IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA) 25/3/2015.

APPEAL CASE NO: A547/13

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: ~~YES~~ / NO.	
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.	
(3) REVISED. OK	
25/3/2015	
DATE	SIGNATURE

IN THE MATTER BETWEEN

GILROY CLEMENTS McALPINE	First Appellant
LEVIN ANTHONY HIRST	Second Appellant
ARNOLD PISTORIUS	Third Appellant
and	
THE MASHISHIMANE COMMUNAL PROPERTY ASS.	First Respondent
THE MINISTER OF LAND AFFAIRS	Second Respondent

JUDGMENT

LEGODI, J

INTRODUCTION

[1] Enforcement of an oral agreement which was concluded on 22 April 2007 and reduced to writing in the form of a letter signed by the parties on the 25 April 2007, became the subject of a dispute in the court a quo before Ranchod J. The appellants (the plaintiffs in the court a quo) claimed the balance of the purchase price in the amount of R1 479 005.58 for game and other movables purchased by the first respondent (the first defendant in the court a quo). Ranchod J dismissed the appellants' claim. This appeal is with the leave of that court.

BACKGROUND

[2] As a background, on 20 September 2006 the Minister of Land Affairs, now Rural Development and Land Community Reform, purchased for the Mashishimale Community near Phalaborwa, Limpopo, several immovable properties collectively known as Croc-Ranch, a private upmarket nature game reserve which was fenced and operated by Gamevest (Pty) Ltd (Gamevest). The purchase price agreed upon was R104 000 000. The properties were purchased after the Mashishimale community was successful in a land claim lodged in terms of Restitution of Land Rights Act 1994. After purchase of the property, the Mashishimale Communal Property Association, (the first respondent) was established in terms of Communal Property Association Act, 1976. The Croc-Ranch property was then transferred and registered into the name of the first respondent.

[3] On the 22 April 2007, the first respondent and Gamevest entered into an oral agreement in terms of which Gamevest sold some of its game and other movables on the property to the first respondent for an amount of R2 500 000. The oral agreement was reduced to writing in a letter from Gamevest dated 22 April 2007. The letter was signed by all parties to the agreement on the 25 April 2007. In the letter the following is recorded:

> "*1. That the handover date from Gamevst to the CPA, has been extended by mutual consent to 30 May 2007;*
>
> *2. That a price has been agreed for the remaining game on Croc Ranch as well as the moveable property and equipment in an amount of*

R2 500 000.00 (Two million five hundred thousand Rand) which shall exclude the following items:

2.1 *The tractor and 4 X 4 vehicle of Mr. McAlpine;*

2.2 *The game privately owned by Mr. Kevin Hirst;*

2.3 *The guns owned by Mr. McAlpine;*

2.4 *The personal belongings of Directors, employees and contractors of Gamevest;*

2.5 *Buffalo which are still on the farm but have been sold;*

And that Gamevest and/or Mr. McDonald will supply a full list of the game and moveables purchased within three days from date hereof.

3. *That the rental, which is owed by Gamevest to the CPA is an amount of R1 080 000.00 (One million and eighty thousand Rand) being the rental of R216 000.00 per month for five months being December 2006, January 2007 to April 2007 and that Gamevest is relieved from paying any further rental for May 2007 or any further period to which the handover date may be extended)*

4. *That R980 000.00 (Nine hundred and eighty thousand Rand) is to be set off by agreement from the price of the moveables leaving an outstanding amount of R1 520 000.00 (One Million five hundred and twenty thousand Rand).*

5. *That the CPA will liase with professional hunter Sandy McDonald in the next thirty days to finalise a business plan and a proposal to the board of Gamevest on how the outstanding balance of R1 520 000.00 will be paid within a reasonable period.*

6. *That of the remaining R100 000.00 (Hundred thousand Rand) owed by Gamevest to the CPA, which has not been set off against the payment for the game and moveables, Gamevest undertakes to pay the reasonable running expenses involved in operating the reserve for the month of May 2007 which shall include but not be limited to salaries, fuel, maintenance, insurance and other necessary expenses up to R100 000.00 and shall*

account to the CPA fully on these expenses and the balance not expended so shall also be set off against the balance of the amount owed on the game and moveables.

7. *That the retention monies currently held in an interest bearing investment trust account by the transferring attorneys, Ramatwala Lenyai Attorneys, shall be paid over immediately to Gamevest and/or their attorney.*

8. *That professional hunter, Sandy McDonald, of McDonald Hunting Safari's will liase with the office of the Regional Land Claims Commissioner Limpopo in order to finalise a business plan for the smooth takeover of the reserve which shall also include a proposal to Gamevest on paying the balance of the amount outstanding in respect of game and moveables within a reasonable time.*

9. *That the office of the Land Claims Commissioner Limpopo will assist where and how it can, Mr McDonald in obtaining the necessary permits to facilitate that hunting on Croc Ranch can commence as soon as possible on behalf of the CPA.*

10. *That Mr McDonald be issued a key for the main gate of Croc Ranch and that his employee living on the farm, the professional hunter, "Chris" also be issued a key for the main gate and take responsibility for security on the farm.*

11. *That two representatives of the CPA are allowed to live on the farm in order to satisfy the CPA that the running of the farm is conducted in satisfactory manner.*

12. *That the Regional Land Claims Commissioner Limpopo has agreed to sign a short addendum to the agreement of sale for Croc Ranch, a copy of which is annexed hereto as annexure "A" and which has been signed.*

13. *That the CPA has discussed granting to Mr McDonald a management contract in respect of the running of the reserve and the hunting*

concession for a period of one year subject to a written agreement being successfully concluded between the parties.

14. The current status of the exemption permit for hunting and capture will remain status quo as per instructions from the meeting however, the profits to be for the account of the claimants CPA / Mashishimale tribe. The permit will then be transferred to a designated person from the tribe. This is to be facilitated by the Department of Environmental Affairs and Tourism in Phalaborwa".

[4] On the 26 January 2008, Gamevest ceded and assigned its claim against the first respondent, to and in favour of the appellants who were all directors of Gamevest until approximately December 2008. On the 28 September 2008, the appellants instituted action proceedings in terms of which they claimed payment of the outstanding balance of the purchase price in the amount of R1 479 005.88.

THE ISSUES

[5] In its plea, the first respondent raised a defence which can be summed up as follows: Gamevest failed to furnish within three days from the 22 April 2007 a complete list of the game and movables purchased; and that as result, the parties did not reach consensus on the essential terms of the agreement and that accordingly the agreement was void, alternatively that the agreement was invalid and void for vagueness. The other defence was that it was a tacit term of the agreement that the outstanding balance of the purchase price would be payable by the first respondent within a reasonable time upon receipt of a State grant payable to the first respondent as part of the first respondent's successful land claim transaction and that as on the 3 February 2010, the date on which the plea was drafted, the first respondent had not received the said State grant.

[6] The court a quo having heard evidence of single witnesses from both sides, granted absolution from the instance. Two issues were argued in this appeal. That is, failure to provide the list of game and movables rendered the agreement null and unenforceable. Secondly, that as at the time the summons were issued, the amount has

not become due and payable as no demand was made. The other issue which was not argued, but not abandoned, was that State grant was a term of the agreement.

STATE GRANT

[7] Payment of the balance of the purchase price through funding by the state was not part of the oral and or written agreement between the parties. However, the court a *quo* found that such a term can be inferred from the circumstances of the case and the agreement as a whole. In coming to the conclusion, the court a *quo* expressed itself as follows in paragraph 23 of its judgment:

> *"If a bystander were to be asked who would be paying for the game and movables, no doubt the answer would be of course it is the Land Claims Commission".*

[8] Then in paragraph 24 and at the end thereof, the court a quo stated:

> *"I am of the view that it was tacit term to be inferred from the agreement that the payment for the Game and movable was subject to a business plan being proposed and further subject to the certainty of a State Grant by CPA"*

[9] 'CPA' refers to the first respondent. I cannot agree with the conclusion by the court a quo. Payment of the balance of the purchase price was introduced for the first time in the first respondent's plea. In the plea and of relevance, the following was pleaded:

> *"11.1.4 The purchase price payable by the first defendant would be R2 500 000 payable as follows:*
>
> *(i)* ...
> *(ii)* ...
> *(iii)* ...
> *(iv)* ...
> *(v) The outstanding balance of the purchase price would be payable by the first defendant within a reasonable time <u>after receipt of a</u>*

<u>State Grant payable to the first defendant as part of the first defendant's successful land claim transaction</u>". The underlining is my emphasis.

[10] I want to reiterate, the written agreement quoted in paragraph 3 of this judgment was signed by all the parties on the 25 April 2007. Clearly, the parties had time to reflect properly what was agreed upon. Payment of the balance of the purchase price on condition of the State grant to the first respondent was not recorded in the agreement. However, Mr Malatji, the only witness for the first respondent, in his evidence, stuck to the fact that payment of the balance of the purchase price was subject to the State grant and the court a quo agreed, having found that such a term can be inferred.

[11] It all started with an oral agreement on the 22 April 2007. The agreement was reduced to writing and signed on the 25 April 2007. Neither of the parties immediately after 25 April 2007 raised the State grant as a condition for payment of the balance of the purchase price. Secondly, importation of 'payment after the State Grant' into the agreement is a direct contradiction to 'payment within a reasonable time' as clearly recorded in clauses 5 and 8 of the agreement. The court must be satisfied that both parties did in fact agree to the term. I am not satisfied that on the facts of the case, the court a quo could have been satisfied that the parties agreed to such a term. Gamevest was run by directors with vast experience in business ventures. They would not have agreed to a term that was so uncertain. Put this way, they would not have abandoned their game and other movables on the farm and be content with a term that may not happen, as it turned to be the case here.

FAILURE TO MAKE DEMAND FOR PAYMENT

[12] The first respondent was never placed in *mora*. The agreement relied upon requires payment to be made within a reasonable time. It is trite law that where no time for performance is fixed by the agreement relied upon, the party requiring performance should place the other contracting party in *mora* by demanding performance by a fixed date, so was the contention on behalf of the first respondent. I can find no basis for this submission in the circumstances of the present case.

[13] The appellants did not claim for damages arising from the breach and cancellation of the agreement. They enforced their rights in terms of the agreement by claiming payment of the balance of the purchase price in terms of the agreement. Therefore, summons should be seen as a demand on the first respondent. The suggestion that a date for payment should have been fixed in the summons has no basis.

[14] At the risk of repetition, the first respondent in paragraph 11.1.4 (v) of its plea pleaded as follows:

> *"(v) The outstanding balance of the purchase price would be payable by the first defendant within a reasonable time after receipt of a State Grant payable to the first defendant as part of the defendant's successful".*

[15] As indicated earlier, state grant was never a term of the agreement. The period within which payment of the purchase price or balance thereof was to be made, is clearly spelt out in clauses 5 and 8 of the agreement quoted in paragraph 3 of this judgment. It did not appear to be in dispute that six months was a reasonable period as envisaged in clauses 5 and 8 of the agreement. What counsel for the first respondent suggested, amounted to that the summons having been served during or about September 2008, a date for payment about or during March 2009 should have been fixed in the summons. It was not necessary to place the first respondent in *mora*. As I said, the appellants were enforcing their rights in terms of the agreement and service of the summons was sufficient to place the first respondent in *mora*. In terms of clauses 5 and 8, the reasonable period of six months would have taken effect from the 23 April 2006. Therefore as in September 2008 a reasonable time for payment of the balance of the purchase price had long passed. I now turn to deal with the last issue.

FAILURE TO PROVIDE THE LIST

[16] In clause 2 of the agreement, is stated as follows:

> *"... Gamevest and or Mr McDonald will supply a full list of the game and the movables purchased within three days from date hereof".*

[17] 'Date hereof' refers to the 22 April 2007. The issue was strongly argued by counsel on behalf of the first respondent. It was common cause that the list was never provided. The court a quo in dealing with the list expressed itself as follows:

> *"13. Insofar as the provision of the list of the game on the farm within three days is concerned, the plaintiff has failed to provide any evidence that Gamevest has in fact done so".*

[18] The court a quo then indicated that Mr McDonald was a professional hunter who was carrying on hunting operations on the farm. Mr Bekker testified that since Gamevest no longer had anyone on the farm, it was for Mr McDonald to produce that list but that the agreement was however clear. It was either Gamevest or McDonald or both of them who were to have provided the list and that while the primary obligation to produce the list rested on Gamevest, if it was unable to do so because it was no longer represented on the farm, then Mr McDonald would do so on its behalf as he had continued conducting the hunting operations there.

[19] Perhaps a brief background relevant hereto is necessary. During October 2006 formal counting of the game on the farm was done. The counting was conducted from a helicopter hovering over the farm and it took three days to complete. A list of the counted game was compiled and also presented to the representatives of the first respondent. On the morning of the 22 April 2007 and before sale agreement in respect of the game and movable was concluded, a tour of the farm was undertaken. All parties were present. Upon return, Mr Bekker the only witness for the appellants had a discussion with one Mr Shelote from the Regional Land Claims Commission. Mr Shelote had been the head negotiator on behalf of the first respondent. The price for the game and other movables was discussed. Mr Bekker testified that Mr McDonald who was doing hunting operations on the farm was called to give an indication regarding the price. Mr McDonald and Shelote had a discussion. Mr Bekker was again approached and a R2 500 000 price was suggested to which Mr Bekker agreed. Mr Shelote had a discussion with the representatives of the first respondent. In a joint meeting, all the parties agreed on the terms as quoted in paragraph 3 of this judgment.

[20] However, Mr Malatji the only witness for the first respondent suggested that payment of the purchase price agreed upon was subject to the provision of the list within

three days from the 22 April 2007. It was necessary to have the list as they wanted to know exactly what they were purchasing, so was the evidence. However, Mr Bekker in his evidence vehemently denied the suggestion.

[21] In cross-examination, Mr Bekker repeated himself on the issue as follows:

> *"There was no conditions or pre-conditions to payment. Gamevest had agreed with the first defendant that payment would be made within a reasonable period of time. If Gamevest, for example, had not provided the list, the obligation to pay would not have fallen away so I remind the court that at that point in time we were negotiating the handover of the farm, in fact, Game Vest was not in charge anymore of the day to day operations of the farm. ... there was a high fence around the farm with a gate and to the best of my recollection, one of the two representatives of the first defendant had a key and the farm manager had a key".*

[22] According to Mr Bekker, the agreement was clear. The price of R2 500 000 was 'for the remaining game on Croc Ranch as well as the movable property and equipment' as recorded in clause 2 of the agreement. It looks like the real essence for the business plan and the list, was to enable the first respondent to approach the second respondent for funding. But, that was never a condition for payment of the purchase price. The list was never meant to change the price already agreed upon. The first respondent and McDonald were to talk amongst themselves, prepare a business plan and compile a list of the remaining game. They were then required to make a proposal to Gamevest for payment of the balance of the purchase price as envisaged in clauses 5 and 8 of the agreement. Such payment was to be done within a reasonable period. Mr McDonald was the person conducting hunting operations on the farm. So, if the first respondent wanted to do business with McDonald, he would have told them what he had hunted in the meantime. That was a matter between Mr McDonald and the first respondent. The appellants had nothing to do with the negotiations between the first respondent and McDonald. All what the appellants had, was the agreement in terms of which the first respondent was to pay R2 500 000 for the remainder of the game and movables on the farm, so was the contention on behalf of the appellants. I tend to agree.

[23] The business plan and the list of the game were meant to be used for funding from whatever source. But, that did not affect the first respondent's obligation to pay the balance of the purchase price within a reasonable time from 22 April 2007. Gamevest's failure to provide the game list as quoted in clause 2, did not suspend the obligation by the first respondent to pay the balance of the purchase price within a reasonable time.

[24] Consequently I would propose to make an order as follows:

24.1 The appeal is upheld with costs.

24.2 The whole of the court a *quo*'s judgment and order are hereby set aside and substituted as follow:

24.2.1 ***"Judgment is hereby granted in the amount of R1 479 005.88***

24.2.2 ***The first defendant to pay interest on the said amount of R1 479 005.88 calculated from the date on which the summons were served to date of payment;***

24.2.3 **The first defendant to pay the costs of the action"**

M F LEGODI
JUDGE OF THE HIGH COURT

I, AGREE IT SO ORDERED

C P RABIE
JUDGE OF THE HIGH COURT

I AGREE

S A M BAQWA
JUDGE OF THE HIGH COURT

FOR THE APPELLANT:	ADV H S HAVENGA SC
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APPEAL HEARD ON:	18 FEBRUARY 2015
JUDGMENT RESERVED:	18 FEBRUARY 2015
JUDGMENT HANDED DOWN:	