



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF
APPEAL

From: The Registrar, Supreme Court of Appeal

Date: 05 April 2024

Status: Immediate

The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal

Summermania Eleven (Pty) Ltd v Hattingh N O (316/2022) [2024] ZASCA 42 (05 April 2024)

Today the Supreme Court of Appeal (SCA) dismissed with costs an appeal against an order granted by the Eastern Cape Division of the High Court, Makhanda in terms of which the appellant, Summermania Eleven, was found to be in breach of a warranty that it had given in an agreement of sale.

In the warranty clause the respondent, the William Hattingh Trust, which sold a farm to Summermania, gave an undertaking that it would maintain the same composition and numbers of game on the farm until the farm was transferred to Summermania. After the transfer of the farm, its sole director Mr Nielsen alleged that the numbers of game on the farm, particularly Kudus, were significantly lower than those recorded in the Deed of Sale of the farm. He commissioned Mr Benjamin Van Niekerk, an experienced game counter to do a count from a helicopter. Mr Van Niekerk confirmed that the numbers of Kudu had reduced by 150. This led to the court proceedings. By the time the trial started, Mr Van Niekerk had fallen seriously ill with a motor neuron disease which rendered him emotionally fragile. As a result he could not give oral evidence in court and the trial had to be postponed.

When the trial resumed the trial court granted an application for Mr Van Niekerk's evidence to be tendered by way of an affidavit. The trial court found then found, on the strength of that affidavit, the numbers of Kudu had, were lower at the time of transfer and that the Trust had breached the warranty that it had given – to maintain the numbers of game on the farm until registration of transfer.

On appeal by the Trust the full court of the Eastern Cape Division found that the trial court had failed to properly evaluate the affidavit evidence of Mr Van Niekerk, who was Summermania's sole witness on the issue of breach of warranty, it overturned the judgment of the trial court.

On further appeal by Summermania the SCA agreed with the full court, that Summermania had failed to discharge the onus on it to prove that there was a breach of the warranty. The SCA found that Mr

Van Niekerk's evidence was insufficient to prove that there had been a reduction in the numbers of game on the farm. The court highlighted that Mr Van Niekerk could not be cross examined, and his evidence did not address aspects of the game count that had been shown to be unreliable. Mr William Hattingh, the sole trustee of the Trust had given evidence that aerial counts on the farm were dangerous because of the mountainous topography in the area where the farm is located. He also pointed out that whereas the recommendation was that aerial counts must be done by two counters, Mr Van Niekerk had done the count alone. In addition Mr Van Niekerk's evidence on the speed and altitude at which the aircraft was flying was not reliable. The SCA found that Mr Van Niekerk's evidence carried little probative value. As a result Summermania failed to discharge the onus on it to prove a breach of the warranty.

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