IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NUMBER: 13452/2014

DATE: 4 DECEMBER 2014

In the matter between:

MYSTIC PEARL 133 (PTY) LIMITED Applicant

and

GARY BASSON t/a COMBINED GAME SERVICES Respondent

EX TEMPORE JUDGMENT

ROGERS, J:

[1] This is an application in which the applicant is seeking specific performance of an agreement for the purchase of ten bontebokke with an alternative claim for payment of R400 000 plus VAT in the event that the respondent fails to deliver the animals. Mr Ferreira appears for the applicant and Ms De Wet for the respondent.

[2] The background to the matter is as follows. The person who represented the applicant in its dealings with the respondent was a Mr Van Zyl. He met the respondent, Mr Basson, during 2009 and they concluded certain transactions

in terms whereof Van Zyl or his company purchased game from Basson. During July 2009 the applicant pursuant to these dealings bought 11 rooihartbeeste from Basson. Those animals were delivered and payment made. This is common cause.

[3] In the replying papers the applicant says that the 11 rooihartbeeste were of poor quality and that some of them died. Also in July 2009 Van Zyl bought, he says, 14 kudu and another eight rooihartbeeste. Some of the new rooihartbeeste also died.

[4] The applicant's version is that Van Zyl told Basson that he would deduct the value of the animals which had died from the balance of the purchase price owing under the transactions for the purchase of the eight rooihartbeeste and 14 kudu. Basson has a somewhat different version. He refers to the transaction for the purchase of the eight rooihartbeeste in July 2009 and also refers to an alleged purchase of 26 impala during July 2009. He claims that the purchase price for the eight rooihartbeeste and the 26 Impala was not paid.

[5] The applicant says in reply that he never requested the impalas, that they were delivered while he was away on holiday, that he requested Basson to remove them and that when Basson failed to do so he eventually had them culled.

[6] Be that as it may, these dealings all seem to have occurred during July 2009 although at one point Basson, by way of a typographical error I think, refers to transactions in 2012 and even in 2014. The 2009 transactions are not directly relevant to the present case. The present case concerns a transaction which was concluded towards the end of 2012, more than three years later. The applicant, through Mr Van Zyl, says that it was wanting to acquire a breeding group of bontebokke and that Van Zyl asked Basson for a quote which Basson furnished on 21 November 2012. The quote simply refers to ten bontebokke and the quoted price was R142 500 inclusive of VAT.

[7] The quote was sent to the applicant under cover of an email which said, and I translate from the Afrikaans:

‘I attach a quotation for the game as requested. I will need your details to make the application. See the attached file. If your particulars have changed please let me know.

Please also note: It is a condition, before the permit will be applied for or the animals delivered, that the full price should have been paid into our account. As soon as we have received the money, we will make application for the permit in order to move the animals.’

[8] The permit referred to in the email is a permit sought from

Cape Nature for permission to move animals from one farm or location to another.

[9] On the same day Van Zyl on behalf of the applicant replied, observing that he found it strange that he would have to make payment in advance. He attached one of his earlier permits containing his details for the application to Cape Nature. He also said the following, and I translate again from the Afrikaans:

‘I accept that the purity of the bontebokke will be demonstrated, that they will not be lambs, seven ewes and three rams, and that they can also be delivered this year.’

[10] About two weeks later, on 4 December 2012, the applicant caused a sum of R142 500 to be deposited into the respondent’s bank account. In January 2013 the person charged with Basson’s administration sent an email to Van Zyl stating that she was busy going through her administration and saw that she had never issued a VAT invoice, only a quotation. She accordingly attached an invoice for the applicant’s records. This again referred to ten bontebokke at the price of R142 500 including VAT.

[11] It is clear that after this date the respondent did nothing to comply with the agreement which had been concluded. He

did not cause any permit application to be made to Cape Nature and never delivered the animals. During June, July and August of 2013 Van Zyl sent emails to him asking about progress, saying that he had spoken to Cape Nature and requesting details of the permit application made by Basson so that Van Zyl could expedite its grant. These emails were not responded to and it appears that the respondent had by that stage resolved not to make any application or to deliver the animals.

[12] The present application was issued on 30 July 2014 claiming the relief I summarised earlier. Included in the founding papers was an affidavit by an expert, Mr Mitchell, on the current value of a breeding group of ten bontebokke comprising seven ewes and three rams. The value of R400 000 excluding VAT was said to be a minimum value with the true value likely to be higher. The respondent filed a notice of opposition and in due course an answering affidavit. Replying papers were file and so the matter came before me today.

[13] The respondent’s version is a somewhat surprising one. He says that he was still owed money from the 2009 transactions, being the supply of the eight rooihartbeeste for a price including VAT of R36 024 and the supply of the 26 kudu at R50 388 including VAT, coming to a total sum of

R86 412. He says that interest from July 2009 to December 2012 amounted to a further R44 805. He alleges, further, that when the payment of R142 500 was made on 4 December 2012 he appropriated it to those outstanding 2009 debts which, after deducting the capital and the interest on those alleged debts, left only an amount of R11 283. He said in his answering affidavit that he acknowledged being indebted to the applicant in that amount and he tendered repayment of it.

[14] The manner in which the payment of 4 December 2012 was said to achieve this result was by set-off. I am perfectly satisfied that the respondent's approach to the matter is entirely misconceived. The question is not one of set-off but rather appropriation of payments. There had been no dealings between the parties since 2009 until the latter part of 2012. When the parties transacted with each other in the latter part of 2012, it was on the basis of a quote for the supply of ten bontebokke at a price of R142 500. The emails were exchanged to which I have already referred and one knows that the respondent had specified, as a condition of the transaction, that the purchase price should be paid up front. That is exactly what happened on 4 December 2012. The payment corresponded exactly with the amount of the quote.

[15] The authorities dealing with the appropriation of payments are perfectly clear on this point. The debtor has the right to make the appropriation at the time of payment, failing which the right passes to the creditor, whereafter – if neither of them have made an appropriation – the law determines the manner of appropriation in accordance with certain residual rules. Here the debtor in regard to the transaction was the applicant. Wessels deals with the matter fully in *The Law of Contract In South Africa* in para 2284 ff. He says the following at para 2293 (citation of supporting authority omitted):

‘The circumstances under which a debt is paid may enable the court to infer an appropriation which was not expressed. Thus if there are two debts, a payment which corresponds exactly to the one and not to the other would be presumed to be an extinction of the debt to which it corresponds… So also if one debt is admitted and another disputed, the debtor will be presumed to have intended to pay the admitted debt… Again, if a creditor demands a specific debt and the debtor, without any explanation, forwards an amount equal to that debt, the payment will be considered to be in discharge of that debt…’

[13] Christie *The Law of Contract in South Africa* 6th Ed contains the following passage to similar effect at page 445 (footnotes omitted):

‘Appropriation by the debtor need not be express but may be tacit or implied, as when there has been a course of dealing between the parties, giving the creditor reasonably to understand that the payment was to be appropriated in a particular way, or when the amount of the payment corresponds with one debt but not the other, or one debt is admitted and the other disputed or the creditor has demanded payment of a particular debt and the amount of the payment corresponds with his demand, or when the creditor sells a pledge specially given in respect of one debt.'

[14] As I have said here, the business dealings between the parties in November and December 2012, coupled with the amount of the payment, place beyond doubt that the applicant was intending to pay the purchase price of the ten bontebokke referred to in the quote. Accordingly it was not open for the respondent to keep the money except on that basis. It was not open to the respondent to appropriate it rather to earlier debts. Even if those earlier debts were not disputed, this would be the position, though according to the applicant the earlier debts are indeed disputed. There is also a question as to whether they have prescribed. However, it suffices for me to put my decision on appropriation on the basis of the course of dealing between the parties in late 2012 and the amount of the payment.

[15] The payment having been kept, the applicant can be taken to have discharged his side of the bargain in paying the

purchase price. If the respondent has claims in respect of earlier transactions he would have had to pursue them either by way of a counter-application in the present proceedings, which he has not done, or by separate proceedings.

[16] Another question which arises on the transaction is precisely what it was that the applicant bought. The applicant alleges in his founding papers that the ten bontebokke were to be a breeding group, comprising seven ewes and three rams. The quote and the invoice do not specifically refer to that composition of animals but Van Zyl alleges that this is indeed what was discussed. Furthermore, the email he sent in response to the quote on 21 November 2012 specifically referred to seven ewes and three rams. Although not quite clear from the context, it appears to me to be confirmation that this is what the respondent had been asked to quote on. In any event, payment was only made about two weeks later. There was no response from Basson to the email of 21 November 2012 stating that the transaction was not for seven ewes and three rams but for something else.

[17] In that regard the principle laid down by Miller, JA in *MacWilliams v First Consolidated Holdings (Pty) Limited* 1982 (2) SA 1 (A) at page 10 applies:

'I accept that "quiescence" is not necessarily acquiescence ... and that a party's failure to reply to a letter asserting the existence of an obligation owed by such a party to the writer does not always justify an inference that the assertion was accepted as the truth. But in general, when according to ordinary commercial practice and human expectation firm repudiation of such an assertion would be the norm if it was not accepted as correct, such party's silence and inaction, unless satisfactorily explained, may be taken to constitute an admission by him of the truth of the assertion or at least will be an important factor telling against him in the assessment of the probabilities and in the final determination of the dispute. And an adverse inference will the more readily be drawn when the unchallenged assertion has been preceded by correspondence or negotiations between the parties relative to the subject matter of the assertion.'

[18] Here there had clearly been interaction between the parties prior to the furnishing of the quotation and then there was the email which followed, leading two weeks later to a payment. Contracts are not concerned with the private workings of individuals' minds but rather with what the objective manifestations of their interactions indicate to be their consensus.

[19] I do not think there is any *bona fide* dispute of fact regarding the composition of the ten bontebokke. It strikes me as ludicrous that a quote would be given for bontebokke

without some background as to what the requirements were. It is clear from the expert evidence of Mr Mitchell that the value of animals and of a group of animals will depend on their composition and whether or not they constitute a breeding group. The respondent, though denying baldly that he was required to deliver seven ewes and three rams and that they should not be lambs, does not refer to his negotiations with Van Zyl nor say precisely what it was that he was to deliver. In other respects his affidavit comprises shotgun denials of the allegations in the founding papers.

[20] There is also what I regard as his reprehensible conduct in accepting the money in regard to the transaction for the ten bontebokke and then sitting back and doing nothing and claiming several years later that he had taken the money in discharge of earlier transactions. It appears either that he took the money under false pretences in December 2012 or that, having taken it for this particular transaction, he later fabricated a defence in terms of which he claims it related to earlier transactions.

[21] I am thus satisfied that the applicant has established its agreement.

[22] The respondent argues through counsel that he does not

have the ten bontebokke to deliver but that of course is no answer to the claim for specific performance. He does not say that the animals are not available as a commodity in South Africa. A person does not have to own that which he sells. The respondent has not begun to make out the case that he cannot procure a breeding group of ten bontebokke for delivery to the applicant.

[23] Mr Ferreira submits that a sufficient time period for delivery of the animals would be until the end of April 2015. I am satisfied that that would be a generous allowance. It will allow time for an application to be made to Cape Nature for the animals to be moved and for them to be delivered.

[24] In regard to the alternative claim for payment of money if the respondent should not deliver the animals, the question arises whether it is appropriate to grant such relief on motion. A preliminary issue which was debated by Mr Ferreira in that regard was whether this was truly a case of damages or whether it was a claim for payment of money as a surrogate for performance. He referred me to the leading case on the subject, *ISEP Structural Engineering and Plating (Pty) Limited v Inland Exploration Co (Pty) Limited* 1981 (4) SA 1 (A) and the doubts expressed on the correctness of that judgment in *Mostert v Old Mutual* 2001 (4) SA 159 (SCA).

[23] The *ISEP* case has not as yet been overruled. *Mostert*'s case indicated that *ISEP* might require reconsideration but as matters presently stand I am bound by the majority judgment in ISEP. I nevertheless wish to refer to something I said (as an acting judge) in an unreported judgment *Du Plessis N.O. v Swiss Invest 02 (Pty) Limited* Case 10064/2001. I quote from para 69 of that judgment:

'The majority decision in the *ISEP* case *supra* precludes the grant of a monetary award calculated not as conventional damages but as the objective financial equivalent of performance. I am mindful of the doubt expressed concerning the correctness of the majority decision (see most recently *Mostert v Old Mutual* 2001 (4) SA 159 (SCA) para 74), but it has not as yet been overruled and is binding on me. I would nevertheless venture to suggest that some of the criticism of the majority decision in *ISEP* may stem from a confusion of terminology. In *Mostert*, for example, reference is made to the critical remarks in De Wet and Van Wyk *Kontraktereg en Handelsreg* 5de Uitg at 212. When the learned authors of that work speak of damages as a "surrogate" of performance they seem to me to be referring to the damages which an aggrieved party who has not cancelled the contract can claim for an absence of performance or for defective performance (see at 196 and 209), in contra-distinction with the damages claimable pursuant to cancellation (at 212). I find no suggestion by the learned authors that "surrogate" damages in this sense fall to be calculated otherwise than in accordance with the conventional contractual method, ie the shortfall in the plaintiff's patrimony by virtue of the fact that he did not get his bargain (see their example at 196). The *ISEP* case fully acknowledges the recoverability of such damages. What is impermissible, according to *ISEP*, is to award monetary compensation measured not in the conventional way but simply as the objective cost of performance. It is to this (impermissible) measure of compensation that the label of "surrogate" damages has sometimes been attached. The effect of *ISEP* is that where there has been no or defective performance there is (in the absence of specific performance) only one measure of damages (the conventional one), not two alternative measures. It is by no means clear that this is a proposition from which the learned authors of *Kontraktereg* would dissent. Of course the two measures of compensation may often lead to the same result but this is only because the objective cost of rendering performance is often a reliable guide to the patrimonial shortfall suffered by the aggrieved party in consequence of defective performance. The issue arose in *ISEP* only because it was one of those cases where there was not a correlation between the cost of performance and patrimonial shortfall.'

[24] In the *Swiss Invest* case from which I have just quoted, one similarly had a case where there was no correlation between the objective cost of making performance and shortfall in the aggrieved party's patrimony. This was because the party in breach was required to perform certain work not on

the plaintiff's property but on neighbouring property. The question, therefore, was by how much the plaintiff's property was less valuable by virtue of the fact that certain work had not been performed on adjoining property. That difference in value would not be given by the cost of performing the work on the adjoining property.

[25] To revert then to the circumstances of the present matter, this seems to me to be a case where it is unnecessary to concern oneself with surrogate damages in any special sense. If the respondent fails to make specific performance, the applicant's patrimony will be reduced by the value of the animals which have not been delivered, given that the applicant has already paid the purchase price. That is a conventional, contractual measure of damages.

[26] The difficulty, of course, is that in motion proceedings one does not ordinarily award damages. The learned authors of Herbstein and Van Winsen *The Civil Practice of the High Courts in South Africa* 5th Ed say at page 292 that there are certain classes of cases in which motion proceedings are not permissible at all and among these are illiquid claims for damages. At pages 294-295 they give examples of cases where motion proceedings have been held to be permissible in the absence of real disputes of fact, one of those being for the

cancellation of a contract provided that no damages are claimed in respect of the cancellation, and they refer to *Estate Behr v Matcham* 1924 CPD 6.

[27] I am not aware of any authority or any reported judgment in which damages have been awarded on motion and Mr Ferreira was not able to refer me to any. I accept that the position as stated by the learned authors of Herbstein and Van Winsen may not be an absolute rule of law, since the likelihood of genuine disputes of fact is not directly determined by the nature of the relief sought. Nevertheless, illiquid damages are typically the sort of matters where disputes do arise. The respondent in the present case did deny the valuation advanced by Mr Mitchell and also pointed to the fact that the purchase price for the animals in November 2012 was only R142 500 whereas barely a year and a half later the value was said to be R400 000 plus VAT.

[28] Although I am not particularly impressed by what the respondent has said on the question of value and although the applicant may very well prove to be right in its valuation, it would be inappropriate, I think, to fix the damages at this stage. Given the general rule in terms whereof damages are not awarded in motion proceedings, the respondent perhaps thought that he did not have to go further than he did in order

to ward off a claim for damages. I would simply add that the question of the valuation of the animals for purposes of determining the amount payable to the applicant in the event of the animals not being delivered is properly regarded as one of illiquid damages.

[29] However, I am satisfied that the applicant would be entitled to damages if the animals are not delivered, though not in an amount which I can now determine. Given the manner in which the notice of motion was framed and the prayer for further and alternative relief, I think I can at least grant a declaratory order in regard to the recoverability of damages though quantum will still need to be established.

[30] In regard to the date at which the value of the animals should be determined, it seems to me that in a case like this, where the purchase agreement has not been cancelled but the damages are claimed by virtue of a failure by the respondent to make performance, the appropriate date for determining the value of the damages is the date on which the applicant elects to recover damages following non-performance. In the present case that will be on or after 30 April 2015, which is the date by which the respondent will have to make specific performance.

[31] I must also deal with the question of costs. Mr Ferreira for

the applicant asked for costs on a scale as between attorney and own client. I do think that the respondent's conduct has been reprehensible, particularly the manner in which he accepted the payment on 4 December 2012, did nothing towards the discharge of his obligations and then, only when sued, came up with a version that the money had been applied to earlier transactions. As I observed earlier, either he took the money under false pretences in December 2012 or he fabricated a defence when he made his answering affidavit. Either way, that is worthy of censure. However, to the extent that there is a difference between an award of attorney and client costs and an award of attorney and own client costs, I propose only to order the former order.

[32] I therefore grant the following order:

(1) **<u>THE RESPONDENT SHALL BY 30 APRIL 2015 DELIVER TO THE APPLICANT, AT THE APPLICANT'S GAME FARM, SITUATED AT FARM 220, SANDOWN ESTATE, BREDASDORP AND KNOWN AS DUINEFONTEIN, TEN (10) BONTEBOKKE COMPRISING OF SEVEN (7) EWES AND THREE (3) RAMS ("THE BONTEBOKKE").</u>**

(2) **<u>IF THE RESPONDENT FAILS TO MAKE DELIVERY AS AFORESAID BY 30 APRIL 2015, THE APPLICANT</u>**

SHALL BE ENTITLED TO RECOVER DAMAGES FROM THE RESPONDENT EQUAL TO THE VALUE OF THE BONTEBOKKE AS AT 30 APRIL 2015.

(3) **IF THE APPLICANT ELECTS TO CLAIM DAMAGES TO AFORESAID, THE QUANTUM OF THE DAMAGES SHALL, IF NOT AGREED, BE DETERMINED BY ORAL EVIDENCE. THE APPLICANT IS GRANTED LEAVE TO APPROACH THE COURT ON THE SAME PAPERS, SUPPLEMENTED AS NEEDS BE, FOR DIRECTIONS IN REGARD TO THE HEARING OF ORAL EVIDENCE.**

(4) **THE RESPONDENT IS TO PAY THE APPLICANT'S COSTS ON AN ATTORNEY AND CLIENT SCALE.**

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ROGERS, J