



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case No: 538/2016

In the matter between:

DR DAVID GRIESEL

FIRST APPELLANT

GLAUDINA BOERDERY (EDMS) BEPERK

SECOND APPELLANT

**DEVENCO INVESTMENTS 60
(EDMS) BEPERK**

THIRD APPELLANT

and

PIET HAASBROEK

RESPONDENT

Neutral citation: *Griesel v Haasbroek* (538/2016) [2017] ZASCA 39 (30 March 2017)

Coram: Leach, Willis and Mbha JJA and Molemela and Gorven AJJA

Heard: 21 February 2017

Delivered: 30 March 2017

Summary: Sale : action for purchase price : express term as to risk passing to purchaser : ambit of risk : risk event causing loss : purchase price payable.

ORDER

On appeal from: North West Division of the High Court, Mahikeng (Leeuw JP, Gura J and Djaje AJ sitting as full court on appeal from Landman J).

1 The appeal is upheld with costs.

2 The order of the full court of the North West Division of the High Court, Mahikeng dismissing the appeal from the High Court is set aside and substituted by:

‘1 The appeal against the order of the trial court of the North West Division of the High Court, Mahikeng is upheld with costs.

2 Paragraphs 1 and 2 of the order of that court are set aside and substituted by:

“1 Judgment is granted in favour of the first plaintiff against the first defendant for payment of the sum of R1 146 302.53 together with interest on the said sum at the rate of 15.5% per annum from 27 October 2009 to date of payment.

2 The first defendant is ordered to pay the plaintiffs’ costs incurred in respect of the action against the first defendant.”

JUDGMENT

Gorven AJA (Leach, Willis and Mbha JJA and Molemela AJA concurring):

[1] This appeal concerns the question of who should suffer the loss arising from the death of a bull buffalo (the disputed buffalo). It died during an operation to sedate it in order to draw blood to test for diseases (the operation).

The appellants were the plaintiffs in an action in the North West Division of the High Court, Mahikeng (the trial court). They sued the respondent (Mr Haasbroek) as first defendant for the purchase price of the disputed buffalo. I shall refer only to the first appellant (Dr Griesel) when referring to the appellants unless the context requires specific reference. The veterinarian, Dr Van Zyl, who administered the sedative, was sued as second defendant on a different cause of action. He was absolved from the instance with costs and takes no part in the appeal. Nothing further need therefore be said about the claim against him.

[2] The backdrop to the appeal is as follows. Dr Griesel conducts a game farming operation which includes around 50 buffaloes. The second appellant owns the farms on which it is conducted. These have been consolidated and are farmed as one by Dr Griesel. I shall refer to the consolidated farm as his farm. The game on his farm is owned by the third appellant. Mr Haasbroek also conducts a game farming operation and his buffalo herd is around 140 strong.

[3] In the end, the claim rested on three basic contentions: a sale agreement was concluded with Mr Haasbroek; Mr Haasbroek expressly agreed to assume the risk of death or injury to the disputed buffalo arising from the operation; and the death of the disputed buffalo was caused by the envisaged risk. Mr Haasbroek disputed all of these contentions.

[4] The matter was heard by Landman J in the trial court. The claim against Mr Haasbroek was dismissed with costs. After being refused by the trial court, leave to appeal against this dismissal was granted by this court to the full court of the North West Division. The full court dismissed the appeal with costs. The present appeal results from this Court having granted special leave to appeal against the judgment of the full court.

[5] The dispute arose as follows. Dr Griesel wished to purchase three bull buffaloes from a distant seller. The regulations require buffaloes to be disease free before they can be transported.¹ Blood tests are required for this purpose. Only if they are certified disease free will a transport permit be granted. Permits specify a destination. In order to draw blood for the tests, buffaloes must be sedated. This is generally done by shooting a dart syringe containing a sedative into the animal from a firearm. This is referred to as darting the animal. In addition, skin tests are often done. These also require the sedation of the animal. Ordinarily, when buffaloes are purchased, they are sedated at least twice. First, for the blood test. Secondly, so as to be placed onto the vehicle in which they are to be transported.

[6] As it turned out, Dr Griesel purchased four, rather than three, bull buffaloes from the distant seller. All four were tested and found to be disease free. Their horns were measured. A reduced price of R1 million per buffalo plus VAT was agreed. Dr Griesel knew that Mr Haasbroek was interested in purchasing a bull buffalo and had in mind to offer one of the four buffaloes to him.

[7] To this end he sent an email to Mr Haasbroek on 16 September 2009, attaching a photograph of the disputed buffalo. He told him that the horns measured 41 inches and offered it to him for R1 million plus VAT and 25% of the transport and attendant costs. Mr Haasbroek expressed interest and Dr Griesel felt that he had agreed to take the disputed buffalo. Dr Griesel then attempted to have the transport permit amended so that three buffaloes would be delivered to his farm and the disputed buffalo to that of Mr Haasbroek. Before

¹ Animal Diseases Regulations, GN R2026, GG 10469, 26 September 1986 promulgated in terms of the Animal Diseases Act 35 of 1984.

this arrangement could be finalised, however, Mr Haasbroek told him that he did not want the disputed buffalo.

[8] The buffaloes were scheduled to arrive at Dr Griesel's farm early on Wednesday, 14 October 2009. It was arranged that Mr Haasbroek would attend the offloading of the buffaloes. Accompanied by his son, Mr Haasbroek flew his helicopter to Dr Griesel's farm that morning. They met Dr Griesel at his holding boma. While waiting for an official to break the seal on the vehicle before the buffaloes were released, those present climbed onto the top of the vehicle and viewed the buffaloes through narrow slats.

[9] Dr Griesel testified that it was then and there on top of the vehicle that the sale agreement was concluded. After he had pointed out the disputed buffalo, Mr Haasbroek said that he wanted it and asked the price. Dr Griesel told him that the price had not changed but specified that Mr Haasbroek would have to assume the risk of death or injury arising from the darting, sedation and drawing of blood to test the disputed buffalo. This was needed for a transport permit. Mr Haasbroek agreed to all of this without hesitation. He told Dr Griesel that he would let him know when his vet could carry out the operation.

[10] Mr Haasbroek contested this version. He testified that he had not purchased the disputed buffalo. He had simply indicated that he was interested in it. He said that he wanted it tested to ensure both that it was disease free and that the horn measurement was the claimed 41 inches. It was for this purpose that the operation would be carried out. Whilst he agreed to pay for the testing and to use his own vet, no mention was made of his assuming the risk of death or injury during and as a result of the operation. Mr Haasbroek maintained this position throughout the trial and in the appeal before the full court.

[11] It is common cause that, if the disputed buffalo had been transported to Mr Haasbroek's farm from that of the distant seller, as Dr Griesel had tried to arrange, no further sedation would have been necessary. Also that, after it was released from the truck on that Wednesday morning, the disputed buffalo would need to be sedated at least twice more; once to be tested so as to obtain a transport permit, and again to be loaded onto the transport. It had recently been sedated on three occasions; first for the blood tests, secondly for tuberculin tests, and thirdly to be loaded onto the transport to Dr Griesel's farm. The experts agreed that, in those circumstances, the risk of death or injury increases each time a buffalo is sedated. Put simply, Dr Griesel felt that Mr Haasbroek's vacillation had unnecessarily caused risk to the animal. Dr Griesel testified that this was why he insisted on Mr Haasbroek assuming the risk of death or injury arising from the operation.

[12] The buffaloes Dr Griesel had purchased were subsequently released from the boma into the open veld a few days after 14 October 2009. The operation took place on 27 October 2009. The Land Rover of Dr Griesel was used to locate and identify the disputed buffalo. It was among a herd of 40 or 50 buffaloes near a dense thicket of acacia bushes. Dr Van Wyk fired and the dart struck the body of the disputed buffalo in what everyone present agreed was a good place. The herd, including the disputed buffalo, responded by running behind the acacia bushes for about 40 or 50 metres before stopping. The disputed buffalo was not followed immediately. After a period of between four and five minutes, the party set off in the Land Rover to locate the disputed buffalo.

[13] The empty dart syringe was found near where the herd had stopped behind the acacia bushes. Despite an exhaustive search on foot, in the Land Rover and eventually in Mr Haasbroek's helicopter, the disputed buffalo

was not found. The party then returned to Dr Griesel's house and it was agreed to try again a few days from then. However, later that afternoon the disputed buffalo was found dead. The evidence of the expert witnesses of both parties was that, because the disputed buffalo had been darted, had lain on its side and had not been tracked down in time, the contents of its stomach were regurgitated which led to it suffocating.

[14] The trial court found that an agreement for the sale of the disputed buffalo had been concluded as claimed by Dr Griesel. It found that Mr Haasbroek had expressly agreed to assume the risk of death or injury arising from the operation. It found that the disputed buffalo died during and as a result of the operation. The trial court held, however, that the assumption of the risk by Mr Haasbroek was subject to non-interference in the operation by Dr Griesel. Since it found that Dr Griesel had interfered in the operation the trial court reasoned that Dr Griesel bore the onus of showing that the disputed buffalo had not died as a result of his conduct. In its view, Dr Griesel failed to discharge this onus. Despite finding that it could not be said that Dr Griesel caused the death of the disputed buffalo, the trial court found that the conduct of Dr Griesel during the events of 27 October 2009 was reprehensible and amounted to a repudiation of the agreement. On that basis, it dismissed the claim with costs.

[15] The full court supported the finding that an agreement of sale had been concluded. It went on to hold that the sale was '*imperfecta*' because there was an uncertain future event. This was whether the disputed buffalo would test negative. This made the sale subject to a suspensive condition. The full court held that the common law concerning the risk of *vis major* or *casus fortuitus* applied to the passing of risk. This ignored the pertinent finding of the trial court that express agreement had been reached on the passing of the specific

risk arising from the operation. The full court agreed with the trial court that the conduct of Dr Griesel was reprehensible. It found, however, that Dr Griesel's conduct did not amount to a repudiation of the contract, as had been held by the trial court. Instead, it found that Dr Griesel 'to a great extent contributed to the death of the [disputed] buffalo.' It concluded that the risk had not passed to Mr Haasbroek.

[16] In these findings, the full court erred. It was correctly conceded before us that the common law relating to risk in contracts which are *perfecta* is not relevant to the risk assumed by Mr Haasbroek in the present matter. Apart from anything else, the risk assumed by him was limited to death or injury arising from the operation. Neither were the issues of *vis major* or *casus fortuitous* relevant. Also not relevant is the issue of whether the contract was subject to a suspensive condition such as was found by the full court. It was correctly accepted on behalf of Mr Haasbroek in argument that these considerations should have no bearing on the outcome of the appeal.

[17] Before dealing with the pertinent issues before us, it is necessary to dispose of an issue raised by Mr Haasbroek. It was submitted that the appeal should fail because it was not established which of the appellants had allegedly sold the disputed buffalo to him. Despite the second appellant owning the farms and the third appellant owning the game on them, it is clear that Dr Griesel acted on his own behalf. It is common cause that, prior to the delivery of an invoice after the death of the disputed buffalo, no mention had been made by Dr Griesel to Mr Haasbroek of the other two appellants. At no stage was there any indication that he was selling the disputed buffalo on behalf of either of the other appellants. There is no bar to his having sold buffaloes belonging to the

third appellant.² Any sale agreement which resulted was accordingly one between Dr Griesel and Mr Haasbroek. If, therefore, it is found that Mr Haasbroek is liable for the purchase price, the judgment must be in favour of Dr Griesel.

[18] By the time the present appeal was heard, it had been conceded by Mr Haasbroek that a sale agreement had been concluded. At the appeal hearing, it was conceded that it was an express term of the agreement that Mr Haasbroek would assume the risk of death or injury to the disputed buffalo during the operation. In other words, the express risk term pleaded by Dr Griesel was conceded to be a term of the sale agreement. No qualifications or alternatives to this term were pleaded such as that the risk would revert to Dr Griesel if he interfered in the operation or anything of the sort. In the light of the background and probabilities of the matter, highlighted above, it seems to me that both of these concessions were appropriate.

[19] Once these issues were conceded, the only remaining question, according to Dr Griesel, was whether the risk eventuated. The heads of argument of Mr Haasbroek conceded that the disputed buffalo ‘died as a result of the darting process.’ This is consonant with the evidence of the expert witnesses called by both Mr Haasbroek and Dr Griesel. It also accords with a reading of the evidence as a whole. It was therefore correctly conceded that the disputed buffalo died during and as a result of the operation.

[20] Consequently, it must be accepted that all three contentions of Dr Griesel, referred to at the beginning of this judgment, were established. He accordingly

² *Voet* 18.1.14; *Transvaal Mortgage Loan and Finance Co Ltd v Aronson* 1904 T S 864 at 866. In *Frye's (Pty) Ltd v Ries* 1957 (3) SA 575 (A) at 581A-B this court held, ‘there can be no doubt that neither a sale nor a lease is void merely because the seller or lessor is not the owner of the property sold or leased.’ In *Mighty Solutions t/a Orlando Service Station v Engen Petroleum Ltd & another* [2015] ZACC 34; 2016 (1) SA 621 (CC) para 28, the Constitutional Court approved the dictum in *Frye's* in relation to a lease.

submitted that, in these circumstances, the appeal should succeed and that he was entitled to an order that Mr Haasbroek pay the purchase price of the disputed buffalo.

[21] Mr Haasbroek met this submission along the following lines. The claim was for specific performance. In a sale agreement, the purchase price can only be claimed against delivery. A seller may be excused performance by way of delivery if it is proved that there was a supervening impossibility of performance. However, this is not so if that impossibility is self-created. For this reason, not only did Dr Griesel have to prove the agreement, the express term relating to risk and that the risk had eventuated, but in addition he bore an onus to show that the death was not caused by his conduct.

[22] This submission fails to appreciate the contractual position. The case of Dr Griesel was not based on being excused delivery on the basis of supervening impossibility of performance. The case pleaded and established was that the parties were aware that between the sale and the delivery, a high risk event was going to occur in the form of the operation. The parties agreed that Mr Haasbroek assumed the risk of death or injury to the disputed buffalo if it arose from this high risk event. The risk arising from other events was left intact. In other words, the common law term of a sale agreement which would normally require delivery by Dr Griesel had been varied by agreement between the parties. If the risk assumed by Mr Haasbroek eventuated, he would suffer the loss arising from it. This means that, if during and as a result of the operation the disputed buffalo died or was injured, Dr Griesel would not be obliged to deliver the disputed buffalo alive or in a healthy condition, depending on which of those risks occurred. The risk which eventuated was the death of the disputed buffalo during and as a result of the operation. The law concerning

supervening impossibility of performance and the issue of whether any impossibility was self-created or not was therefore not of application.

[23] Mr Haasbroek persisted in submitting that the onus lay on Dr Griesel to prove that he had not caused the death of the disputed buffalo. He submitted that in the plea and further particulars, this issue was squarely raised. He relied on five averments in these documents to support this submission. It is therefore necessary to consider those averments to establish if they have the consequence contended for.

[24] The first averment relied on is in the plea to paragraph 8 in the particulars of claim. In the previous paragraph of the plea, it was admitted that Mr Haasbroek had instructed Dr Van Zyl to carry out the operation. Paragraph 8 averred that, on 27 October 2009 and pursuant to that instruction, Dr Van Zyl administered a sedative by darting the disputed buffalo, Mr Haasbroek pleaded as follows:

‘Save to mention that the sedation of the buffalo took place under the direct supervision and as indicated and prescribed by [Dr Griesel], these averments are admitted.’³

[25] The second averment relied on is in the plea to paragraph 9. This paragraph averred that after the disputed buffalo was darted, it ran away, could not be found and died later that day. The first two of these averments were admitted but the third was denied. Paragraph 6.3 of the plea went on:

‘In particular, [Mr Haasbroek] avers that after the buffalo was darted, [Dr Griesel] instructed that the buffalo should not be followed immediately.’⁴

³ My translation. The original read:

‘Buiten om te vermeld dat die verdowing van die buffel geskied het onder direkte toesig en soos aangewys en voorgeskryf deur [Dr Griesel], word die besonderhede hierin vervat erken.’

⁴ My translation. The original read:

‘In die besonder beweer [Mnr Haasbroek] dat [Dr Griesel] opdrag gegee het na die pyl van die buffel, dat die buffel nie onmiddellik gevolg moes word nie.’

[26] The third averment is in response to further particulars sought from Mr Haasbroek as to what had been meant by the averment in the plea to paragraph 8 that the operation took place under the direct supervision and as indicated and prescribed by Dr Griesel. The response as to what was meant by this aspect of the plea was:

‘On the day of the operation [Dr Griesel] prescribed how, where and by what procedure the buffalo should be darted and sedated.’⁵

[27] The fourth averment relied on is the response to a request for further particulars to an aspect of paragraph 6.3 of the plea referred to above. Mr Haasbroek was asked who, according to him, was in control of the operation. He responded that it was Dr Griesel.

[28] The fifth averment relied on also arose from a request for further particulars to that aspect of paragraph 6.3 of the plea which averred that Dr Griesel gave an instruction not to immediately follow the disputed buffalo. It asked to whom this instruction had been given. Mr Haasbroek’s response was that it had been given to Dr Van Wyk after the latter had indicated that it should be followed.

[29] In his heads of argument, Mr Haasbroek also sought to rely on aspects of the plea of Dr Van Wyk in his capacity as the second defendant. The only additional averments in this were that Dr Griesel instructed that the helicopter not be used but required the operation to be conducted from the Land Rover. I can find no basis to uphold the submission that these averments, taken separately or as a whole, raised the issue that Dr Griesel was required to prove that his actions were not the cause of death of the disputed buffalo.

⁵ My translation. The original read:

‘Op die dag van die verdowing het [Dr Griesel] voorgeskryf hoe, waar en volgens welke prosedure die buffel gepyl en gedooft moes word.’

[30] Mr Haasbroek submitted before us, somewhat faintly, that the issues had been broadened to include this requirement by the leading of evidence during the trial. This is, of course, permissible when the issues are squarely and fully raised and dealt with in the evidence.⁶ Evidence was led to prove that the disputed buffalo died during and as a result of the operation. This was necessary to prove that the specific risk assumed by Mr Haasbroek had eventuated. Without that proof, Dr Griesel would have failed in his claim. On the most generous reading of the evidence, it cannot be said that the issue that Dr Griesel should prove that he was not the cause of death was squarely and fully dealt with. It simply was not raised as an issue during the trial. The submission that the issues were broadened to include this cannot be upheld.

[31] Even if the submission had merit, on a proper reading of the evidence the conclusions drawn by the trial court concerning the conduct of Dr Griesel cannot be supported. Mr Haasbroek was correctly found to have been a poor witness and the version of Dr Griesel as to the conclusion of the agreement was correctly preferred. This is supported by the belated concessions made on behalf of Mr Haasbroek. The conduct of Dr Griesel complained of related to the events of 27 October 2009. The trial court found that no reliance could be placed on Dr Griesel's evidence concerning the events of that day. The finding was based on the trial court's assessment of the probabilities, not on the performance of Dr Griesel as a witness. There were two essential criticisms of his conduct relied upon.

[32] The first was that he insisted that the entire operation be carried out from the Land Rover and that the helicopter should not be used at all. This was, however, not what the evidence disclosed. There was clearly a misunderstanding between Dr Griesel and the members of Mr Haasbroek's

⁶ *Robinson v Randfontein Estates GM Co Ltd* 1925 AD 173 at 198; *Shill v Milner* 1937 AD 101.

party as to the extent of his suggested use of the Land Rover. It is common cause that, on arriving at the farm and while they were enjoying a cup of coffee, they asked Dr Griesel how things would be done. He said that they should use the Land Rover to identify the disputed buffalo since the herd was accustomed to the Land Rover and they could get closer that way. Mr Haasbroek and Dr Van Wyk said that they were under the impression that Dr Griesel wanted the entire operation to be conducted from the Land Rover. However, Dr Griesel testified that he believed that the darting would and should be done from the helicopter. He himself had only ever conducted darting operations in the open veld from helicopters and not from land based vehicles. He was in fact surprised when Dr Van Wyk climbed into the Land Rover with the firearm and his kit for the operation. In any event, once he responded in the way he did, not only was no challenge raised by Mr Haasbroek and Dr Van Wyk, they did not even request clarification.

[33] The second criticism arose during the operation itself. Once the dart was fired and the herd began to run, Dr Van Wyk and Mr Boshoff said that they should set off after the disputed buffalo. Dr Griesel, who was driving the Land Rover, responded that they should wait a few minutes. There is a dispute as to whether he was merely expressing an opinion or, as was pleaded, whether he instructed Dr Van Wyk not to follow immediately. He and Dr Van Wyk both testified that he had expressed an opinion. What is not in dispute is that, when Dr Griesel said this, no voice of protest was raised. Nor was any demand made of him that he do so. Mr Haasbroek did not respond at all. When Dr Griesel was asked why he took that view, he testified that if they had set off then, there was a strong likelihood that the herd would scatter. This would have made it very difficult to locate and follow the disputed buffalo. Since the dart had struck in a good place, he expected that the disputed buffalo would collapse in three or four

minutes and be easy to locate. There is no indication that this view was not reasonable or at least reasonably held by him.

[34] It can scarcely be concluded that, in the circumstances, Dr Griesel's conduct in these regards was deserving of criticism or could be said to have caused or contributed to the death of the disputed buffalo. It certainly did not warrant the finding that his conduct was reprehensible.

[35] In the result, there was no basis for the trial court or the full court to deny Dr Griesel his claim. There was agreement that Mr Haasbroek would purchase the disputed buffalo. There was agreement that he would assume the risk of death arising from the operation. The operation resulted in the death of the disputed buffalo. The risk accordingly eventuated. Mr Haasbroek is thus liable for the purchase price of the disputed buffalo. The amount claimed as the purchase price is not disputed. There was no suggestion that costs should not follow the result.

The following order is made:

1 The appeal is upheld with costs.

2 The order of the full court of the North West Division of the High Court, Mahikeng dismissing the appeal from the High Court is set aside and substituted by:

‘1 The appeal against the order of the trial court of the North West Division of the High Court, Mahikeng is upheld with costs.

2 Paragraphs 1 and 2 of the order of that court are set aside and substituted by:

“1 Judgment is granted in favour of the first plaintiff against the first defendant for payment of the sum of R1 146 302.53 together with interest on

the said sum at the rate of 15.5% per annum from 27 October 2009 to date of payment.

2 The first defendant is ordered to pay the plaintiffs' costs incurred in respect of the action against the first defendant.”

T R Gorven
Acting Judge of Appeal

Appearances

For the Appellants: MC Maritz SC
Instructed by: Dr. Hardus van der Westhuizen Inc
Symington & De Kok Attorneys, Bloemfontein

For the Respondent: JG Bergenthuin SC (with him CAC Korf)
Instructed by: Kotzé Low & Swanepoel
Phatshoane Henney Attorneys, Bloemfontein