief Justice.

Preiss J found for the present respondent on the basis that the

constitution under discussion did not permit juristic persons such as the parties to these proceedings to be members of the Association. He was of the view that the constitution, by its very terms, entitled only natural persons to be members. The present parties, both being juristic persons, did not become members of the Association and cannot rely on the provisions of the constitution.

The appellant criticizes both the finding and the ratio decidendi of the judgment delivered by Preiss J. It contends that the point on which the judgment turned was a matter not raised or fully canvassed in the affidavits. In addition, as far as the substance of the judgment is concerned, Mr Van der Bijl, who appeared for the appellant in this Court, while conceding that juristic persons could not become members of the Association, contended that the parties to the appeal had become entitled to enforce the constitution and were bound by its

terms.

I do not intend to traverse the arguments of both parties relating to this aspect. I shall assume, without deciding, that Mr Van der Bijl is correct and that the parties are to be treated as being bound by the provisions of the constitution whether as members or as ex-members. But even on this assumption, the appellant's appeal can nevertheless not succeed.

Section 16 of the Act is applicable "... in default of agreement" between the owners concerned. I shall assume, once again in favour of the appellant, that the word "agreement" in s 16 of the Act bears a wide meaning, and encompasses any agreement relating to the fencing of the boundary between two holdings and not merely to a give-and-take line. But even if a wide meaning is assumed it is clear that the agreement must be one that is enforceable. The appellant avers that

there is such an enforceable agreement and relies on clauses 5.10 and

9.7 of the constitution.

Clause 5.10 provides as follows:

> All members agree that, for the purpose of fencing out of the reserve the property of any person whose membership of the association is terminated, the association, acting through the executive committee, may erect on their property ... a game proof fence . . . and all members further agree to pay their pro rata share of such fence. (My underlining).

The operative word is may. The agreement, properly interpreted against the background of the rest of the constitution, places no obligation on the remaining members (the Association) to erect a game-proof fence on their property, but affords them a choice. If they so wish, they can erect such a fence on their property. That the members of the Association should reserve for the remaining members an option and not an obligation to erect a fence on their own property appears to

be a wise precaution. If by a mere resignation from the Association, a former member can force the remaining members to erect a game proof fence on their property, such a resigning member would be able to derive an enormous benefit. He would have at least one boundary of his farm fenced off at no cost to himself. In the present case, Kate's Hope would become the sole possessor of what is obviously a large and valuable part of the reserve, viz. the full width of a section of the Njelele River.

The remaining members of the Association have not exercised the choice to erect a fence between Terblanchehoek and Kate's Hope in terms of the constitution. It is clear that the respondent has no enforceable right under clause 5 of the constitution. Consequently clause 5 cannot be relied upon as an agreement in terms of the Act.

I turn next to para 9.7. It reads:

> Without derogating from the generality of the aforegoing, no member and no person who was formerly a member, or who bound himself to observe the provisions of this constitution (as amended from time to time) shall apply for the deproclamation as a private nature reserve of any portion of his land or of the land represented by him in the reserve, nor without the consent of the association erect fences within or around his land enclosing more than 5% (five percent) thereof.

It is at least arguable that this clause was not intended to operate to the detriment of the remaining members, I shall, however, assume that there is an agreement, binding on both the applicant and the respondent, that they may not without the consent of the Association erect fences within or around their land enclosing more than 5% (five percent) thereof. Once again, I shall assume in favour of the appellant that the envisaged give-and-take line is one enclosing more

than 5% of the respondent's land.

The clause, however, incorporates a condition. The prohibition only remains enforceable as long as the Association does not give its consent. In the present case there is no allegation or evidence by either of the parties relating to the question of consent by the members of the Association, i.e. the natural persons who are members, other than Pretorius, the deponent on behalf of the respondent.

It follows that the question of onus is decisive of this issue. It is the appellant who invoked the terms of para 9.7 as a defence against the respondent's application. This means that not only must the appellant prove the agreement, but also that it is enforceable. The appellant had to prove non-fulfilment of the condition mentioned, i.e. that the remaining members of the association had not given their consent to the respondent's intention to press for the give-and-take

fence now under discussion. The rule is that the litigant, whether the plaintiff or the defendant, relying on a contract that is subject to a condition must plead and prove the condition and its fulfilment (Pillay v Krishna and Another 1946 AD 946 at 952; Reisto Dairy (Pty) Ltd v Auto Protetcion Insurance Co Ltd 1963(1) SA 632(A) at 644 G-H).

The appellant did not offer any proof that the remaining members had not consented to the give-and-take line as proposed by the respondent or to the fencing off of the appellant's property. In the result, the appellant's reliance on para 9.7 of the constitution must fail.

The respondent was and is, therefore, entitled to the order made by the court a quo.

Mr Van der Bijl raised a further technical objection. It deals with the composition of the Board constituted in terms of s 16 of the Act and in particular with the appointment of the magistrate as a member

and chairperson of the Board. It does not appear from the papers how it came about how the magistrate was appointed and, therefore, whether the Board was properly constituted or not. Mr Van der Bijl contended that the form of the order made by Preiss J precluded him from attacking the composition of the Board at a later stage.

In so far as the order made by Preiss J en passant seems to validate the composition of the Board as constituted at present, the wording of paragraph 1 of the order will have to be changed slightly to make provision for the composition of a new Board, if it subsequently appears that the present Board has been constituted in an irregular manner. The change in wording does not merit any award of costs in favour of the appellant, especially in view of the fact that the objection to the composition of the Board was not an issue before the Board and was raised in the court a quo for the first time and then without any

factual basis.

As far as costs are concerned, Preiss J ordered the appellant to pay the respondent's costs, including the costs of two counsel. Mr Van der Bijl objected to the latter part of the cost order. The objection is without foundation. From the affidavits before us it is clear that it is important, at least for the respondent who is endeavouring to maintain a nature reserve, to have its property fenced in an effective way. It will enable the respondent to manage and cull the game in a responsible manner. It will enhance the value of its land. The appellant steadfastly refused to co-operate. The court o quo was justified in making the particular order. The respondent was also justified in coming to this Court represented by two counsel.

In the result the appeal is dismissed with costs, including the costs of two counsel. Paragraph 1 of the order made by the court a quo is

amended to read as follows:

It is declared that s 16 of the Fencing Act no 31 of 1963 as amended applies to the farms of Terblanchehoek and Kate's Hope and that a Board properly constituted in terms of s 16 of the Act is entitled to proceed with the hearing in accordance with the provisions of s 16 of the Act.

PJJ OLIVIER JA

Concur:

Mahomed CJ Vivier JA
Scott JA Stretcher AJA