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**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN**

Case no. 1464/15

Date heard: 7/11/16

Date delivered: 24/1/17

Not reportable

In the matter between:

ANDREW DENNIS CHARLES HUTCHINSON

Plaintiff

and

CHRIS LABUSCHAGNE

First Defendant

ACTEBIS 141 CC

Second Defendant

JUDGMENT

PLASKET, J:

[1] The parties to this claim and counter-claim are the plaintiff, Mr Andrew Hutchinson, an estate agent and auctioneer of Grahamstown, the first defendant, Mr Chris Labuschagne, a farmer who resides on O. G. F., Southwell Road in the district of Grahamstown, and the second defendant, Actebis 141 CC (Actebis), a close corporation having its registered office at O. G. F. and which was represented at all material times by Mr Labuschagne.

[2] The dispute concerns the terms of an agreement entered into between Mr Hutchinson and Actebis for the purchase and sale of a number of blesbuck. Mr Hutchinson, on the one hand, and Mr Labuschagne, on the other, content for terms that differ fundamentally from each other. It is, however, not in dispute that Mr Labuschagne cancelled the agreement. Whether he had just cause to do so is, however, in issue.

The pleadings

[3] Mr Hutchinson alleged in his particulars of claim that during November or December 2014 he entered into an oral agreement with either Mr Labuschagne or Actebis in terms of which they agreed to sell to him 'ninety Blesbuck for a price per head on the veld'. That price was R2 000 plus VAT per animal.

[4] A number of additional express terms of the agreement were pleaded. They included that 'the animals to be purchased would include four colour variant Blesbuck ewes'.

[5] Other terms that were pleaded were that Mr Hutchinson would capture the animals he had purchased, that the capture costs and risk of injury or death to the animals would be for his account and that he could at his option 'capture the animals by means of darting them individually, or by means of mass capture'.

[6] In early March 2015, Mr Hutchinson captured four blesbuck – a common blesbuck ram, a masked blesbuck ewe and two other colour variant blesbuck ewes. He then decided to postpone the capture operation to afford time to the numerous kids that were part of the herd to be weaned.

[7] The particulars of claim then state:

'Prior to the 20th of March, and in breach of his obligations in terms of the aforesaid agreement, and without just cause, the First alternatively Second Defendant contacted the Plaintiff telephonically and unilaterally attempted to repudiate the agreement by purporting to cancel the further implementation of the agreement of sale, and advised the Plaintiff that the

Plaintiff was not permitted to return to O. G. F. to capture the balance of 86 animals in accordance with the agreement between the parties.'

[8] Mr Hutchinson did not accept the repudiation and tendered performance of his obligations. He claimed to be entitled to the delivery of 86 blesbuck in accordance with the agreement. He sought an order directing Mr Labuschagne or Actebis to allow him and an animal capture team and equipment access to O. G. F. to capture the 86 blesbuck.

[9] In the alternative, he pleaded that, in the event of the 86 blesbuck having been disposed of, he was entitled to damages in the total amount of R1 153 224. This amount was calculated on the basis of the present market value of the 86 common blesbuck still on O. G. F., being R4900 per head, and the two remaining colour variant animals being R300 000 each. The total amount claimed also included VAT of R414 624.

[10] The defendants, in their plea, denied that Mr Labuschagne concluded any agreement personally with Mr Hutchinson: to the knowledge of the Mr Hutchinson, he acted as agent of Actebis, the owner of the blesbuck concerned.

[11] Prior to December 2014, Mr Hutchinson had acted on behalf of Actebis as a livestock agent and had, since 2010, provided services to Mr Labuschagne and Actebis for the marketing of their livestock. In this capacity, he had often been given access to O. G. F. so that he could inspect livestock.

[12] During 2014, Mr Labuschagne requested Mr Hutchinson to inspect the herd of blesbuck on the farm in order to furnish advice concerning the sale of the adults in the herd. Mr Hutchinson said he would inspect the herd and then furnish his advice. He duly inspected the herd.

[13] When Mr Labuschagne and Mr Hutchinson met, the former advised the latter that Actebis wanted to sell about 60 mature blesbuck so that a fresh bloodline could be introduced into the remaining herd. Mr Labuschagne sought Mr Hutchinson's advice as to the best way to dispose of the blesbuck.

[14] Two options were proposed: either Mr Hutchinson could auction the animals on behalf of Actebis or he could purchase them for his own account.

[15] Mr Labuschagne requested Mr Hutchinson to make an offer to purchase the blesbuck. He offered R2 000 plus VAT per head with the costs of capture to be borne by him. Mr Labuschagne accepted the offer in respect of approximately 60 common blesbuck but expressly excluded the colour variant animals. He did this because he knew their value to be in excess of R2 000 and that some colour variant animals had been sold at the time 'for considerable sums of money'.

[16] He requested Mr Hutchinson's advice on the sale of the colour variant blesbuck. Mr Hutchinson said he wished to purchase them and would revert to Mr Labuschagne in that respect. Mr Hutchinson then inspected the herd on more than one occasion.

[17] In due course, Mr Hutchinson made arrangements to capture adult male blesbuck. Only these animals were to be captured because the kids had not been weaned from their mothers. On 4 March 2015, Mr Hutchinson arrived on O. G. F. with a capture team, a game transporting truck and trailer, vehicles and a helicopter. A veterinary surgeon was also present.

[18] Mr Hutchinson proceeded to attempt to capture animals by using the helicopter and immobilising darts. Four animals were captured in this way. Mr Labuschagne was only able to see one of them in the truck because the compartment that held the remaining three was dark. The animal he saw was a common blesbuck ram.

[19] On the following day, Mr Labuschagne noticed that some of the colour variant blesbuck were missing. He was advised by his staff that three colour variant animals had been captured and taken. (One of these was a so-called masked animal.) He telephoned Mr Hutchinson and 'confronted him with the fact that he had caught and removed three colour variant ewes under the pretence of capturing normal coloured Blesbuck rams'. He also asked Mr Hutchinson what price he would pay for the colour

variant animals. Mr Hutchinson 'stated that he would pay R2 000.00 each and laughed'.

[20] At this point, Mr Labuschagne, on behalf of Actebis, told Mr Hutchinson that he would not set foot on O. G. F. again and 'by implication cancelled the agreement, which was done with just cause having regard to the Plaintiff's conduct and the breach of the agreement to purchase and remove normal colour Blesbuck'.

[21] The primary defence raised by Mr Labuschagne and Actebis is that the agreement was not for the sale of 90 blesbuck, did not include the colour variant animals and was cancelled with just cause as a result of Mr Hutchinson's breach by capturing colour variant animals rather than common blesbuck.

[22] In the alternative and on the assumption that the agreement was for the sale of 90 animals including the colour variant animals, it was pleaded that:

'25.1 the Plaintiff owed to the Second Respondent a fiduciary duty to disclose the true value of the colour variant Blesbuck because he held himself out to the Second Defendant as an expert Game Trader and Livestock Agent and had been approached by the Second Defendant for advice as to the sale of its Blesbuck;

25.2 the Plaintiff knew that the value of the colour variant Blesbuck was in the sum of at least R300 000.00 each;

25.3 the Plaintiff knew that the Second Defendant did not know the value of the colour variant Blesbuck;

25.4 the Plaintiff falsely and with the immoral intention of self-enrichment at the expense of the Second Defendant represented their value to be no different from normal coloured Blesbuck when he knew that their value was 150 times greater;

25.5 the Plaintiff did not act honestly, reasonably and in good faith and his conduct was contrary to public policy as it is informed by the provisions of the Constitution;

and that, accordingly, the agreement allegedly concluded between Plaintiff and the Second Defendant, which is denied, regarding the colour variant Blesbuck, is void and unenforceable, and falls to be declared as such in accordance with the Second Defendant's Counterclaim filed herewith.'

[23] The body of the counter-claim mirrors the plea. The following relief is claimed:

(a) An Order confirming the cancellation of the agreement concluded on or about December 2014 for the sale to Plaintiff of approximately sixty adult Blesbuck of normal colouration;

(b) An Order declaring that the contract concluded between the Plaintiff and the Second Defendant during or about December 2014 did not include the sale to the Plaintiff of three colour variant Blesbuck;

(c) An Order directing the Plaintiff to return to the O. G. F. the three colour variant Blesbuck ewes removed by him on 4 March 2015;

Alternatively:

(d) Payment of the sum of R620 000 together with interest thereon calculated at the legal rate of interest from 4 March 2015 to date of payment;

Alternatively in the event that the Court should find that the contract concluded with the Second Defendant included the colour variant Blesbuck:

(e) An Order declaring that the contract for the sale of the colour variant Blesbuck is void and unenforceable;

(f) An Order directing the Plaintiff to return to O. G. F. the three colour variant Blesbuck ewes removed by him on 4 March 2015;

Alternatively:

(g) Payment of the sum of R620 000 together with interest thereon calculated at the legal rate of interest from 4 March 2015 to date of payment;

(h) Further or alternative relief;

(i) Costs of suit.

The issues

[24] It is common cause that an agreement was entered into by the parties for the sale of blesbuck. The terms of that contract – particularly whether the agreement included the sale of the colour variant blesbuck – are in dispute. Secondly, the identity of the seller is an issue. Thirdly, if I find that the agreement included the colour variant animals, I will then have to decide whether the agreement is unenforceable because of a breach by Mr Hutchinson of his duties as an agent. Finally, I will have to decide on the form of the relief and costs.

Who was the seller?

[25] It is convenient first to decide the question whether the seller was Mr Labuschagne, acting personally, or Actebis represented by Mr Labuschagne as its agent. Both are cited as defendants but only one may be liable.

[26] Mr Labuschagne testified that O. G. F. is owned by Actebis. This is the vehicle through which his farming operations are carried on. He is the sole member of Actebis.

[27] Mr Hutchinson had had dealings with Actebis and Mr Labuschagne for some time. From invoices he had sent in the past in connection with livestock transactions, he appears to have known that Actebis was the owner of the farm and the livestock. Furthermore, the invoice he sent for payment of the purchase price of the four animals that he captured was addressed to 'Actebis 144 CC t/a O. G. F.'.

[28] From these facts, it is clear that the agreement for the sale of the blesbuck was entered into by Mr Hutchinson, on the one hand, and Actebis, represented by Mr Labuschagne, on the other. As Mr Labuschagne was Actebis' agent, he could not be sued on the agreement. The claim against Mr Labuschagne must therefore fail.

The evidence

[29] Mr Hutchinson, who represented himself in the trial, was the only witness to testify in support of the plaintiff's case. Mr Labuschagne was the only witness to testify in support of the defendants' case.

[30] The evidence of the witnesses was, to a large extent, consistent with each other as to material aspects of the case. Where they differed, their differences were generally not material. They differed fundamentally, of course, in relation to the terms of the agreement for the sale of the blesbuck.

[31] I am of the view that credibility plays no role in this matter. Neither witness struck me as lacking credibility: where they differed, this was as a result, perhaps, of memory lapses on the part of one or the other or of misunderstandings in their interchanges. Ultimately, the factual issues must be decided on the probabilities.

[32] It was common cause that Mr Hutchinson had acted as livestock agent and advisor for Actebis for a number of years prior to the incident that gave rise to this litigation. Mr Labuschagne was frank in saying that he had been satisfied with the service rendered by Mr Hutchinson and that he had appreciated his assistance. It was in this capacity that Mr Labuschagne asked Mr Hutchinson for advice when he wanted to dispose of some of his herd of blesbuck. Mr Hutchinson knew that the reason for so doing was to introduce a new bloodline into the herd.

[33] It was also common cause that Mr Hutchinson inspected the herd on a number of occasions and that he advised Mr Labuschagne to either allow him to auction the blesbuck or sell them to him. He testified that, as far as the colour variant animals were concerned, he had advised Mr Labuschagne to put them into a breeding program that, I presume, he would arrange.

[34] It was common cause too that Mr Labuschagne, who knew that the colour variant blesbuck were worth a lot more than the common blesbuck, asked Mr Hutchinson for his opinion as to their value: without knowing the value of these animals, both men knew that they were, at the time, extremely valuable and that colour variant animals were fetching extremely high prices. By the time of the capture of the animals and the cancellation of the agreement, Mr Hutchinson had not reverted to Mr Labuschagne on this issue. From his evidence it emerged, however, that by the time of the capture, he had determined their value to be R300 000 a head. (This value is not disputed by Actebis.) Mr Hutchinson never disclosed to Mr Labuschagne that he had ascertained that the colour variant animals were worth this amount. He likewise did not disclose that he had sold the masked blesbuck at his auction for R20 000 before he had even captured it. (He also sold 30 of the common blesbuck at the auction for R4 900 per head.)

[35] Mr Hutchinson's version is that he made an offer to purchase the entire herd of about 90 animals at a price of R2 000 per head and that Mr Labuschagne accepted this offer. Indeed, Mr Hutchinson testified that he sent an offer to Mr Labuschagne by e-mail in which he offered to purchase at least 60 but not more than 90 blesbuck, made up of 'mature males and females and sub adult Ewes and Rams,

born during December 2013 and January 2014'. The offer also stated that '[i]ncluded in the herd will be four colour variant Blesbuck ewes'.

[36] Mr Hutchinson received a reply that said that the reference to sub-adult animals should be deleted and that the revised document should be sent back for signature.

[37] Mr Labuschagne, on the other hand, testified that he agreed to a price of R2 000 per head for 60 of the common blesbuck and that he was waiting for Mr Hutchinson to revert to him with his valuation of the colour variant animals. He said that his partner had dealt with the e-mail from Mr Hutchinson and that she had not told him that the document included the colour variant animals. (Mr Hutchinson relied on an oral agreement. The written offer was not accepted by Mr Labuschagne and was never signed by him.)

[38] It was common cause that on the day of the capture of the animals, Mr Hutchinson arrived with a helicopter and a veterinary surgeon and that they proceeded to dart animals from the air in order to capture them. They captured four animals – a common blesbuck ram, the masked ewe and two other colour variant ewes.

[39] The following day, Mr Hutchinson received a telephone call from Mr Labuschagne. He was extremely angry and cancelled the agreement because he had discovered that of the animals that had been captured, three, including the masked ewe, were colour variant animals and, on his understanding, were not part of the agreement. Later, Mr Hutchinson paid Actebis, by electronic transfer, the amount of R9 120, being R2 000 per blesbuck and VAT. Actebis repaid R6 840 – the purchase price in respect of the three colour variant ewes and only retained the payment in respect of the ram.

[40] At the time that the agreement was being negotiated, neither Mr Hutchinson nor Mr Labuschagne knew the value of the colour variant animals but they did know that they were worth considerably more than the common blesbuck. Mr Labuschagne had asked Mr Hutchinson to advise him of their value. Mr Hutchinson

was to revert to Mr Labuschagne in this respect. By the time agreement was reached, he had not done so. In my view, it is extremely improbable that a person, knowing that the animals were worth a lot more than the common blesbuck, not knowing how much they were worth and while waiting to be informed of their value would sell them at the same price as the common blesbuck. It is far more probable that they would have been excluded from the agreement and be dealt with separately once their value was known.

[41] The probabilities also favour Mr Labuschagne's version for two further reasons. First, the reason he wanted to sell 60 blesbuck was to introduce a new bloodline into his herd. It is unlikely, given this reason, that he would have agreed to sell 90 animals as alleged by Mr Hutchinson, as the entire herd comprised some 90 animals. Secondly, as soon as Mr Labuschagne realised that the colour variant animals had been captured, he flew into a rage, telephoned Mr Hutchinson, inferred, according to Mr Hutchinson, that he had stolen the animals and told him that he was never to set foot on O. G. F. again. That conduct is consistent with a belief that the agreement did not include the colour variant animals and inconsistent with seller's regret.

[42] I conclude therefore that the agreement that was concluded between Mr Hutchinson and Actebis, represented by Mr Labuschagne, was for the sale of 60 adult blesbuck (and not for 90 animals), that the purchase price was R2 000 per head, that the 60 animals contemplated by the agreement were common blesbuck and that the colour variant animals, including the masked ewe, were not contemplated by the agreement. The sale of these latter animals was still to be discussed when Mr Labuschagne knew their value.

[43] As three of the four animals captured by Mr Hutchinson were not animals that had been sold to him and the value of two of them was 150 times higher than the purchase price per head, Mr Hutchinson breached the agreement, the breach was material and Actebis was entitled to cancel, as it did.

[44] This means that the Mr Hutchinson's claim must fail against Actebis but that the counter-claim brought by Actebis must succeed. In the light of my conclusion on

the facts, it is not necessary for me to consider the alternative argument based on the breach of an agent's duty to his principal, interesting as that issue is.

[45] The masked ewe was sold by way of auction for R20 000. It is common cause that the value of the two remaining colour variant ewes was R300 000 each. The total value of the three animals with which this case is concerned is thus R620 000.

The order

[46] I make the following order.

- (a) The plaintiff's claim against the defendants is dismissed with costs.
- (b) The second defendant's counter-claim succeeds with costs with the result that the following relief is granted.
 - (i) The cancellation of the agreement concluded on or about December 2014 for the sale to the plaintiff of approximately sixty adult blesbuck of normal colouration (the agreement) is confirmed;
 - (ii) It is declared that the agreement did not include the sale to the plaintiff of three colour variant blesbuck, one of which was a masked ewe;
 - (iii) The plaintiff is directed to return to O. G. F. the three colour variant blesbuck ewes referred to in paragraph (ii) above, and to do so within two weeks of the date of this order;
 - (iv) If the plaintiff is unable to return the animals referred to above, he is directed to pay to the second defendant the sum of R620 000 together with interest thereon calculated at the legal rate of interest from 4 March 2015 to date of payment;
 - (v) The plaintiff is directed to pay the defendants' costs of suit.

C Plasket

Judge of the High Court

APPEARANCES

For the plaintiff: In person

For the defendants: D De La Harpe instructed by Huxtable Attorneys