

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No.: 3192/2007

In the case between:

SAFARI ADVENTURES CO. LTD

Applicant

and

TREVOR CRAIG OERTEL

First Respondent

SA NATIONAL BIRD OF PREY CENTRE

Second

Respondent

WILDTHINGZ ANIMAL PARK (PTY) LTD

Third Respondent

JUDGEMENT:

VAN DER MERWE, J

HEARD ON:

6 SEPTEMBER 2007

DELIVERED ON:

27 SEPTEMBER 2007

[1] This application concerns four young cheetahs identified by the inordinately long microchip identification number set out in the notice of motion.

[2] The applicant is a company registered and incorporated in the Republic of Mauritius. It is averred that the directors of the applicant are Mr. Graeme Bristow and Mr. Jano Labat.

The first respondent is a businessman and farmer of Vrede, Free State. The first respondent is also a director of the second respondent, and association not for gain incorporated in terms of section 21 of the Companies Act, No. 61 of 1973. The first respondent and the second respondent make use of the same place of business. The first respondent deposed to the answering affidavit in this application in his personal capacity as well as in his capacity as representative of the second respondent. No relief is claimed against the third respondent and the third respondent was not represented before me.

[3] The cheetahs are presently in the possession of the first respondent and/or the second respondent. Unless the court indicated otherwise, a reference hereinafter to the respondents, must be understood as a reference to the first respondent and/or the second respondent.

[4] The application was launched on an urgent basis on 18 July 2007 for claiming firstly an order prohibiting the respondents from cancelling the export permit in respect of the cheetahs issued by the Free State Department of Environmental Affairs and Tourism and secondly an order that the

respondents deliver the cheetahs forthwith to Mr. Vivian Bristow, the father of Mr. Graeme Bristow, and in the event of the respondents failing to do so, an order authorising the sheriff to take possession of the cheetahs and deliver them to Mr. Vivian Bristow. On the direction of the presiding judge, the application was postponed to 19 July 2007 in order to affect service of the application. The application was duly served on 18 July 2007 on all three respondents. On 19 July 2007 an order was made by agreement between the applicant and the respondents. In terms of this order the application was postponed to 2 August 2007, the respondents were to file answering affidavits on or before 15h00 on Monday 23 July 2007 and the applicant was to file its replying affidavit on or before 12h00 on Friday 27 July 2007. Answering and replying affidavits were duly filed. On 2 August 2007 however the matter was postponed to 10 August 2007 on account thereof that the papers were not indexed properly or timeously and on 10 August 2007 the matter was again postponed by the same presiding judge as the judge acquired additional heads of argument on behalf of

the applicant. The hearing before me on 6 September 2007 counsel for the respondents nevertheless argued that I should refuse to hear the application due to an alleged lack of urgency. I find this stance quite unacceptable. It is not disputed that on the information available to the applicant at the time, the cancellation of the said export permit was immediately eminent. In any event in terms of the order made by agreement on 19 July 2007, the respondents filed a comprehensive answering affidavit and the applicant replied thereto. It is in my opinion clearly in the interest of the parties that at least some of the disputes between them be prejudicated upon an order to advance the finalisation of the matter. If I would exceed to the request to refuse to hear the application, the application could in terms of this court, simply be enrolled for hearing during the next week. This seems to me to be wasteful in the extreme.

- [6] It is probable that the permit referred to in the notice of motion was already cancelled on 18th July 2007. In the light hereof and in the light of what follows, I do not believe that it

will serve any useful purpose to now make an order in this regard.

[7] On the view that I take of the matter, it is necessary to firstly determine whether on their own version and evidence, the respondents have established that they obtained the ownership of the cheetahs as alleged. If not, the issue arises whether the respondents are entitled to withhold delivery of the cheetahs in terms of an *ius retentionis* as security for the claim for unnecessary and useful expenses in respect of the care of the cheetahs and their improvement by way of training.

[8] In the answering affidavit the first respondent clearly stated that he purchased the cheetahs for an amount of R160 000,00, on behalf of and with money supplied by Mr. Graeme Bristow and his partner Mr. Labat. On his own evidence, the first respondent therefore acted nearly as an agent for Mr. Graeme Bristow and his partner. This was repeatedly confirmed by the first respondent in e-mail

communications forming part of the record. After the purchase of the cheetahs during August 2006, they were transferred to Mr. Vivian Bristow and/or the third respondent in the Limpopo province. It was their condition of the permit that allowed the entrance of the cheetahs into the Limpopo province that the cheetahs had to be exported from the Limpopo province by no later than 31 December 2006, failing which the cubs could be forfeited to the state or _____. As the cheetahs could not be exported to Mauritius before 31 December 2006, the cheetahs were returned to the care of the respondents during January 2007. The answering affidavit then proceeds as follows:

“26.4 When the cheetah cubs were returned to me from Vivian Bristow in Polokwane, I had a conversation with Mr Vivian Bristow to the effect that as the four cheetahs were now almost adult, and would soon be adult cheetahs, I should take two of the cheetahs, and the other two could go to the Third Respondent herein. During the conversation I suggested to Mr Vivian Bristow

that, should we do this we should refund to Graeme and Jano Labat the R160 000 (One Hundred and Sixty Thousand Rand) that had been paid by them, but Mr Vivian Bristow respondent to me that we could pay them at some later date, if and when they asked for the return of their money.

26.5 Accordingly, upon the four cheetahs returning to my property in Vrede in the Free State Province, I considered two cheetahs to belong to me and the Second Respondent, with the other two cheetahs belonging to the Third Respondent, as was discussed between me and Mr Vivian Bristow.”

- [9] From the foregoing it is clear that according to the respondents’ version there is no legal basis whatsoever for which a change of the contraction relationship between the respondents on the one hand and Mr. Graeme Bristow and Mr. Labat on the other hand or a transfer of ownership of the cheetahs as alleged, could be founded. The arbitrariness and unacceptability of the respondents’ contention is compounded by the fact that the first respondent admittedly made an affidavit filed in legal proceedings in the Natal High

Court stated that the cheetahs belonged to the third respondent. Moreover, it is common cause that the export permit required from the South African authorities for the export of the cheetahs to Mauritius, was arranged for by the first respondent and that up to the beginning of July 2007 the respondents actively participated in the arrangements for the export of the cheetahs. In my opinion, on the respondents own case, the respondents did not obtain ownership of the cheetahs. The third respondent does not claim ownership of any of the cheetahs.

- [10] It does not, of course, follow that the applicant has shown that it is the owner of the cheetahs or that it is contractually entitled to claim delivery of the cheetahs. In the founding affidavit on behalf of the applicant, deposed to by Mr. Vivian Bristow, it was stated affectedly that the applicant became the owner of the cheetahs when they were purchased towards the end of 2006. In the answering affidavit it was pointed out that according to the registration number of the applicant, it only came into existence during the year 2007.

If so, so the respondents said, the purchase of the cheetahs could not at the time have been made as agent for the applicant. In an affidavit by Mr. Graeme Bristow attached to the replying affidavit on behalf of the applicant by Mr. Vivian Bristow, Mr. Graeme Bristow said that the applicant was indeed registered and incorporated as a company on 9 February 2007 but that thereafter the agreement whereby the cheetahs was purchased, was excepted by the applicant.

[11] In the light hereof, the respondents made an application for the striking out of these new allegations in their replying affidavit. In the alternative, if the striking out application was not successful, the respondents moved for relief to file further affidavits in respect of the new matter in the replying affidavit.

[12] There appears to be no question that Mr. Graeme Bristow has at least a material interest in the cheetahs. I must admit however to a measure of uneasiness on the question as to whether the gain as to be found as a fact that the ownership or the right to claim delivery of the cheetahs now vests in the applicant. In the founding affidavit it is stated that the applicant runs and conducts the business of a wild life park and sanctuary in Mauritius. It is common cause however

that by e-mail dated 14 September 2006 Mr. Vivian Bristow contacted one Maurice Koenig to assist in respect of commission from the Mauritian authorities to import the cheetahs. It is not disputed that apparently as a result of this communication, Maurice Koenig issued a letter dated 5 October 2006 on the letterhead of The Medine Sugar Estates Co Ltd, Bambous, Mauritius in the following terms:

“This is to confirm that Casela Nature and Leisure Park, a department of the Medine SE Co Ltd., is in business partnership with Mr G Bristow of WildThingZ Animal Park concerning the importation of lions and cheetahs for display in our park in Mauritius.

In this concern we would appreciate authorization be given for the transfer of the purchased cheetahs cubs from the Free State Province to Mr Viv Bristow’s place in the Limpopo Province, for further training up to December, time at which we are expecting them in Mauritius.”

Attached to the founding affidavit to the copy of the document that in terms of the contents thereof is an import permits in respect of the cheetahs dated 14 May 2007 and valid until 13 November 2007, issued by the Division of the Veterinary Services, Ministry of Agro-Industry & Fisheries,

Republic of Mauritius. Also attached to the founding affidavit is a further document entitled "Import Permit". According to the contents of this document it was issued on the 11 May 2007 by the National Parks and Conservation Service of the Ministry of Agro-Industry & Fisheries of the Republic of Mauritius in respect of four cheetahs and valid to 11 November 2007. According to the contents of this document it was issued in accordance with the Convention on International Trade in Endangered Species of Wild Fauna and Flora (It is called "CITES"). This document was however on the face of it issued to Casela Limited, c/o Medine Sugar Estate Bambous. In the founding affidavit it is stated that in terms of the provisions and regulations of CITES such permit had to be issued to the owner of the property on which the animals will be kept and that is Casela Limited. That the CITES provisions and regulations so provide, does not make a lot of sense and is denied by the first respondent who states that he had in the past obtained CITES permits to import animals onto property that he did not own. Moreover, the allegation that the interest of Casela

Limited is limited to ownership of the land, does not seem to be in accordance with the lien quoted above.

[13] In the light hereof I believe that it is in the interest of justice and of the parties that I issued the claim to decide the issue of the applicant's alleged ownership of the cheetahs. In the result there could be no prejudiced to the respondents. I also do not think that the applicant will suffer any real prejudice. In the light of what follows, further steps will in any event have to be taken by the applicant and in the process the applicant will have opportunity to show that it is in fact the owner of the cheetahs or that it has a contractual right to claim delivery of the cheetahs.

[14] It is common cause that it was expected that the cheetahs would have been exported to Mauritius before 31 December 2006. It is common cause or undisputed that thereafter the respondents has lawful possessors, cared for and trained the cheetahs. It is common cause also that it is very expensive to maintain and take care of the cheetahs. In the

result I am satisfied that the respondents have lien against the whole world so to speak which entitles them to retained possession of the cheetahs until it has been compensated for the necessary and useful expenses incurred in respect of the cheetahs. From these expenses must of course be deducted from any income that the respondents derived from the cheetahs. On behalf of the applicant it was argued that the respondents should not be allowed to rely on a lien as they failed as yet to quantify their claim for necessary and useful expenses. I do not think that this is a proper approach. The respondents were confronted by an urgent application and in their defence thereto they in the first place relied on ownership of the cheetahs and in the alternative on a use *ius retentionis*. As I have found that the respondents cannot rely on a ownership of the cheetahs, it could be said that the proper time putting forward the claim for which the lien serves as security, has only now arrived. I have therefore come to the conclusion that the respondents are entitled in terms of the lien and withhold delivery of the cheetahs to whoever would otherwise be entitled thereto.

[15] During argument it was mentioned that the respondent should delivered the cheetahs against the security of R100 000,00 paid into the trust account of his attorneys by Mr. Vivian Bristow. Apart from the questions whether the nature and amount of the security so offered are sufficient, the respondents clearly cannot be expected to accept security for their claim for necessary and useful expenses from a person that has no direct interest the matter.

[16] It follows that the application cannot succeed.

[17] The application is dismissed with costs including the costs of reserved on 10 August 2007.

C.H.G. VAN DER MERWE, J

On behalf of applicant:

Adv. A. J. R van Rhyn SC
Instructed by:
Naudes
BLOEMFONTEIN

On behalf of respondents:

Adv. P. R. Cronje

Instructed by:
Webbers
BLOEMFONTEIN

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