

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

Case No: A71/2013

In the matter between:

LUITHA MAGARETHA PIETERS

APPELLANT

versus

WILLEM EDELING

RESPONDENT

CORAM:

NAIDOO, J et MONALEDI AJ

JUDGMENT:

NAIDOO, J

DELIVERED ON:

20 March 2014

JUDGMENT

- [1] The appellant sued the respondent in the Bloemfontein Magistrate's Court for payment of R70 000.00, together with interest and costs, on the basis of an oral agreement that she had entered into with the respondent. Her claim was dismissed with costs. The appellant appeals against that judgment. She was represented in this court by Mr W Gibbs and the respondent was represented by Mr AJR Van Rhyn
- [2] In her summons, the appellant alleged that on 29 December 2008 she and the respondent entered into the agreement, in terms of which she purchased from the respondent a horse named Sahara

for R70 000.00. She alleged that the following were the express, alternatively tacit terms of the agreement:

- 2.1 the horse must be suitable for the purpose for which it was to be used, namely endurance racing;
- 2.2 a veterinarian must examine the horse within a reasonable time after the conclusion of the contract, for the purpose of determining whether the said horse possessed the physical strength/ability to participate in endurance races.
- 2.3 the purchase price of R70 000.00 was payable upon delivery of the horse to the appellant.

[3] The appellant took delivery of the horse on 29 December 2008 and paid the respondent R70 000.00. She took the horse to a veterinarian (the vet) on 27 January 2009 and the examination of the horse by the vet revealed that

- 3.1 The horse had old injuries in the joints of her legs, and
- 3.2 The horse was not suitable to participate in endurance racing.

[4] The respondent denied the terms and conditions of the agreement as alleged by the appellant. He however, pleaded in the alternative that it was a specific term of the agreement between him and the appellant that, immediately upon delivery of the horse to her, she would take the horse to the vet for an examination to determine the

general state of its health. The respondent also pleaded that it was pertinently agreed between the parties that should the appellant fail adhere to this term, then she assumed the risk and forfeited her right to cancel the agreement.

- [5] The respondent pleaded further that the appellant acted contrary to the agreement between them by failing to take the horse to the vet immediately upon taking delivery of it, and that she kept the horse in unsafe conditions for a month or more. Consequently, the appellant forfeited her right to cancel the agreement, and the respondent was under no duty to take the horse back. I pause to note that no evidence was placed before the court to support the allegation that the appellant kept the horse in unsafe conditions.
- [6] It is common cause that the appellant had the horse in her possession for approximately a month before she took it to the vet for the examination agreed upon. Her evidence is that the only vet she would allow to do an examination on any of her horses was a Dr Roy Gottschalk, and that it was agreed upon between the respondent and her that Dr Gottschalk would examine Sahara. She took delivery of the horse during the Christmas holiday period, as a result of which she was unable to secure an appointment with the vet until 27 January 2009. It is apparent from her evidence that her daughter, for whom the horse was purchased, rode the horse once during that month for a distance of not more than eight kilometres. This was confirmed by the plaintiff's daughter, Ludrie, in her evidence. Ludrie's further evidence was that she was not aware if anyone else rode the horse during that period.

- [7] The transcript of a telephone conversation between the parties on 27 January 2009 forms part of the record. The telephone conversation was apparently recorded by the respondent without the knowledge or consent of the appellant, such transcript having been introduced into the record without objection from the appellant. During the said conversation the respondent said that he had asked the appellant to have the horse examined by a vet within three days. This was denied by the appellant, and during the conversation, the agreed time period for the examination of the horse by the vet seems to have metamorphosed from “dadelik” (immediately) to “so gou as moonlik” (as soon as possible) to “binne ‘n redelike tyd” (within a reasonable time) after the appellant took delivery of the horse. At one point during this conversation, the respondent alleged that he had said to the appellant that she must take the horse immediately for the vet check and that she should not come back after a month and say that there is a problem with the horse. She then placed in context that he had made this statement in justification of his refusal, when she requested him to lend her the horse so that her daughter could ride it, and that the respondent did not make this statement in relation to the purchase of the horse.
- [8] Dr Roy Gottschalk, whose expertise was undisputed, practises, with his wife as a veterinarian in Gauteng. Although his wife, Dr Murray, performed the examination on Sahara, he was present and they were in agreement regarding the findings in respect of Sahara’s condition. In summary, Dr Gottschalk testified that the horse was found to be lame and unsuitable to participate in

endurance racing competitions. The main finding was that in the left hind fetlock joint there was bone fragment which resulted in a condition called osteochondrosis. Dr Gottschalk's evidence is that this was a longstanding problem that could not have occurred in a few weeks or months. It is a condition that would probably have existed since the horse was very young. He also opined that this could be due to a fracture that had occurred a long time ago. A fresh fracture would appear differently to what he had observed. He found other problems which were chronic and longstanding, namely changes in the sesamoid bones and ligaments related thereto. He described these as old lesions, which occur over months, and not days or weeks. His conclusion is that these were pre-existing injuries. Another injury he noticed was bruising under the hoof wall on the front leg of the horse. His view was that bruising takes several months to clear and he could not say that this was a fresh bruise. Put differently, he could not say it occurred in the month prior to his examining Sahara, in spite of being pressed to do so under cross examination.

- [9] The respondent in his evidence asserted that the agreement between him and the plaintiff was that she would take the horse immediately upon delivery for the vet check, as the examination was referred to in the evidence. He warned her that this must be done because he does not want her to come back in a month and say that there is a problem with the horse. He denied that there was any talk or agreement that Dr Gottschalk would be tasked with undertaking the examination of Sahara. He also testified that in view of her taking delivery of Sahara on 29 December, he realised she may not be able to take the horse immediately to a vet and

hence agreed that it would be within a reasonable time after taking delivery thereof.

[10] In summary, therefore, the following are common cause between the parties:

10.1 The horse, Sahara, was sold by the respondent to the appellant for R70 000.00;

10.2 Sahara was purchased for the purpose of participating in endurance racing.

10.3 The appellant was obliged to have the horse examined by a vet “as soon “as possible” or “within a reasonable time” after she took delivery of the horse.

10.4 The appellant took delivery of the horse on 29 December 2008 and took the horse for the vet check on 27 January 2009.

10.5 The vet, Dr Roy Gottschalk, found certain injuries on the legs of the horse, which rendered it unsuitable for the purpose of participating in endurance racing.

10.6 The injuries that were observed by Dr Gottschalk were old injuries.

[11] The respondent disavows the appellant’s claim largely on the basis of the time frame within which the vet check was done, after the appellant took delivery of the horse, alleging that one month thereafter was not a reasonable time or could not be said to have been “as soon as possible” after delivery. As mentioned earlier, the respondent in his plea, alleged in the alternative to his denial of the terms of the contract as alleged by the appellant, that a specific term of the agreement was that the horse would be taken

immediately upon delivery to the vet for the examination mentioned above. From the evidence, however, it was clear that the respondent had intended, and the appellant understood, that the vet check should be done within a reasonable time or as soon as possible after delivery of the horse. The judgment of learned magistrate also appears to hinge on his interpretation of what was a reasonable time, leading him to conclude that the appellant had not fulfilled that term of the agreement between her and the respondent.

- [12] As correctly argued by Mr Van Rhyn in his Heads of Argument, the determination of what is a reasonable time depends on the facts and circumstances of every case. It is common cause that the appellant took delivery of the horse two days before the end of December, which is during the Christmas holiday season. Her evidence is that the first opportunity she had to contact the vet was on 2 January 2009, and was given 27 January 2009 as the earliest appointment. Dr Gottschalk testified that while his practice is open all year round, the December holiday period is reserved for emergency work. He was unable to say if the 27th January 2009 was the earliest appointment that could be given to the appellant, as he does not usually make the appointments. In any event, it was not suggested by anyone, nor was there any evidence that the vet check that had to be done could or would have been treated as an emergency. It is also common cause that the appellant had the additional problem of not being able to transport the horse to Johannesburg. In interpreting words, whether in statutes or in a contract, it is trite that they should be given their ordinary meaning, unless doing so would lead to an absurdity or would be in conflict

with the rest of the contract. As indicated the agreement between the parties was that the vet check had to be done within a reasonable time or as soon as possible. Given that the earliest appointment that the appellant could secure was 27 January 2009, coupled with the transport problems that she experienced, that was the soonest possible date she could have the examination done on the horse. In the circumstances that would also have been within a reasonable time, absent any evidence that the horse suffered any injury while in the possession of the appellant.

- [13] It was argued, and in fact the magistrate relied on this in making his finding, that the appellant did not specifically plead that it was a term of the contract that the vet check had to be done by Dr Gottschalk. She testified, and was supported by her daughter, that she mentioned to the respondent when she took delivery of the horse that Dr Gottschalk would be the vet conducting the examination. Dr Gottschalk himself testified that he treats and examines all the appellant's horses. In my view, the essential term of the contract was that a veterinarian would do the examination. The appellant's testimony that Dr Gottschalk would be the vet, simply amplifies and explains a term of the contract. If the argument on behalf of the respondent and the magistrate's reasoning in this regard were to cast doubt on the probability of the appellant's version, then the same can be said for the version of the respondent, who pleaded that the specific term of the contract was that the vet check would be done immediately, while his viva voce evidence revealed otherwise, namely that the agreement was that the examination would be done as soon as possible or within a reasonable time.

- [14] The magistrate, in his judgment, made no mention whatsoever of the expert testimony of Dr Gottschalk, the only expert that testified in this matter. His evidence was that the injuries to the joints and legs of the horse were old injuries which would not have occurred in the month or so prior to the examination. As indicated above, he testified that these injuries could have existed from the time the horse was young, and may have been aggravated by hard exercise, but that it was difficult to tell. He said that it was also possible that the bruise observed on the hoof of the horse could have been an old bruise which was healing, as the nature of bruises is that they take several months to clear. The bruise was visible to the naked eye. Dr Gottschalk also said that a horse may injure itself, although this may not be a usual occurrence.
- [15] In this regard, it is perhaps a convenient time to mention the allegation of the respondent that the horse, Sahara, was kept in unsafe conditions during the month that it was in the appellants possession. No evidence was tendered in this regard. The appellant's daughter Ludrie testified that she rode the horse once for a distance of not more than eight kilometres prior to the vet check. In any event, she herself was recovering from an operation so she was not able to ride the horse hard. She was not aware of anyone else that may have ridden the horse. She also said the that horse was kept in a camp with a number of other horses. From the appellant's telephone conversation, it appears that one of the trainers may have ridden the horse but the evidence is that it would have been ridden in a ring. That was the evidence with regard to the circumstances of the horse in the time that it was in the

appellant's possession. There was much speculation that the horse was injured or injured itself during that period. It is perhaps also useful to point out that during the telephone conversation with the appellant, she was totally unaware that the call was being recorded, while the respondent, being the party recording the call, was eminently in a position to tailor his conversation and remarks to give him maximum benefit, especially in view of the fact that he is a practising advocate and would have been well aware that he intended to use the recording to his advantage in court.

- [16] It is significant that during this telephone conversation, the respondent mentioned that two days prior to the appellant taking delivery of the horse, it was ridden for fifteen kilometres by "Jorrie", who appears to be somewhat heavier than Ludrie, with no ill effects or sign of any problem with the horse. Ludrie's evidence as well as that of the appellant is that everyone was happy with the horse, so that it is not unreasonable to infer that the horse was not ridden hard and hence presented with no problems while in the appellant's possession. In this regard it must also be borne in mind that the appellant took the horse for the examination because that was a term of the contract and not because it was showing signs of injury. She only became aware of the injuries after the examination by Dr Gottschalk, which could explain her emotional and somewhat animated state during the telephone conversation with the respondent. It is true that the respondent may not have known what the appellant would say during this conversation, but the fact that he chose to record that particular conversation, on the day he knew that the horse was being taken to the vet, seems to suggest that he was expecting some negative feedback with regard to the

condition of the horse. While it may be so that the appellant had been told by Mr Dingling that he would not buy a horse like Sahara, and that she herself had noticed some thickening in the legs, this must be seen in the light of Dr Gottschalk's evidence that a horse could go for years with the sort of injury that Sahara presented with, and not manifest signs of problems. The respondent's evidence is that the horse had previously participated in endurance racing and had been ridden for about one thousand kilometres. It had not participated in endurance races for over a year prior to the appellant buying it. There is nothing to suggest that Sahara's previous participation in such races caused the injury to the horse. The most important aspect of Dr Gottschalk's evidence is that the injuries he observed on Sahara were old injuries which would have been present for much more than a month prior to his examination. The import of this evidence is that at the time the appellant took delivery of the horse, it was not fit for the purpose for which it was bought, being the participation in endurance racing. Therefore, the time when the horse was taken for the vet check becomes less important in the face of this circumstance.

- [17] In my view, the magistrate erred in not taking into account the expert evidence of Dr Gottschalk, and in attaching too much weight to the time when the horse was taken for the examination, to the exclusion of the expert testimony. In weighing the probabilities in this matter, I find the version of the appellant to be more probable, and consequently that she has proved that, on a balance of probabilities, she is entitled to the relief that she seeks.

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

18.1 The appeal is upheld

18.2 The order of the court a quo is set aside and substituted with the following:

The Defendant is to pay to the Plaintiff:

18.2.1 the sum of R70 000.00;

18.2.2 Interest on R70 000.00 at the rate of 15.5% per annum from date of summons to date of payment;

18.2.3 Costs of suit

18.3 Respondent to pay the costs of the Appeal.

18.4 The Appellant is ordered to return the horse, Sahara, to the Respondent.

S. NAIDOO, J

I agree.

MONALEDI AJ

And it is so ordered.

Counsel for Appellant:

Instructed by:

Mr W W Gibbs

Symington & De Kok

169B Nelson Mandela Drive

Bloemfontein

(S Visser)

Counsel for Respondent:

Instructed by:

Mr AJR Van Rhyn SC

Stander & Partners

58 Victoria Road

Willows

Bloemfontein

(HJ Stander)