

SOUTH AFRICA / JUDGMENT

Royal Vision Investments CC v Taljaard (4856/2019) [2020] ZAFSHC 121 (30 June 2020) [2020] ZAFSHC 121

COURT

Free State High Court, Bloemfontein

BEFORE

Molitsokane

CASE / FILE NUMBER

4856/2019

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FREE STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC OF SOUTH AFRICA

Case No: 4856/2019

In the matter between:-

ROYAL VISION INVESTMENTS CC APPLICANT

and

COBUS TALJAARD RESPONDENT

JUDGMENT

BY: MOLITSOANE, J

HEARD ON: JUNE 2020

DELIVERED ON: 30 JUNE 2020

- [1] The Applicant seeks an order that the Respondent or any other person acting under his control and authority return, at their own costs, its 64 Kafue Lechew game. The application is opposed.
- [2] According to the testimony of Mr Pieter Andre Swart (Swart), the Applicant trades in game on the farm, Magdala 1214 in the district of Kroonstad. The Applicant owns about 700 Kafue Lechews on the said farm. This farm is adjacent to another farm known as Klipplaatsdrift.

The Respondent resides on the latter farm. The Respondent contends that he is a mere employee on the farm and not its owner. The

uncontested evidence reveal that the farm Klipplaatsdrift is owned by Chimoio Game Farming (Pty) Ltd.

- [3] It is the version of the Applicant that 64 of its Kafue Lechwes, valued at R640 000.00 went through a gap in the fence between its farm and Klipplaatsdrift and were roaming on the latter farm. It is the Applicant's case that Swart made numerous enquiries from the Respondent relating to the return of the Lechwes to no avail.
- [4] The Respondent does not essentially deny that the said Lechwes went through the gap into Klipplaatsdrift or that they belong to him or Chimoio Game Farming. He, however, opposes the granting of the relief sought on three grounds, namely:
1. That the relief sought cannot be granted as there is a genuine dispute of fact;
 2. That the Applicant failed to prove its ownership of the Kafue Lechwes;
 3. That the Respondent was not the owner of the farm Klipplaatsdrift and thus was not in possession of the Lechwes;
- [5] The Applicant bases his case on the *actio rei vindicatio*. To succeed with this cause of action the Applicant must, firstly, prove it is the owner of the *res in issue*[1]. Secondly, it must prove that the *res in issue* still exists and clearly identifiable[2]. And, lastly, that the respondent was in possession of the thing[3].
- [6] In the adjudication of the issues between the parties it is apposite to start with the first requirement of *rei vindicatio* as this would also partly address the issue of whether there is a genuine dispute of fact. It is the Applicant's case that it is the owner of the 64 Lechwes which according to evidence went through a gap in a fence between the farms Magdala and Klipplaatsdrift. It is the case for the Applicant that upon realising that the Lechwes were on the farm Klipplaatsdrift he tried to get in touch with the Respondent by way of telephone and WhatsApp messages. The purpose of the communication was to alert the Respondent that the Lechwes herein were on the latter's farm and he also intended to arrange to fetch them.
- [7] On 30 June 2019 Swart sent a message to the Respondent that some of his (Swart's) Lechwes had crossed to the Respondent's farm. On 2 July Swart requested the Respondent to call him as he (Swart) would be having a helicopter presumably to fetch the Lechwes. On the same day the Respondent responded to the WhatsApp message by asking how many of Swart's Lechwes had crossed over. Further communication ensued as days went by and it is clear that on the WhatsApp messages the Applicant referred to the Lechwes as his property.
- [8] In the founding affidavit Swart deposes that the Lechwes belong to

the Applicant, a close corporation. It is on this basis, inter alia, that the Respondent contends that there is a genuine dispute of fact and further contends that the Applicant failed to prove the ownership of the Lechwes. This contention is in my view without merit. It is undisputed that after Swart noticed the gap and the Lechwes on the farm Klipplaatsdrift he began to communicate with the Respondent about their return. It is so that in his WhatsApp message to the Respondent the Applicant referred to the Lechwes as his property and not as the property of the Applicant. This is understandable. In his affidavit Swart indicates that he had been a neighbour of the Respondent for a long time. Swart and the Respondent knew each other. Careful reading of the WhatsApp messages reveal that the tone of the messages of Swart to the Respondent were friendly and sought to resolve the issue amicably as between neighbours. While it is not clear what the status of Swart is in the Applicant entity it is clear that Swart referred to the Lechwes as his property. In common parlance it is not unheard of that one may refer to something as his although legally it may belong to an entity. The nearest example is the case where an individual buys a motor vehicle and is financed by a bank. The vehicle might belong to the bank in terms of the instalment sale agreement until it is fully paid but it is common that the credit receiver would refer to the vehicle as his when referring to it while in truth it belongs to the bank. It is clear that Swart informally referred to these Lechwes as his during the discussion and when a formal application was issued chose to correctly indicate that they belonged to the Applicant. While it is so that Swart in his founding affidavit interchangeably refers to the Lechwes as his^[4] and sometimes to the Applicant^[5], I am satisfied that they belong to the Applicant. The impression one gets in reading the affidavit of Swart is that the Applicant is his alter ego. The Respondent does not contend that the Lechwes belong to him or to any person whatsoever or even to Chimoio Game farming (Pty) Ltd.

[9] The undisputed evidence of Mr Andries Steyn, a helicopter pilot is that

he assists farmers on a daily basis and had flown over the farms in the district of Kroonstad including that of the Respondent. According to him, which evidence is corroborated by Swart, there were no more than five Lechwes on the Respondent's farm around the period May and June 2019. The number of the Lechwes on Klipplaatsdrift suddenly increased exponentially. This begs the question whose Lechwes were those roaming on the farm, Klipplaatsdrift except the five or so belonging to the Respondent. In the absence of any version from the Respondent as to who the owner of the Lechwes roaming Klipplaatsdrift is, I am satisfied that the Applicant is the owner thereof. In my view while there might appear to be a dispute as to the ownership of the Lechwes on the basis of the allegations whether they belong to Swart or Applicant, this dispute is not a genuine dispute that cannot be resolved on the papers. It is clearly explainable as indicated above. It is untenable that the Respondent would cling to the Lechwes which do not belong to him or the company of which he is the Director solely on the basis that Swart said they were his. He resides next to the Applicant and surely knows fully that the Applicant or Swart for that matter trades in game.

[10] The Respondent further contends that the Applicant failed to allege

that the Lechwes still existed and are unidentifiable. This contention also stands to be rejected. The version of Swart is that he saw the Applicant's Lechwes roaming the farm Klipplaatsdrift. What more can be expected of the Applicant. It is so that initially he said that 35 of the Applicant's Lechwes had crossed over to the farm Klipplaatsdrift and later on before the application was initiated said they were 64. This can surely not amount to a dispute of fact. This in my view is of no consequence. When confronted the Respondent asks about the gender of the Lechwes. At no stage does he pertinently deny that the Lechwes were on the farm Klipplaatsdrift, either 35 or 64 of them. This point must fail.

- [11] Lastly, the Respondent denies that he is in possession of the Lechwes. This argument he bases on the fact that the farm Klipplaatsdrift belongs to Chimoio Game Farming (Pty) Ltd. He asserts that because he is not the owner of Klipplaatsdrift, he is not in possession of the Lechwes in this case. Although he does not in so many words say so, he implies that Chimoio is in possession of the Lechwes rather than him. Proof of ownership in *actio rei vindicatio* is a requirement necessary to be proved by the claimant. In respect of the defendant the claimant must prove that the defendant is in possession of the res and ownership is immaterial.
- [12] The undisputed evidence is that the Lechwes were enclosed on the farm of the Applicant. That there was a gap in the fence between the Applicant's farm and Klipplaatsdrift. The Lechwes crossed over to Klipplaatsdrift through the gap in the fence and were on the said farm. While there appears to be a discrepancy as to whether Swart closed the gap in the fence or whether when it was discovered Swart was overseas, is neither here nor there. The fact is that a gap existed. While I accept that the Respondent is not the owner of the farm I cannot say that he was not in possession of the Lechwes. Applicant is a Director of Chimoio Game Farming[6]. He resides on the farm. He does not pertinently deny that the Lechwes were on the farm where he resides and which farm he is a Director thereof. He only disputed through his attorneys the ownership of the Lechwes and liability thereof. It is clear that even if it could be said that the farm belonged to Chimoio he was clearly in joint possession of the Lechwes as he resided on the Klipplaatsdrift. As a Director one would have expected him to engage meaningfully with the Applicant in this matter but he chose not to do so. At no stage did he ever aver before the institution of the application that he was not in possession of the game but same was in possession of the owner. I am satisfied that the Plaintiff has proven this requirement also.
- [13] The Applicant sought a punitive cost order but I am unable to agree. While the conduct of the Respondent must be frowned upon it is my considered view that a punitive cost order would be inappropriate. I am of the view that costs on the ordinary scale would be appropriate. I accordingly make the following order:

ORDER

1. The Respondent and/or any person acting under his instruction and authority be ordered at their cost, to return the Applicant's property, namely, 64 Kafue Lechwe game within 5 days of this order;
2. The Sheriff and/ or Police be authorised and directed to attach and remove the Lechwes in paragraph 1 above and deliver same to the Applicant , if Respondent fails to comply with this order;
3. The Respondent is ordered to pay the costs of this application on party and party scale.

P.E. MOLITSOANE, J

On behalf of the Applicant: Adv S GROBLER SC

Instructed by:

Gous Vertue & ASS INC Attorneys

BLOEMFONTEIN

On behalf of the Respondent: Adv R Van der Merwe

Rosendorf Reitz Berry

[1] Goudini Chrome (Pty) Ltd v MCC Contracts 1993(1) SA 77(AD0 at 82.

[2] Sorvaag v Pettersen and Others 1954(3) SA 636 (CPD) at 639.

[3] Chetty v Naidoo 1974(3) SA 13(AD)

[4] See page 6, par [4.1]; page 7 par [4.2]; [4.4]

[5] See page 6 par [3.5]; [3.8] page 7 par [4.2]

[6] See Annexure 'OA3' page 52

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Prepared on 11 October 2026 · Esheria