



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case No: 3784/2015

In the matter of:

PETER THORMAHLEN SAFARIS CC t/a
THORMAHLEN & COCHRAN SAFARIS

APPLICANT

and

WERNER VAN DER WALT t/a
CHEETAU SAFARIS

RESPONDENT

CORAM: NAIDOO, J

HEARD ON: 17 MARCH 2016

JUDGMENT BY: NAIDOO, J

DELIVERED ON: 26 MAY 2016

NAIDOO J

[1] This is an application in which the applicant seeks the following order:

- "1. The Respondent is ordered to deliver the correct lion, as purchased by the Applicant from the Respondent, within a period of fourteen days from the date of this Order to the Applicant;
2. If the Respondent fails to deliver the abovementioned lion as ordered, that the Sheriff be authorised and directed to take such steps on behalf of the Respondent to deliver the correct lion to the Applicant;
3. The Respondent is ordered to pay any costs incurred by the Sheriff in order to deliver the lion to the Applicant;
4. Alternatively and if it is impossible to deliver the correct lion to the Applicant, that the Respondent be ordered to pay an amount of R480 000.00 plus VAT to the Applicant;
5. The applicant is ordered and directed to deliver the wrong lion, to the Respondent upon delivery of the correct lion alternatively upon receiving the payment of the amount of R480 000.00 plus VAT.
6. The Respondent is ordered to pay any costs incurred by the Applicant in order to deliver the wrong lion to the Respondent;
7. The Respondent is ordered to pay the costs of this Application;
8. Further and/or alternative relief"

The respondent opposes the application. The applicant was represented in this court by Mr C Coetzer and the respondent by Mr HJ Cilliers

BACKGROUND

[2] A director of the applicant and deponent to the Founding Affidavit, Friederich Peter Johann Thormählen (Thormahlen)) is a professional hunter and hunting outfitter, with more than fifteen years' experience in the big game trophy hunting industry in Africa. The applicant's main business activity comprises tours and hunting safaris to overseas based trophy hunters in South Africa and other African countries. Thormahlen saw an electronic advertisement in which a male lion was advertised for sale and to be hunted in the Kalahari Region. The sale price of the lion was Five Hundred and Fifty Thousand Rand (R550 000.00). A photograph of the lion was included in the advertisement. The respondent, Werner Van Der Walt (Van Der Walt), was responsible for placing the advertisement. Thormahlen contacted Van Der Walt and after the terms and conditions were discussed, via electronic mail (e-mail), the parties entered into an agreement, on 5 June 2014, in terms of which the applicant bought the lion from Van De Walt.

- [3] The purchase price included:
- 2 days for a professional hunter and client
 - All food and accommodation
 - Trackers and skimmers
 - A hunting vehicle
 - All permits and paperwork

The applicant paid a deposit of Two Hundred and Fifty Thousand Ran (R250 000.00) to the respondent on 5 June 2014. The applicant thereafter paid an amount of R280 000.00 to the respondent on 19 June 2014, which amount he avers was the balance outstanding. The applicant immediately marketed the lion

to an overseas hunter for \$100 000.00 USD, and it was arranged that the client of the applicant would hunt the lion on 21 June 2014. The respondent was informed accordingly and was requested to obtain the necessary permits. In preparation for the hunt, the applicant alleges that the respondent transported the lion to a farm in the North West Province. The respondent denies this alleging that the lion remained in Bethlehem. Nothing much turns on this, however.

- [4] The respondent, however, failed to obtain the necessary permits and the hunt did not take place. The applicant marketed the lion again, this time to a hunter from Russia, and informed the respondent accordingly. Once again, the hunt did not take place as the respondent failed to secure the necessary permits. After certain discussions between the parties, the respondent offered to buy the lion back from the applicant, which the latter accepted. The respondent, however, failed to honour this agreement by not paying the agreed purchase price. After much correspondence and communications between the parties, the applicant requested the respondent to deliver the lion to a farm, belonging to a Marthinus Steyl (Steyl), in Winburg, Free State Province, which the respondent did on 7 July 2015. Only an employee of Steyl was present at the time of delivery of the lion. Steyl only saw the lion on 27 July 2015. He took photographs of the latter mentioned lion and indicated to the applicant that this was not the same lion that was sold to the applicant. Thormahlen formed the same opinion after viewing the photographs. He telephoned the respondent and indicated to him that he had delivered to the applicant a different lion to the one that the applicant had purchased. The respondent apparently insisted that he delivered the correct lion.

- [5] The applicant alleges that the respondent breached the contract between them firstly because the two scheduled hunts did not take place due to the respondent's failure to obtain the necessary permits and secondly, because the respondent delivered the wrong lion to it. The applicant chose not to cancel the agreement but to claim specific performance, alternatively the payment of the amount claimed in the notice of motion.
- [6] The respondent, in his opposing Affidavit, raised three points *in limine*. In the first point, the respondent alleges that an entity known as Distant Star Trading 126 CC (Distant Star) conducts business as Cheetau Safaris and that he, at all times, acted as a representative of Distant Star when he concluded the agreement with the applicant. The applicant's failure to join the close corporation as a party to these proceedings is fatal to his application, which falls to be dismissed as a result of such non-joinder. The second point *in limine* is the non-joinder of Marthinus Steyl, to whose farm in Winburg the lion was delivered. The respondent alleges that the applicant had indicated that Steyl had purchased the lion from it and the lion was delivered to Steyl's farm. As a result he has a direct and substantial interest in these proceedings. The non-joinder of Steyl as a party to these proceedings should result in the dismissal of the application. The third point *in limine* raised by the respondent is that the applicant was aware or ought reasonably to have foreseen, prior to bringing this application, that a genuine dispute of fact exists with regard to the delivery of the correct lion. Such dispute involves a factual question which could only be determined upon the hearing of evidence. The applicant ought not to have proceeded by way of application proceedings, and on this basis, the application should be dismissed.

- [7] The existence and identity of Distant Star only came to light in the respondent's opposing affidavit and appeared nowhere else in the papers relevant to the conclusion of the agreement between the parties. Mr Cilliers conceded, during argument before me, that he could not take the matter of the non-joinder of the close corporation any further and did not pursue that point. The issue of the non-joinder of Steyl was also not pursued by My Cilliers and it is not necessary for me to deal any further with these two points *in limine*. Both parties agree that the real and main dispute between them is whether the lion delivered to Steyl's farm was the lion which the applicant purchased. The respondent also raised the issue of the applicant's failure to pay the full purchase price, and therefore, itself did not comply with the terms of the agreement. In its Replying Affidavit, the applicant expressed the view that referring the issue of the identity of the lion to oral evidence will not take the matter further, as both Thormahlen and Steyl would simply repeat that they had not physically inspected the lion that was purchased. The applicant seeks a ruling in its favour on this aspect, based on the photographs attached to the papers. In the alternative, the applicant seeks an order for the referral of the matter to oral evidence. Mr Coetzer repeated this during his address before me, and indicated that the matter should be referred to oral evidence.

ISSUES

- [8] The issues for this court to decide are:
- 8.1 Whether this court is able to find that the lion that was delivered by the respondent to the applicant is the lion that the latter had purchased from the respondent, or whether it is a different lion;
 - 8.2 Whether the matter should be referred to oral evidence.

The Law

[9] Uniform Rule 6(5)(g) provides as follows:

“Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as to it seems meet with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the foregoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for him or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise.”

[10] The general rule regarding the approach of the court where material facts are in dispute was stated nearly sixty years ago in the case of **Stellenbosch Farmers’ Winery Ltd v Stellenvale Winery (Pty) Ltd 1957(4) SA 234 (C)**, where the learned Judge said at page 235

“It seems to me that where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant’s affidavits justify such an order”

This applies to any final order that is sought on notice of motion. The Stellenbosch case was followed in a long line of cases, one such being the often quoted **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984(3) SA 623 (A)** at 634 where the court remarked that “It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant’s affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order”.

[11] Rule 6(5)(g) affords the court the discretion either to dismiss the application if a dispute of fact arises and the court cannot properly

decide the matter on the papers, or to make an order that is appropriate or fair. The object of the order is to ensure a speedy and just resolution of the issues between the parties. The sub-rule provides for the referral of the disputed issues for oral evidence as one of the possible orders that the court can make, if the circumstances of the matter warrant such an order.

Application of the Law

- [12] The applicant purchased the lion from the respondent in June 2014. For the twelve months following the conclusion of the contract, the respondent failed on two occasions to secure the necessary permits that he was obliged to obtain in terms of the contract. The applicant alleges that the respondent then offered to buy back the lion from the applicant who accepted the offer. The respondent failed to pay the purchase price to the applicant and that agreement was not concluded. The respondent then delivered a lion to the applicant thirteen months later. The applicant relies on the photographs of the lion taken in 2014 when the agreement was concluded, and those taken in July 2015, when the lion was delivered, to base his allegations that the lion he purchased was not the one that was delivered. The respondent insists it is the same lion and that a lot could have happened in the intervening 13 months to alter the appearance of the lion.
- [13] In addition, the respondent alleges that the lion in question is called Tyson and bears a micro-chip implant with number 711024456. The respondent alleges that Distant Star purchased Tyson in 2012, and thereafter the micro-chip was implanted into Tyson. I pause to note that reference to the name of the lion and the micro-chip was mentioned for the first time in the Answering Affidavit. The issue of whether the correct lion was delivered was

raised by Thormahlen, on behalf of the applicant, with the respondent during or about July 2015, after Thormahlen saw the photographs of the lion taken by Steyl. No mention was made, at that stage, of the name of the lion nor was any attempt made by the respondent to resolve the matter by providing the applicant with the necessary documentation. The respondent, instead, asked the applicant to take it up with his (respondent's) attorney.

- [14] The applicant compared the physical features of the lion in the photograph attached to the electronic mail advertising the lion for sale (the first photograph) with those of the lion in the photograph that Steyl took (the second photograph). While the lion in the first photograph does indeed look like it has straighter hair and a larger mane than the lion in the second photograph, I note that the lion in the first photograph is facing to the right of the photograph so that the right hand side of its body is closest to the camera, while the lion in the second photograph is facing left so that the left hand side of its body is closest to the camera. The light in the first photograph is different to that in the second photograph. The applicant also indicates that the one lion has more facial scars than the other and one has a pink nose while the other has a black nose. These latter mentioned features are not at all discernable simply by looking at the photographs.
- [15] It must also be borne in mind that the first photograph was taken at least thirteen months prior to the second photograph. It could, of course, have been longer than thirteen months, as there is no indication when that first photograph was taken. The respondent alleges that a number of factors could have affected the physical appearance of the lion in the space of a year. That is not an unreasonable proposition, but, without more, it amounts to speculation. In my view therefore, it cannot reasonably be

concluded, by looking at the photographs, that the lion in the first photograph is not the lion in the second photograph, nor can it be concluded that it is the same lion in both photographs.

- [16] The applicant alleged that he immediately recognised the lion in the first photograph because it was previously (prior to 5 June 2014) advertised for sale by another person. The respondent did not take issue with this allegation in his Answering Affidavit, and asserted that it was irrelevant to the issue in dispute, being the identity of the lion. I disagree. The respondent alleges that Distant Star purchased the lion, Tyson, from Mpongo Game Reserve and took possession of the lion during 2012. He attached to his Answering Affidavit a document purporting to be a computer printout reflecting the details of the lions, together with micro-chip numbers, belonging to Distant Star. I note that although the said document reflects Tyson, with the micro-chip number I have mentioned, it bears neither a date nor any indication that it is an extract from Distant Star's records. The respondent's allegation that Distant Star owned Tyson since 2012, begs the question how another person was able to market that same lion a few months prior to the respondent selling it to the applicant. The respondent also attached to his Answering Affidavit, a number of photographs of lions, which he alleges are of Tyson from his arrival in 2012 to July 2015. These appear to be colour copies of photographs, with no indication of who took the photographs or where they were taken. The notations regarding the dates are written in manuscript underneath some of the photographs, and are preceded by the name "Tyson". A person perusing these copies can easily be forgiven for thinking that these are photographs of several different lions, for such is the disparity in the appearance of the lions depicted in these various photographs.

- [17] It is true that the applicant was aware, prior to the launch of this application that the respondent's version is that he delivered the correct lion to the applicant. It is equally true that this has now erupted into a factual dispute, which cannot be resolved on the papers and would best have been dealt with in a trial. I have alluded to the general rule regarding the approach to be adopted in applications where there are material disputes of fact, as set out in the cases of Stellenbosch Farmers' Winery and Plascon-Evans. This rule is, however, not immutable and the court retains the discretion to make other appropriate orders in terms of rule 6(5)(g). The respondent seeks the dismissal of the application on the ground that the applicant was aware of or should reasonably have foreseen that the issue of the identity of the lion would give rise to a factual dispute, so that it should have proceeded by way of action and not motion proceedings.
- [18] While it cannot be said that the respondent's version is far-fetched or untenable, which therefore, justifies the dismissal of the application, my view is that the questions which have now arisen as a result of the averments and allegations in the Answering Affidavit, entitle this court to invoke the discretion conferred upon it by Uniform Rule 6(5)(g). The court's responsibility is to ensure not only an expeditious resolution of the dispute between the parties but also to see that justice is done between the parties. This, in my view, is a fitting case to refrain from adopting a strictly legalistic approach and to afford the applicant the opportunity to have his case properly ventilated. The physical attributes of the lion in question, which the applicant relies on to base his claim, the issue of whether the appearance of a lion can change substantially by loss of hair (as alleged by the respondent), the industry specific practices, such as purchasing a lion simply by looking at a photograph (as alleged by the applicant) as well as

other issues related to the identity of the lion that was purchased by the applicant, can best be resolved by examining and cross-examining the deponents to the affidavits in this matter and any other witness or witnesses that the parties deem necessary to call. I find, therefore, that this court is unable to determine whether the lion that the respondent delivered to the applicant is the lion that the applicant purchased from the respondent or whether it is a different lion. I also find that the dispute cannot be properly resolved on the papers and that it is necessary to refer the matter for the hearing of oral evidence in order for the dispute to be properly interrogated and resolved. The court hearing oral evidence would then be better placed to consider the relief sought by the applicant in the Notice of Motion.

ORDER

[19] In the circumstances, I make the following order:

19.1 In terms of rule 6(5)(g) the matter is referred for oral evidence in respect of the following issues:

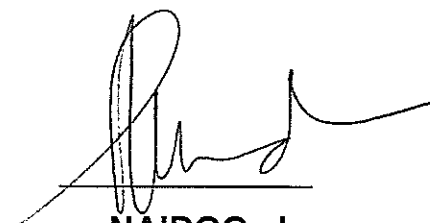
19.1.1 Whether the lion delivered to the applicant is the same lion purchased by the applicant from the respondent;

19.1.2 What amount, if any, the applicant is entitled to claim in respect of damages or loss.

19.2 The parties may supplement the papers in this matter, to the extent necessary;

19.3 The parties shall be entitled to call any witness, including those who have deposed to affidavits in this application. In the event of a party calling witnesses who have not deposed to affidavits:

- (a) such party must serve, on the opposing party, at least 15 calendar days before the date appointed for the hearing of the matter, a statement in respect of each such witness setting out the nature of the evidence to be delivered by such witness.
 - (b) Where an expert witness will be called, the party calling such witness must comply with the Rules of Court relating to the calling of expert witnesses
- 19.4 That fact that a party has served a statement in terms of 19.3(a) and has subpoenaed such a witness shall not oblige such party to call that witness.
- 19.5 Costs of this application are held over for determination by the court hearing oral evidence



NAIDOO, J

On behalf of Applicants: Mr JC Coetzer
Instructed by: Conradie Attorneys
113A Albrecht Street
Dan Pienaar
Bloemfontein
(AC Conradie/JAC0011/15)

On behalf of Respondent: Mr HJ Cilliers
Instructed by: Phatshoane Henney
Cor Markgraaff & Kellner Streets
Westdene
Bloemfontein
(MV/SJ/JPK3/0001)