THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 258/08

MKITHI JAPHET MATHENJWA NO	First Appellant
JERE OLPAS GUMBI NO	Second Appellant
EMMANUEL CEBO GUMBI NO	Third Appellant
GUGU SYDNEY GUMBI NO	Fourth Appellant
GQAMANGAYE MICHAEL GUMBI NO	Fifth Appellant
BHINJA MIKAYELI MATHENJWA NO	Sixth Appellant
MANDLA ELLIOT GUMBI NO	Seventh Appellant
LONDO ISRAEL GUMBI NO	Eighth Appellant
NTOMBEMHLOPHE ELIZABETH NGCAMPHALALAI NO	Ninth Appellant
MBEKISENI ZEBLON GUMBI NO	Tenth Appellant
SINDOSOWE MONICA MATHENJWA NO	Eleventh Appellant

and

MAGUDU GAME COMPANY (PTY) LTD	Respondent

Neutral citation: *Mathenjwa v Magudu Game Company* (258/08) [2009] ZASCA 57 (28 MAY 2009)

Coram: STREICHER ADP, NUGENT, LEWIS, PONNAN JJA AND KROON AJA

Heard: 12 MAY 2009

Delivered: 28 MAY 2009

Summary: Wild animals - ownership in – whether ownership acquired and thereafter lost.

ORDER

On appeal from: High Court Pietermaritzburg (Koen J sitting as a court of first instance).

The appeal is dismissed with costs.

JUDGMENT

KROON AJA (STREICHER ADP, NUGENT, LEWIS, PONNAN JJA concurring)

[1] This appeal relates to a vindicatory application launched by the respondent in the Pietermaritzburg High Court in which the eleven appellants *inter alios* were cited as respondents. (The respondent did not pursue relief against three further entities cited as respondents in the court a quo, and they are not involved in this appeal). The matter concerns the ownership of wild animals.

[2] The appellants are the trustees of the Emwokweni Community Trust (the Trust) which, representing a local community, is the owner of certain farms situate in the Magudu area, Vryheid, Kwazulu-Natal (the trust properties). The respondent is a registered company and conducts the business of the Magudu Game Reserve, which adjoins the trust properties.

[3] The relief sought by the respondent was the following:

(a) a declarator that it is the owner of all the game presently on the trust properties, as well as all game as may in future enter upon the properties from the Magudu Game Reserve, or alternatively, is entitled to possession thereof.

(b) an order that the Trust, its employees, and/or any associates through the Trust be interdicted from interfering with, dealing in, hunting, removing and/or in any way becoming involved with the said game;

(c) a declarator that the respondent is entitled to enter upon the trust properties for purposes of removing the game and relocating same to the Magudu Game Reserve.

[4] By agreement between the parties the issues embraced in the relief sought were referred for the hearing of oral evidence. Subsequent to the hearing of the oral evidence the court a quo (Koen J) was advised that the parties were agreed:

(a) that the game in issue was confined to specific species. (In correspondence preceding the launch of the application the Trust conceded that the elephants, rhinoceroses and buffaloes on the trust properties, did not belong to the Trust and no claim was laid thereto. The court a quo was advised that this was a gratuitous concession, not based on any legal principle. (In fact, in the correspondence the Trust's attorneys advised the respondent's attorneys that the three species in question could be removed by the respondent));

(b) that the interdict referred to in the notice of motion (if granted) should extend only to 'disposing of, dealing in, hunting and removing' the game until the respondent had removed the game from the trust properties.

[5] In the result, the court a quo in substance granted the relief sought (in respect of the specified game, as agreed). It is that decision which the appellants seek to assail in this appeal. The appeal is with the leave of the court a quo.

BACKGROUND

[6] In 1995 three farmers, Mr Greeff (representing Die Greeff Eiendoms Trust), Mr Crafford (representing the Mahlatini Game Ranch (Pty) Ltd) and Mr Coetzer, whose farms were contiguous, agreed to remove the fences between their farms to form a game reserve, allowing the game on the farms to range freely between the various properties. They decided to form a company (the respondent) which, the respondent alleged, would own the game on the reserve. Various agreements were signed by the parties for the implementation of their arrangement. (Certain terms of these agreements will receive closer attention later in this judgment). The court a quo referred to the contracting parties as 'the founders'.

[7] In 2001 a Mr Bouwer, the owner of the trust properties inter alia, entered into negotiations with the respondent and joined the venture, and the fences between the reserve and his land, including the trust properties, were subsequently removed and his land and game were added to the reserve. In 2001 Bouwer signed certain of the agreements referred to in the preceding paragraph, as also other agreements with the respondent.

[8] Around the perimeter of the reserve the fence was upgraded and electrified. In the case of Bouwer's properties these steps were taken before

the internal fences between those properties and the remainder of the reserve were removed.

[9] In April 2006 Bouwer claimed that his agreement with the respondent was void and he sought restitution, including all the proceeds received from the sale of game emanating from his properties to various hunters since 2001.

[10] In May 2006, the Trust acquired ownership of the trust properties pursuant to a successful land claim under the Restitution of Land Claims Act 22 of 1994 and the purchase by the State, through the Regional Land Claims Commissioner, of the properties from Bouwer. After the purchase the properties were transferred to the Trust.

[11] For the purposes of the acquisition of the trust properties by the Land Claims Commission on behalf of the Trust from Bouwer the land was valued by an appraiser, Mr Pretorius. In his report, confirmed in his evidence, he recorded that in arriving at a value he took into account that, as he had been told by both Greeff and Bouwer, ownership of the game on the properties vested in the respondent and game counts could not be done as the properties were managed together with the greater Magudu Game Reserve comprising a total of some 15 000 hectares, accommodating four of the big five wild animals (lions being excluded), but, on the other hand, that game did occur on or traverse the trust properties.

[12] After taking transfer of the trust properties the Trust declined to become a member of the Magudu Game Reserve. Following on disagreements

between the Trust and the respondent (the former wishing to grant hunting concessions on the trust properties) the Trust denied the respondent, its employees or agents any right of access to the properties and in fact obtained an interdict against such access (required by the respondent, so Greeff averred, for maintenance and conservation purposes). (According to the judgment of the court a quo an interim working arrangement was, however, subsequently reached which operates pending the outcome of the proceedings, and the interim interdict was discharged. We were advised from the Bar that the interim arrangement permits hunting to take place on the trust properties subject to the proceeds being deposited into a trust account.) The position remains that there are no fences between the trust properties and the land comprising the reserve.

[13] The institution of the present litigation ensued. The essential questions that fell to be decided were whether the respondent acquired ownership of the game in question and, if so, whether it retained or lost such ownership.

THE AGREEMENTS SIGNED

[14] The founders signed an 'Umbrella Agreement', a document titled 'The Magudu Game Reserve Association Constitution', a 'Shareholders' Agreement', a 'Game Valuation and Count Agreement', various 'Use Agreements' and 'Agreements of Game Purchased'.

The effect of these agreements was that the shareholding of each of the founders in the respondent (the incorporation of which was envisaged and was subsequently effected) was determined with reference to the size of their respective properties, and a monetary adjustment was made with reference

to the value of the game found on each founder's land (as agreed) and contributed to the joint venture, so that a shareholder's total contribution to the venture (consisting of game, or game and money) corresponded with his shareholding. Each shareholder, however, retained ownership of the property made available to the scheme by him or it.

[15] Pursuant to the negotiations with Bouwer in respect of the addition of his land and game to the Magudu Game Reserve on a similar basis, the agreements (with the exception of the 'Use Agreements') were extended to, and some new agreements concluded with, him. On 5 March 2003 Bouwer appended his signature to the 'Umbrella Agreement', the 'Constitution', a 'Deed of Acceptance of Membership of the Magudu Game Reserve Association' and the 'Shareholders' Agreement'. He also signed (on a date not specified) a 'Record of Agreement' between himself and the respondent. On 7 July 2003 he signed a 'Koopooreenkoms' ('purchase agreement') providing for the purchase by the respondent from him of certain land and the game thereon as a going concern.

[16] The final arrangement with Bouwer, although similar to that between the three founding members, was, however, not identical. Initially, the 'Record of Agreement' (which, while not being a model of clarity, reflected an agreement in principle) provided inter alia that:

(a) Bouwer's properties (set out in an annexure) would form part of the Magudu Game Reserve;

(b) Bouwer would acquire a 20 per cent shareholding in the respondent (to be transferred to him from the existing shareholders);

(c) the value of all the game on the extended reserve was R24 370 000;

(d) the consideration for the shareholding (R4 874 000, being 20 per cent of R24 370 000) would be settled by the selling of certain land and game to the existing shareholders as well as a cash payment, made up as follows:

land (± 1650 hectares at R1 100 each):	R1 815 000
game:	R1 289 840
cash:	R1 769 160.

(e) all internal fencing was to be taken away by not later than August 2002. (In fact, Greeff testified that a delay supervened).

[17] However, it was thereafter agreed that the shareholding in the respondent be increased and that Bouwer receive 20 per cent of the increased shareholding (from the respondent) for the consideration of R4 874 000. The 'Koopooreenkoms' was thereafter concluded. The total consideration payable by the respondent in terms thereof was R1 951 105, which included R572 605 in respect of game. The land which was the subject of the agreement comprised portions of two of the properties referred to in the annexure to the 'Record of Agreement' (which rendered it necessary for subdivisions to be effected). The reasons for the restricted sale of ground need not be set out. According to Greeff the game reflected by the sum of R572 605 was the estimated amount of game on the properties in question at the time.

[18] At a late stage in his oral testimony Greeff seemed to suggest that the game to the value of R572 605 may have been in addition to the game to the value of R1 289 840 referred to in the 'Record of Agreement'. However, to the

extent that that was the import of his evidence, he was clearly confused and mistaken in this regard. There was no suggestion that in the interim Bouwer had introduced further game onto his properties and Greeff had earlier stated that the game referred to in the 'Record of Agreement' was that which was on all of the properties referred to in the annexure thereto.

[19] In the result, therefore, the final arrangement was that as a quid pro quo for his 20 per cent shareholding Bouwer would be credited with the sale price provided for in the 'Koopooreenkoms'; transfer the land referred to in the 'Koopooreenkoms' to the respondent; make the remainder of the land referred to in the annexure to the 'Record of Agreement' (of which he would remain the owner) available to the respondent as part of the extended reserve; contribute game to a total value of R1 289 840 to the venture; and make payment of the cash amount of R1 769 160.

[20] The cash amount involved was paid by Bouwer (albeit to the other shareholders, not the respondent). The land referred to in the 'Koopooreenkoms' was, however, never transferred to the respondent and no shares were ever issued to Bouwer. The agreements with him remained executory and became the subject of ongoing litigation between the parties. However, the result of the removal of the fences between Bouwer's properties and the other land utilized by the respondent was that the game that was on Bouwer's properties intermingled and roamed freely with the other game over the extended reserve.

[21] Both prior to and subsequent to the negotiations and agreements concluded with Bouwer, the respondent acquired substantial amounts of further game (over and above that originally on the land) by purchase or barter, and added same to the reserve. Progeny has also been born to the game on the land.

THE ORAL EVIDENCE

[22] Greeff, a director of the respondent, deposed to the founding and replying affidavits on behalf of the respondent. He also gave evidence at the oral hearing. In addition to sketching the history of the matter, including the various agreements signed, his testimony was to the effect that the owners of the land which formed the constituent parts of the game reserve all agreed that the respondent would become owner of all the game on the reserve and that was their common intention. Crafford (whose interest in the venture was at a later stage acquired by Greeff) also testified that as far as he was concerned, when the internal fences were removed, so that the game could roam over the entire reserve, the respondent became the owner of the game. Under cross-examination, however, he agreed that the way in which the game previously on the farms was dealt with was governed by the terms of the various agreements 'as they interacted with each other', that there were no separate oral agreements that did not form part thereof and that the consequences of the arrangement were to be found 'on an interpretation basis'.

[23] The Trust did not tender any oral testimony. Its stance in the answering affidavit filed on its behalf, and in cross-examination during the oral

testimony, was that the respondent was put to the proof of its allegation of its ownership of the game in question and that the various agreements invoked by the respondent did not substantiate its claim.

THE JUDGMENT OF THE COURT A QUO

[24] Koen J had regard to the following common law principles relating to the ownership in game:

(a) Wild animals which are in a natural state of freedom become the property of their captor wherever and however captured provided that apart from physical control, the *animus* to be the owner is also present;

(b) A wild animal which escapes from physical control, disappears from the sight of its previous owner and regains its natural state of freedom becomes *res nullius* with a consequent loss of ownership.[1]

[25] The learned judge further held, correctly, that the abstract theory applies in our law in respect of the passing of ownership in property.[2] In terms thereof, a valid underlying transaction or *iusta causa traditionis* is not a requirement for the valid transfer of ownership. Provided that the agreement to transfer ownership (the 'real agreement' or 'saaklike ooreenkoms') is valid, ownership will pass in pursuance and on implementation thereof, notwithstanding that the *causa* (the 'verbintenisskeppende ooreenkoms' or 'contractual agreement') may be defective. In other words all that is required is delivery (actual or constructive) coupled with an intention to pass and receive ownership.

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[1] Van der Merwe, *Things*, 27 *Lawsa*, paras 325 and 406.

[2] *Commissioner of Customs and Excise v Randles Brothers and Hudson* 1941 AD 369 at 198-199; *Trust Bank van Afrika Bpk v Western Bank Bpk* 1978 (4) SA 281 (A) at 301; *Air-Kel(Edms) Bpk h/a Merkel Motors v Bodenstein* 1980 (3) SA 917 (A) at 922.

[26] The conclusion reached by the learned judge was that the individual parties to the game reserve venture (who were the owners of the game on their respective properties prior to the dropping of the internal fences) intended that ownership of the game pass to the respondent, that the latter intended to receive ownership and that delivery of the game was effected when the internal fences were dropped. He reached this conclusion based on his assessment of the evidence, the probabilities and the interpretation to be placed on the various agreements signed (insofar as these might have had a bearing on the question of whether there was the requisite intention).

[27] In respect of the requirement of control for there to be ownership in the game at common law, it was held that the upgraded electrified perimeter fence around the extended reserve (which was game proof) afforded the requisite control. That control (over game that happened to be on the trust properties) was not lost when the Trust barred the respondent from access to the trust properties and the respondent remained owner of all the game on the extended reserve as it was before the Trust decided not to be a member of the reserve.

[28] One last aspect was the subject of dispute in the court a quo. The appellants argued that in the event of the court deciding the matter in favour of the respondent, a time limit should be placed on the opportunity to be afforded to the respondent to remove its game, of one winter season (that being the season of the year when removal of game from one area to another can be undertaken). The respondent contended for a minimum of two winter

seasons. The learned judge commented that the issue of what would constitute a reasonable period was not canvassed in the papers or the evidence, and might very well require input from experts. He was not prepared, in the absence of the issue being fully ventilated between the parties, to make an arbitrary determination. He therefore stated that he would grant the relief in the form sought and if the parties could not reach agreement and either party acted unreasonably, the court would have to be approached for the issue to be determined.

CONTENTIONS OF THE RESPONDENT

[29] The basis on which the respondent argued that it became the owner of all the game in the reserve was framed as follows:

(a) When the reserve was created and the fences removed it was the intention of the farmers concerned that the respondent would become the owner and controller of their game; the respondent was created for that purpose[3]. The 'real agreement' consisting of the intention to transfer and receive ownership of the game is evidenced by the conduct of the owners who contributed land to the venture and removed the internal fences, thus allowing their game, previously confined to their respective properties, to move between the various properties and to intermingle.

[3] The 'Shareholders Agreement' referred to in paras [14] and [15] above recorded that the respondent had as its purpose '…..carrying on the business of the conservation of veld and wild game resources on a commercial basis primarily in the area of land to be called the Magudu Game Reserve'.

(b) It would in fact not have been practicable for the individual farmers to retain ownership of the game which they contributed. The game roamed over the whole reserve, moving freely from one farm to another.[4]

(c) The game intermingled and it became impossible to identify the game contributed by each farmer.

(d) Delivery of the game to the respondent took place when the internal fences were removed (thus enabling the game to roam as referred to above). The game reserve was securely enclosed by an electrified game fence on the perimeter thereof. The respondent accordingly assumed the required control over all the game.

(e) The respondent later introduced further game to the reserve, which it had acquired by purchase or barter. The benefit of the progeny of the game in the reserve also accrued to it.

(f) The appellants made the concession concerning elephants, rhinoceroses and buffaloes referred to earlier.[5]

[30] It was further submitted on behalf of the respondent that nothing in the written agreements signed by the parties detracts from the notion that it was the common intention that ownership in the game would pass from the farmers to the respondent. On the contrary, so it was argued, the contents of the documents underlined the existence of the common intention contended for. Counsel pointed inter alia to the following:

(a) One of the suspensive conditions in the 'Umbrella Agreement' was the signing of an agreement between the parties to the effect that they have

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[4] The founding affidavit, deposed to by Greeff, further recorded that because of drought conditions game migrated to Bouwer's farms and during 2002/2003 the respondent moved a considerable number of the game to those farms to take advantage of the available grazing there.

[5] Para [4] above.

agreed to the valuation and count of all game. A formula was provided for a monetary adjustment so as to achieve an equal contribution of game, or game and money, relative to the shareholding of the parties.

(b) Various provisions in the agreements were to the effect that, to the exclusion of a party thereto, the respondent would be entitled to undertake the control and administration of all culling, catching and hunting of game on a party's land and to trade therein commercially, the nett proceeds thereof to accrue to the respondent and be treated as income of the respondent. The parties were not to permit capturing, hunting or shooting of game on their respective properties and would not be permitted to engage in hunting without a written permit issued by the respondent (and subject to any conditions laid down by the respondent) and payment of the prescribed fees to the respondent. An infraction of these provisions by any party would visit him or it with liability to pay a compensatory fine.

(c) A formula was to be applicable when a new member joined the reserve and added his land and game to it. In terms of the 'Record of Agreement' (as later modified) concluded between the respondent, the Magudu Game Reserve Association and Bouwer he would acquire a 20 per cent shareholding in the respondent, for which he would pay by way of land, use of land, game and cash. The clear effect of the above, so it was argued, supported the contention that on joining the reserve Bouwer would not retain ownership of his game.

(d) Clause 5 of the 'Use Agreements' (Bouwer did not sign such an agreement) provided that in the event of a land owner ceasing to be a member of the association he would be obliged to re-erect fences on his land

(to separate same from the properties remaining in the reserve) *and the respondent would be entitled to capture and remove all wild game from his land.* (My emphasis). (The clause further provided that the departing member would receive no compensation in respect of the game so removed other than through the compulsory sale and purchase of any shares he has in the respondent).

(e) Clause 4 of the 'Use Agreements made provision for a waiver of ownership in the following terms:

'The Landowner also expressly waives any right to or claim to ownership of any wild game traversing his land from time to time, such waiver to be in favour of [the respondent].'

[31] Counsel also invoked the following conduct on the part of the parties:

(a) Hunting on the reserve was done by professional hunters, pursuant to contracts concluded with the respondent, and the profits accrued to the respondent. Supporting documentation in substantiation hereof was placed before the court a quo.[6]

(b) Further documentation substantiated that the respondent had also engaged both in the purchase of game to be added to the reserve as well as in the sale of game to other persons.

(c) As was deposed to by Mr Redelinghuys, the chartered accountant who attended to the preparation of the respondent's financial statements, the game was reflected therein as an asset of the respondent. Similarly, the

[6] In the founding affidavit Greeff recorded that the hunting concessions granted during 2004 included concessions granted specifically in respect of the land that subsequently became the trust properties and a hunting camp was leased from Bouwer for this purpose. In his replying affidavit Greeff referred to invoices issued by the respondent to Bouwer for game he had shot on the reserve and game he purchased from the respondent, as well as invoices relating to game meat that Bouwer had purchased from the respondent.

statements reflected expenses for the purchase of game and income from the sale of game.

(It may be added that in correspondence between Greeff and the Land Claims Commissioner the former recorded inter alia that the respondent is the owner of all game in the game reserve in that it had purchased all the initial game on Bouwer's properties for the amount of R1 289 840, and already owned the balance of the game in the reserve).

[32] Counsel further invoked the fact that the agreement in terms of which Bouwer disposed of the trust properties to the National Department of Land Affairs (which in turn transferred the land to the appellants) concerned only the sale of the land and said nothing about game.

[33] Counsel also adverted to the evidence of Bouwer contained in the affidavit filed by him. (Bouwer, who was cited as the 14th respondent in the court a quo, recorded that he had no personal interest in the application, abided the decision of the court and filed the affidavit for the assistance of the court). He stated inter alia that the respondent purchased his game and that after the internal fences had been dropped the respondent used all the game in its operation. [7]

[7] It may further be recorded that in proceedings instituted by the respondent against Bouwer in the Johannesburg High Court for the enforcement of the sale of the land referred to in the 'Koopooreenkoms' (which are still pending), the papers in which were by agreement placed before Koen J, Bouwer filed an affidavit which contained the following passage:
'I have paid the cash amount to the shareholders and the Applicant (the present respondent) has taken over the game that was on my farms. This we did by dropping the fences between the properties and the game was then allowed to move over the boundaries to the various properties. Since then the Applicant has been using the game in its game farming operations.'

[34] In respect of the contention on behalf of the Trust that the respondent had lost its ownership of the game in question, counsel supported the approach adopted by Koen J. He pointed out that the game remains where it was from the outset, roaming all over the reserve, including the trust properties, but confined by the perimeter fence. He submitted that the refusal by the appellants to allow the respondent to remove game that happens to be on the trust properties to the remainder of the reserve, does not constitute a loss of control leading to a loss of ownership. He labelled the refusal as an unlawful attempt by the appellants to appropriate to themselves game which is owned by the respondent.

[35] Finally, counsel supported the approach of Koen J with regard to the formulation of the order relating to the removal by the respondent of the game from the trust properties. He emphasized that the respondent cannot begin with the relocation process until the Trust has constructed a fence between its land and the reserve. He added that the Trust can hardly complain about the fact that the animals are grazing on their land (about which more later when the Trust's submissions are considered) when it refuses to allow the respondent to remove the animals.

[36] In my judgment, the argument on behalf of the respondent set out in the preceding paragraphs in general carries persuasion, as will appear from the discussion that follows on the contentions raised on behalf of the Trust.

THE CONTENTIONS OF THE TRUST

[37] Mr Pillemer (who, with Mr Voormolen, appeared for the Trust) confirmed that in the court below the Trust had not disputed that prior to the dropping of the internal fences the parties to the game reserve venture were the owners of the game on their respective properties, and intimated that his stance in the appeal was the same. He submitted, however, on the grounds discussed below, that the respondent had not acquired ownership of any of the game on the properties.

[38] Reliance was placed on the evidence of the appraiser, Pretorius, referred to earlier,[8] that in valuing the trust properties he took into account that game from time to time roamed over the properties. The answer thereto is three-fold. First, the relevance of this evidence is not apparent. Second, the evidence merely reflected the factual position. Third, it is no counter to the point taken on behalf of the respondent that the subject matter of the sale from Bouwer to the State was the land and not the game thereon.

[39] Counsel sought to stress that there was no written agreement that expressly purported to transfer ownership of the wild animals in the Magudu Game Reserve to the respondent, and certainly none that transferred ownership from Bouwer, since, so it was contended, the agreements he signed remain executory and disputed. Furthermore, so the argument continued, with the transfer of the land to the appellants the agreements had become impossible of performance.

[8] Para [11] above.

[40] I will later deal more fully with the Trust's contentions founded on the contents of the various agreements. At this stage it is only necessary to repeat that the court a quo correctly proceeded on the basis that the abstract theory of the passing of ownership applies in our law, and that the fact that the agreements relating to Bouwer are executory and the subject of dispute, as well as the fact that Bouwer has transferred part of his land to a third party, relate to the 'verbintenisskeppende ooreenkoms' and any defect therein would not affect the passing of ownership in the game in question if the 'real agreement' relating thereto was valid and implemented.

[41] Counsel adverted to the fact that the trust properties are mountainous bushveld where animals would 'disappear from sight' soon after they cross the boundary into the land. Notwithstanding that the animals are restrained by the perimeter fence running along the outer boundary of the properties the questions to be answered, counsel said, are whether or not animals that enter the trust properties and disappear from sight are at common law deemed to have regained their natural freedom and whether there is the required degree of control in a 'vast' mountainous area to which the entity claiming ownership of the animals has no right of entry, and, if so, does the control relate to all animals on the land, including progeny and those that occur naturally and were not introduced.

[42] It was submitted that the court a quo, in applying the abstract theory in relation to the transfer of ownership, erred by confusing the authorities dealing with 'the validity of the underlying agreements with the need for an interpretation of the agreements and whether the parties intended thereby to

pass ownership of the game to the respondent'. However, counsel added that the question must always be whether or not there was delivery from the transferor to the transferee with the reciprocal intention both to transfer and acquire ownership, respectively, and in that regard the intention of the parties must be measured against the provisions of the common law relating to the acquisition and retention of ownership of wild animals.

[43] These latter statements correctly reflect the principles of the abstract theory. The earlier statement is not wholly in accordance therewith. While counsel correctly submitted that the interpretation of the underlying agreements is relevant to the extent that they bear on the question whether the parties had the required reciprocal intention, the question is not whether the parties intended that ownership pass *via the agreements*. The legal issue is whether there was a valid 'real agreement' to transfer ownership on delivery.

[44] The argument was that on a careful analysis of the agreements the court a quo ought to have concluded that:

(a) the agreements, noticeably, refrained from stating that the respondent would become the owner of the game within the Magudu Game Reserve;

(b) the agreements contained a number of provisions inconsistent with the respondent acquiring ownership of the game (as opposed to the right to manage, capture and exploit the game);

[45] However, while it is true that there was no express statement in the agreements that the respondent would acquire ownership of the game, I am

persuaded that the provisions invoked by the respondent, discussed earlier in this judgment, can only be interpreted as carrying the necessary implication that the respondent was to acquire ownership of the game. And, as will appear below, I am not persuaded that there are any provisions in the agreements inconsistent with the respondent acquiring ownership of the game.

[46] Counsel submitted that in contradistinction to a reference to the respondent becoming the owner of the game, the agreements used language (such as 'manage', 'control', 'administer' and 'use') which suggests an awareness of the limitations placed by the common law upon the ownership of wild game. The short answer to the submission is that the agreements must be interpreted in their entirety. If that exercise is undertaken, then, firstly, it is apparent that the wording referred to by counsel was entirely appropriate in the context of the respondent conducting the business of 'the conservation of veld and wild game resources on a commercial basis' and accepting responsibility 'for the management and conservation of all veld and wild game resources in the reserve including the land . . . on a commercial basis for its own account', on land which belonged to other persons or entities. Secondly, the wording must be read together with other provisions in the agreements which import the necessary implication that the respondent was to become the owner of the game. Asked to elucidate how what he referred to as the common law limitations on the ownership of game affected the question whether the intention was that the respondent acquire ownership of the game, counsel stated that he was referring to the requirement of control over the game. I will revert to this issue below.

[47] Counsel next focused attention on the waiver provision in clause 4 of the 'Use Agreements'.[9] It was submitted that this express waiver was entirely inconsistent with an intention by the parties that the ownership of the wild game be transferred to the respondent when the internal fences were dropped. The essential basis of the submission was that if ownership in the game was intended to pass to the respondent when the internal fences were dropped, it was unnecessary to make provision for the waiver. The allied submission was that the finding of the Court a quo that the waiver was included *ex abundante cautela* is contrary to the presumption against tautology or superfluity in contracts, included as part of the rules of interpretation of contracts.

[48] I fail to understand why the waiver was said to be inconsistent with the intention in question. I do not agree that the language utilised by Koen J offends against the presumption referred to. I do agree with the learned judge's approach that, in effect, the provisions underscored the common intention that the respondent become the owner of the game – at the time the fences were dropped. It bears mention that counsel did not seek to suggest what other effect the waiver had on the members' ownership of the game on their land.

[49] Similar comments apply to counsel's submission that the provisions in the 'Use Agreements' relating to the exclusion of compensation to the landowner in respect of game captured and removed from his land by the

[9] Para [30](e) above.

respondent (upon termination of his membership of the association)[10] were entirely inconsistent with an intention to transfer ownership of the game to the respondent when the fences were dropped. Counsel offered no submissions against the proposition that at least at that stage a transfer of ownership would take place. He sought to argue that the then capture and removal of the game by the respondent and the fencing off of the member's land would meet the requirements of the common law requirements for the acquisition of ownership in wild game. However, counsel did not suggest any reason why the parties would have wanted to delay transfer of ownership in the game to the time when a member's membership of the association came to an end, instead of an immediate transfer of ownership when the member joined the venture. And as set out above there is every indication that the latter was intended. Counsel did not proffer an explanation for the provision that no compensation be paid notwithstanding that, as was accepted, ownership in the game on the member's land immediately prior to his joining the venture reposed in him. The argument also loses sight of the considerations, dealt with earlier, arising out of the intermingling and free roaming of game over the whole of the reserve.

[50] Counsel next referred to the provisions relating to the entitlement of the respondent, to the exclusion of the members of the association, in respect of hunting operations on the reserve (and other associated rights) and to receive the proceeds thereof.[11] The argument, if I understood it correctly, was that if the respondent had become owner of all the game it was unnecessary to

[10] Para [30](d) above.
[11] Para [30](b) above.

provide for the respondent to have exclusive rights on this score. It was suggested that the purpose of the provisions was to accord the respondent rights despite the ownership of the game remaining with the landowners. However, far from these provisions being inconsistent with an intention that the respondent acquire ownership of the game contributed by the members to the venture, in my view they underscore that intention.

[51] The essential submission on behalf of the appellants, based on the factors referred to above, was that on a proper analysis of the agreements they created personal rights to exploit the resources found on the land (which included, but were not limited, to game) in favour of the respondent, but fell short of reflecting an intention to transfer ownership of the game to the respondent, probably, counsel said, on the basis that the ownership of wild game which occurs naturally, is at common law problematic. (Again, it may be repeated, counsel invoked the requirement of control ─ an aspect dealt with below.) I am unable to agree. As already recorded, nothing in the agreements casts doubt on the notion that the intention of the parties was that ownership in the game was to pass to the respondent and thus to create real rights.

[52] With reference to the 'Koopooreenkoms' concluded between Bouwer and the respondent in July 2003, in terms of which the land specified therein and the game thereon (valued at R572 605) were sold to the respondent as a going concern, counsel pointed to the fact that the fences had by then already been dropped. Ergo, so the argument ran, Bouwer's state of mind at the time the fences were dropped must have been that he retained ownership of the game on his land. If, on the other hand, as Greeff suggested, the game

referred to in the 'Koopooreenkoms' was additional game, then, even if Bouwer had intended the ownership of the game originally described to pass with the dropping of the fences, he could not have intended to pass ownership of the remaining game referred to in the 'Koopooreenkoms'. This, counsel said, highlighted the problem of ownership of wild animals that wander and cannot be individually identified, and the agreement (which in fact was never executed) presented a 'significant' obstacle in drawing the inference of an intention to pass ownership of all of Bouwer's game to the respondent when the fences were dropped. The short answer to the argument, however, is that, as I have already found,[12] the game referred to in the 'Koopooreenkoms' formed part of the total game Bouwer was to contribute to the venture. That contribution was part of Bouwer's *quid pro quo* for the shareholding he would obtain in the respondent and the only inference is that the game contributed was to become the property of the respondent.

[53] In the final result, counsel's argument (apart from the reliance on his interpretation of the various agreements) boiled down to the following. With Bouwer's entry into the game reserve venture and the dropping of the internal fences between his properties and the remainder of the reserve an additional approximately 10 000 hectares was added to the venture (which up to then had embraced approximately 5 000 hectares). The additional land, and specifically the trust properties, was rugged and mountainous where game could, and did, factually 'disappear from sight'. That circumstance, taken together with what counsel referred to as the 'vastness' of the reserve area rendered the 'recovery of game' a difficult procedure. Accordingly,

[12] Para [18] above.

notwithstanding that the upgraded and electrified perimeter fence effectively contained the specified game within the confines of the extended reserve, the element of control required for ownership in game was absent. Integral to the argument was the submission, with allusion to the 'vastness' of the land, that it was a question of degree whether the requisite control was present. The required degree, so it was argued, was not met in the instant case.

[54] Pressed on what he contended had become of the ownership that the parties to the game reserve venture had had in the game that was on their respective properties prior to the dropping of the internal fences counsel's final stance, on the basis set out in the preceding paragraph, was that all the game in the reserve had become *res nullius*. In developing his argument, if I understood it correctly, counsel submitted that the parties had probably not given thought to what would happen to the ownership in their game, but the effect of relinquishing control of the game when the internal fences were dropped (as counsel contended for) was the loss of ownership.

[55] The argument cannot be upheld. In the first place, as already recorded, the intention of the parties to the venture was that ownership in all the game in the reserve would pass to the respondent. Secondly, I am unpersuaded by the argument that control over the game was factually relinquished. As appears from the decisions in the cases referred to in the following three paragraphs (to which Mr Ploos van Amstel, for the respondent, referred us) the applicable common law principles, when applied to the facts of the present matter, dispose of the submission.

[56] In *Richter v du Plooy*[13] the plaintiff kept 57 wildebeest on 800 morgen of land which was enclosed. Some of the animals strayed onto an adjoining farm where two of them were shot. It was held[14] that the size of the enclosure did not exclude that the confinement of the animals was of such a character as to make the animals the property of their captor, but that their confinement (having regard to the nature of the animals, the extent of the enclosure, the object of preserving the animals and their susceptibility to the control and management of man) was not sufficient to take them out of the category of wild animals and if they emerged from their place of detention they became *res nullius.* While detained, however, they were the property of the landowner. (It may be noted that the headnote of the case does not correctly reflect what was decided.)

[57] In *Lamont v Heyns & Another*[15] the plaintiff kept 110 blesbok in an enclosed camp some 250 to 300 morgen in extent. The defendants entered the plaintiff's land and shot some of the animals. It was argued on their behalf that the blesbok were wild animals not in the possession of the plaintiff and therefore not his property. The judgment contains the following passage:

'Under such circumstances it would cause great surprise to farmers if the Court were to hold that the blesbok in question were not the property of the plaintiff. But it is contended on behalf of the respondents that that is the law, and various authorities were referred to. . . . And Voet says that wild animals which we have confined in zoological preserves or fish which we have cast into fish ponds are under our control, and are therefore owned by us; but . . . wild animals roaming about in fenced woods

[13] 1921 OPD 117.
[14] At 118-119.
[15] 1938 TPD 22.

are left to their natural liberty, nor are they possessed by anyone; because fences are put up rather for defining boundaries than for the custody or closing in of wild animals. It may have been the case at the time and in the country in respect of which Voet was writing that fences were put up for defining boundaries rather than for closing in wild animals, but we must deal with the facts in the present case.'[16]

It was concluded that although the blesbok were wild animals the plaintiff kept such control over them as to make him the owner of the animals.

[58] In *Strydom v Liebenberg*[17] game was kept on 140 hectares enclosed with game proof fencing. Portion of the land was owned by the plaintiff and the remainder by a company of which he was the sole shareholder and director. The company was liquidated and the land belonging to it was sold to the defendants. The agreement of sale did not include the game. The defendants erected a fence between the two portions of land thereby denying the plaintiff access to the game on the land previously owned by the company. The defendants contended that the plaintiff had lost ownership in that game as he no longer exercised control thereof: the game had therefore become *res nullius*. The contention was rejected on the basis that the game remained confined within the land that had been fenced and had not regained their natural state.

[59] In the present matter regard must be had to the nature of the game reserve venture conducted by the respondent (ie large scale game-farming). It was for the purpose of carrying on that venture that the perimeter fence had

[16] At 24-25.
[17] [2007] ZASCA 117.

been upgraded and electrified, which resulted in the game being confined within the boundaries of the reserve. That confinement, coupled with the purpose thereof, and seen in the light of the approach adopted in the three cases discussed above, constituted the requisite control to vest ownership of the game in the respondent. The size of the reserve and the circumstance that 'recovery of the game' might be a difficult and time consuming exercise do not affect that conclusion; recovery of the game would eventually be achieved.

FINDING

[60] I conclude accordingly that the respondent acquired ownership of all the game in the reserve in that:

(a) the respondent and the founders had the common intention that ownership of the game on the land of the founders would pass to the respondent, and subsequently the respondent and Bouwer had the common intention that ownership of the game on the land of Bouwer would pass to the respondent;

(b) actual delivery of the game took place when the internal fences were dropped, alternatively constructive delivery took place by virtue of the fences being dropped followed by the then possession of game by the landowners on behalf of the respondent;

(c) ownership of the further game introduced into the reserve by the respondent was acquired by it by purchase or barter;

(d) the progeny of the game on the reserve accrued to the respondent.

DID THE RESPONDENT LOSE OWNERSHIP OF ANY OF THE GAME?

[61] Counsel's argument embraced an attack on Koen J's finding that the wild animals from time to time on the properties now registered in the name of the Trust had not regained their natural state of freedom such as to amount to a loss of ownership. It was submitted that the only form of control previously exercised by the respondent of the game on the properties was the fencing in of the game by the external fence. However, so the argument continued, for a considerable period the respondent has effectively had no means to enter upon that land to maintain the fences or to exercise any other control. It had been open to the respondent, aware of the land claim, to protect its rights by moving the animals from the farms in question onto the remainder of the reserve and erecting fences to keep them there. It elected not to do so. That, counsel said, amounted to an abandonment of control, and if the respondent previously had ownership of the game, it thereby lost such ownership.

[62] The argument cannot prevail. The evidence was that there were negotiations between the respondent and the Trust concerning the latter's becoming a member of the association. These did not bear fruit. But, as already found, immediately prior to the Trust adopting the stance that it would not allow the respondent's representatives onto its land the respondent did have effective control over the game, and owned same. It is only that stance of the appellants that interfered with the respondent's exercise of its rights of ownership and prevented it from removing the animals when it wished to do so, and it still so wishes. I align myself with the approach that Koen J adopted on that score and endorse the finding that the respondent did not lose control of the game on the trust properties and that it retained ownership of the game.

[63] It was submitted that representatives of the respondent may in terms of the court order enter upon the trust properties to remove game (without there being any limitation as to the number of entries, and that the Trust must tolerate that situation for an indefinite period 'until such times as the respondent has removed its game from the properties'. However, as Koen J pointed out the modus operandi of the relocation was not canvassed in evidence before him. He accordingly granted the order in the form sought and recorded that should any disputes between the parties arise which they are unable to resolve the court would have to be approached to determine those disputes. In my judgment, that approach was a proper one.

[64] It was next said that in the meantime, and until the game is removed, the respondent enjoys the benefit of the animals grazing upon the trust properties, to the detriment of the Trust, and without compensation. The short answer to the objection is that it does not lie in the mouth of the Trust to invoke the objection when it has itself, by its own conduct, denied the respondent access to its properties for the purposes of the relocation. However, if it considers that it has a claim for compensation it is at liberty to pursue same. It may further be noted that the issue was not raised before the court a quo.

REPLACEMENT OF INTERNAL FENCING

[65] The circumstance of the absence of internal fencing between the reserve and the trust properties was also raised in argument. A suggestion was made in the respondent's papers that the appellants are obliged to erect

such fences (presumably on the basis that their predecessor in title, Bouwer, was, in terms of his agreement with the respondent, obliged to replace internal fences when he withdrew from the venture). It is not necessary, nor possible, in the present judgment, to pronounce on the validity of that stance. The respondent may have to erect the fencing itself (and Greeff in fact testified that the respondent was entitled to do so) to enable it effectively to relocate its game, and thereafter seek whatever remedy it feels it may have against either Bouwer or the Trust; or it may approach the court to resolve the issue of responsibility for the erection of the fencing.

ORDER

[66] The appeal is dismissed with costs.

F KROON
ACTING JUDGE OF APPEAL

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