IN THE HIGH COURT OF SOUTH AFRICA

NATAL PROVINCIAL DIVISION

CASE NO. 2483/07

In the matter between :

MAGUDU GAME COMPANY (PTY) LTD	Applicant
And	
MKITHI JAPHET MATHENJWA N.O.	First Respondent
JERE OLPAS GUMBI N.O.	Second Respondent
EMMANUEL CEBO GUMBI N.O.	Third Respondent
GUGU SYDNEY GUMBI N.O.	Fourth Respondent
GQAMANGAYE MICHAEL GUMBI N.O.	Fifth Respondent
BHINJA MIKAYELI MATHENJWA N.O.	Sixth Respondent
MANDLA ELLIOT GUMBI N.O.	Seventh Respondent
LONDO ISRAEL GUMBI N.O.	Eighth Respondent
NTOMBEMHLOPHE ELIZABETH NGCAMPHALALAI N.O.	Ninth Respondent
MBEKISENI ZEBLON GUMBI N.O.	Tenth Respondent
SINDOSOWE MONICA MATHENJWA N.O.	Eleventh Respondent
COENRAAD VERMAAK SAFARIS (PTY) LTD	Twelfth Respondent
VAN HEERDEN ALEC	Thirteenth Respondent
BOUWER ROLAND NOEL	Fourteenth Respondent

J U D G M E N T

KOEN, J.

[1] This application concerns the ownership of certain game in the Magudu Game Reserve, specifically whether the applicant was the owner of such game and is still the owner, or had lost ownership of the game.

[2] The applicant is the Magudu Game Company (Pty) Limited. According to the shareholders' agreement relating to the applicant, it has as its purpose "*… carrying on the business of the conservation of veld and wild game resources on a commercial basis, primarily in the area of land to be called the Magudu Game Reserve."* The only respondents actively opposing the application are the trustees of the Emvokweni trust (hereinafter referred to as "the trust").

[3] In the Notice of Motion, the applicant claims the following relief:

> ''1. That it be declared that the Applicant is the owner of all the game presently on the properties described as –
>
> 1.1 The Remainder of the Farm Uitgevallen 599 situate in the administrative district Vryheid, measuring 521,1674 hectares and
>
> 1.2 The Farm Burgersrust Nr. 672 situate in the administrative district of Vryheid, measuring 1305,4861 hectares
>
> (hereinafter referred to as "the properties")
>
> as well as all game as may in future enter upon the properties from the Magudu Game Reserve.
>
> 2. That the Respondents, their employees and/or any associates through the Respondents, be interdicted from interfering, dealing, hunting, removing and/or in any way becoming involved with the game to be found on the aforesaid properties at present, and in future until such time as the Applicant has removed its game from the properties;
>
> 3. That the Applicant shall be entitled to enter upon the properties for purposes of removing its game and relocating same to the Magudu Game Reserve;
>
> 4. Costs of suit against the First to Eleventh and Thirteenth Respondents, jointly and severally the one paying the other to be absolved;
>
> 5. Costs of suit against Twelfth and Fourteenth Respondents jointly and severally, with First to Eleventh Respondents and Thirteenth Respondent only in the event of their opposition;
>
> 6. Further or alternative relief."

"The properties" identified and defined as such in paragraph 1 of the Notice of

Motion will also be referred to as "the trust's properties", being the land now registered in the name of the trustees of the Emvokweni trust.

[4] By consent between the parties the following issues arising from the application were referred for the hearing of oral evidence:

> "(a) Whether the applicant is the owner, or alternatively entitled to possession, of the game present on the properties described in paragraph 1 of the Notice of Motion;
>
> (b) whether the Respondents should be interdicted from interfering with, dealing in, hunting or removing the said game;
>
> (c) whether the applicant is entitled to enter upon the said properties for the purpose of removing the said game and relocating it to the Magudu Game Reserve."

[5] Subsequent to hearing argument at the end of the oral evidence, I was advised that the parties were agreed that:

(a) the reference to "game" in paragraph 1 and elsewhere in the Notice of Motion, and in the referral to oral evidence, is confined to Buffalo, Giraffe, Kudu, Nyala, Common reedbuck, Mountain reedbuck, Impala, Warthog, Waterbuck, Bushpig, Blue wildebeest, Zebra, Grey duiker, Blue duiker, Hartebeest, Tsessebe, Ostrich, Bush buck, Red duiker, White rhinoceros, Elephant, Steenbuck, Caracal, Serval, Antbear, Porcupine, Lynx, Hippopotamus and Blesbuck. (In correspondence preceding the launch of the application, the Trust conceded that the Elephant, Rhinoceros and Buffalo on the Trust land did not belong to it and that it lay no claim thereto. I was advised that this was a gratuitous concession on the part of the Trust and not the result of the application of any particular legal principle, and I have

accordingly treated it as such).

(b) The interdict in paragraph (b) of the Notice of Motion should extend only to "disposing, dealing, hunting and removing" the game (as defined in subparagraph (a) above, to be found on the properties at present and in the future, until the applicant has removed such game from the properties.

[6] The papers and exhibits are voluminous. I intend referring only briefly to the history and background facts relevant to this judgment.

[7] The Magudu Game Reserve was formed when Mr Greef and a number of neighbouring landowners or their representatives, being Mr Crafford (acting on behalf of Mahlatini Game Ranch (Pty) Limited), Mr Niebuhr (acting on behalf of Ntibane Game Ranch), and Mr F.J. Coetzer, agreed, and the remaining land owners (after the withdrawal of Ntibane Game Ranch from the agreement) removed the internal fences which separated their respective land and the game found on each. These original owners will be referred to as the "founders".

[8] The founders:

(a) on 19 August 1995 signed an "umbrella agreement" as well as "The Magudu Game Reserve Association constitution";

(b) on 25 November 1995 signed a "Shareholders' agreement", a "Game valuation and count agreement", various "Use agreements" and various "Agreements of game purchase".

[9] The effect of the above was that:

(a) relative to the size of the land which each would contribute for use as part of the Magudu Game Reserve, each of the founders would acquire a corresponding percentage shareholding in the applicant;

(b) having regard to the value of the game on each founder's land (as agreed), a monetary adjustment would be made so that the value of the game contributed by each after such monetary adjustment, would correspond to their respective percentage shareholdings in the applicant.

This arrangement was duly implemented. It found practical expression and recognition in the founders dropping the internal fences separating their properties, with all their game thereafter roaming freely over all their properties comprising the Magudu Game Reserve.

[10] During or about 2002 to 2003 and pursuant to negotiations entered into with a Mr Roland Bouwer for the addition of his land to the Magudu Game Reserve on a similar basis to that applying between the founders, the various agreements were extended to and some new agreements concluded with Mr Bouwer. On 5 March 2003, Mr Bouwer appended his signature to the umbrella agreement, the constitution, a deed of acceptance of membership of the Magudu Game Reserve Association and the shareholders' agreement. On a date not specified in the document, he signed a "Record of agreement" between himself

and the applicant. On 7 July 2003, Mr Bouwer signed a "Koopooreenkoms" providing for the purchase of certain land and game. The arrangement with Mr Bouwer, although similar to that between the three founding members, was however not identical. Thus, in terms of the "Record of agreement", Mr Bouwer would contribute five portions of land (or at least part thereof), but the extent of the land which would remain registered in his name but made available for use by and as part of the Magudu Game Reserve, did not affect the extent of his shareholding in the applicant.

[11] By agreement, Mr Bouwer would receive 20% of the shareholding in the applicant. The agreed consideration for such 20% shareholding was R4 874 000, which was to be settled by the sale of land to the applicant of approximately 1 650 hectares at a total value of R1 850 000, a contribution of game to the applicant of R1 289 840 and a cash payment of R1 769 160. Importantly and arising form the agreement between the Applicant and Mr Bouwer, the internal fences between the "old" Magudu Game Reserve comprising the land of the original founder members, being the land situated to the west in the reserve, and Mr Bouwer's land, which is situated to the east, would be dropped. It is not disputed that Mr Bouwer had game of R1 289 840 which he could contribute and that he paid an amount of R1 769 160 (albeit to the

remaining shareholders and not the applicant). A separate purchase agreement ("koopooreenkoms") was, apparently on the advice of the applicant's conveyancers, concluded between the applicant and Mr Bouwer in respect of the land to be "acquired" by the Trust as part consideration for the 20% members interest in the applicant. This agreement was concluded on 7 July 2003. The land so purchased, being part of that to be made available in terms of the record of agreement, would partly however require subdivision and consolidation into a new part to form the farm Bakenkloof 17634, in extent 953,4324 hectares, which would require certain administrative approvals and hence inevitably involve a delay. The extent of the land to be sold in the purchase agreement was also 1773,7322 hectares (not 1650 hectares) and the *merx* now also included game on these properties to a value of R572 605. (For the sake of completeness I should point out that there is a dispute between the oral evidence of Mr Greef and his affidavit evidence, whether this game was part of the game made over of R1 289 840 or in addition thereto). The land forming the subject matter of the *merx* in terms of the purchase agreement has not yet been transferred, nor have the shares been issued to Mr Bouwer. Mr Bouwer has also not signed a Use agreement in respect of the land, other than that forming the subject of the purchase agreement, which he would make available for the purposes of Magudu Game Reserve. The

transaction with Mr Bouwer remains executory and has been and still is the subject of ongoing litigation between the applicant and Mr Bouwer. However, the internal fences separating the land of the original three founders and that of Mr Bouwer as part of the now extended Magudu Game Reserve, were however dropped and the game of Mr Bouwer have intermingled and roamed freely with the other game over the extended Magudu Game Reserve.

[12] Both prior and subsequent to the negotiations and agreements concluded with Mr Bouwer, the applicant has purchased certain further game (over and above that originally on the land), acquired other game through the barter of game with other reserves, and no doubt has also enjoyed the progeny of such game on the Magudu Game Reserve.

[13] In the meantime, a land claim was being established over portion of the land belonging to Mr Bouwer, not forming part of that sold to the applicant but contributed for use as part of the extended reserve. This land, which is the trust's properties referred to in the Notice of Motion, is situated to the east and south-east of the Magudu Game Reserve.

[14] Pursuant to negotiations the trust's properties were acquired by the Land Claims Commissioner on behalf of the Trust from Mr Bouwer.

This land was valued by a sworn appraiser, Mr Pretorius at some R7 000-00 per hectare excluding improvements. In his report and also his evidence, he confirmed that in arriving at that value he was told that the ownership of the game vests in the applicant, that game counts could not be made as the properties were managed together with the greater Magudu Game Reserve which consists of approximately 15 000 hectares accommodating four of the big five, but that for the purpose of his valuation he took into account, on a basis akin to that relating to improvements, that game do occur on or traverse the trust's properties.

[15] Various meetings were also held between the Land Claims Commissioner and the applicant's representative regarding the land claim, with the applicant endeavouring to persuade the Land Claims Commissioner and the Trust to leave its land in the reserve and to become part of the applicant's activities and the Magudu Game Reserve. This suggestion did not find favour and the trust has apparently decided to go it alone. I was advised, that the trust is now collaborating with other adjoining game farms/reserves on its borders.

[16] The Trust has in the interim taken transfer of its properties and is now the registered owner thereof.

[17] The Trust also commenced negotiating deals with outfitters, including one hunting on the Magudu Game Reserve, for certain hunting concessions on the trust's properties. This led to extreme unhappiness on the part of the Applicant as it believes that it is its game which will be hunted. The Trust refused the applicant's employees and agents to enter upon its land. Such access, according to Mr Greef, a director of the Applicant, the Applicant requires to fulfil its various obligations, including inter alia maintenance of the external perimeter fences, management of veld and game resources, and the like. The disagreement between the parties is evidenced by correspondence between the applicant's attorneys, De Lange Incorporated and the Trust's attorney, Peter Rutsch Incorporated, from 8 August 2006. The trust denied the game reserve employees, personnel and guests access to the Trust's properties. Demands were made for an undertaking *inter alia* that the applicant would not *"enter or remain on (the Trust's properties) at any time or to encourage, cause or permit any other person to enter or remain on (the Trust's properties) without (the Trust's) prior written consent."* A High Court application was eventually brought and an interim order granted on 2 March 2007 interdicting access. It was eventually discharged after an interim working arrangement was concluded which operates pending the outcome of these proceedings.

[18] Peculiar rules apply to the ownership of game/wild animals in our common law. These have been succinctly summarised as follows in Lawsa Vol. 27, para 325 (1st re-issue) :

> "**Occupatio of wild animals** At common law, wild animals which are in a natural state of freedom become the property of their captor wherever captured. All animals that belong to a wild species are considered wild. Examples are inter alia lions, apes, baboons, birds, wild geese, doves, bees, wild ostriches, wild beasts and fish. … Mere wounding of the animal or close pursuit is not sufficient; actual capture is required. Where A wounds an animal which is later captured by B, B becomes the owner of the animal. Apart from physical control, the *animus* to be the owner (*animus domini*) is needed. Such an *animus* can also be a projected *animus* as in the case where a trap is set to catch wild animals. When the animal is captured physical control and the *animus* exists simultaneously. The wild animal need not be captured on the hunter's own land; if a hunter trespasses on the land of another he still becomes the owner of the animals he captures there. Some earlier decisions held that the hunter can in such circumstances be held liable for tort of trespass. The better view is, however, that an *actio iniuriarum* can be instituted against him in appropriate circumstances. The captor also becomes the owner of wild animals captured illegally, for instance if animals are captured in contravention of game laws, fishing ordinances or other statutory provisions unless the relevant legislation states quite unequivocally that ownership in fish and game captured in contravention of it will vest in the captor.
>
> The common law principles enunciated above have been qualified by the Game Theft Act, which was promulgated to protect the lucrative fledgling game – farming industry as an adjunct to the growing tourist industry. The main aim of the Act is to clamp down on the poaching of wild animals …"

The applicant did not place reliance on the provisions of the Game Theft Act No. 105 of 1991. Its provisions are accordingly not considered further at this stage but will be referred to again below.

[19] In our common law, private ownership of game, as opposed to

the *occupatio* of game by capture or for hunting, had not assumed the significance it has today as a major commercial activity. Shortcomings in the common law principles when it comes to their application to modern game farming have been documented – see for example Wildboerdery in Regsperspektief – Enkele knelpunte by M.A. Rabie and C.G. van der Merwe, Stellenbosch Law Review Vol. 1 1990 at pg 112. Other shortcomings have also been recognised and have been sought to be addressed by the legislature, for example by the enactment of the Game Theft Act which commenced from 5 July 1991. As for the balance, the Constitution of the Republic of South Africa enjoins every Court when developing *inter alia* the common law to promote the *"spirit purport and objects of the Bill of Rights"* – see section 39 of the Constitution.

[20] The relevant legal principles relating to transfer of ownership of movables, are trite. In Trust Bank van Afrika Bpk v Western Bank Bpk en andere NNO 1978 (4) SA 281 A at 301 it was held that:

> "… Selfs al sou dit aanvaar word dat die Regter *a quo* tereg bevind het dat die koopkontrak nietig sou wees, as gevolg van onmoontlikheid van prestasie met betrekking tot 'n gedeelte van 'n ondeelbare verpligting ('n standpunt waaroor ek geen mening uitspreek nie), berus sy konklusie dat gedeeltelike prestasie nie eiendomsoordrag tot gevolg kan hê nie op 'n wanopvatting – aangaande die vereistes van die oordrag van eiendomsreg op roerende goed. Volgens ons reg gaan die eiendomsreg op 'n roerende saak op 'n ander oor waar die eienaar daarvan dit aan 'n ander lewer, met die bedoeling om eiendomsreg aan hom oor te dra, en die ander die saak neem met die

> bedoeling om eiendomsreg daarvan te verkry. Die geldigheid van die eiendomsoordrag staan los van die geldigheid van enige onderliggende kontrak."

In Commissioner of Customs and Excise v Randles, Brothers and Hudson Limited 1941 AD 369 at 398 to 399 it was held that :

> "If the parties desire to transfer ownership and contemplate that ownership will pass as a result of delivery, then they in fact have the necessary intention and the ownership passes by delivery. It was contended, however, on behalf of the appellant that delivery accompanied by the necessary intention on the part of the parties to the delivery is not enough to pass ownership; that such recognised form of contract (a causa habilis, as Voet 41.1.35 op cit) is required in addition, and reference was made to certain remarks made in the case of Macadams v Flander's Trustee 1919 AD 207. I do not agree with that contention. The habilis causa referred to by Voet means merely an appropriate causa, that is, either an appropriate reason for the transfer or a serious and deliberate agreement showing an intention to transfer."

Centlivres, J.A. in the same case concurring with Watermeyer, J.A. said:

> "From these passages it is clear, I think that a wide meaning must be given to the words 'justa causa' or 'causa habilis' (Voet 41.1.35), and that all these words mean in the context I am at present considering is that the legal transaction preceding the *traditio* may be evidence of an intention to pass an acquire ownership. But there may be direct evidence of an intention to pass and acquire ownership and, if there is, there is no need to rely on a preceding legal transaction in order to show that ownership has, as a fact, passed. To put it more briefly, it seems to me that the question whether ownership passed depends on the intention of the parties and such intention may be proved in various ways."

In Dreyer and Ano NNO v AXZS Industries (Pty) Limited 2006(5) SA 548 (SCA) Brand, J.A. remarked at para 17 that :

> "… A valid underlying legal transaction or iusta causa traditionis is not a requirement for the valid transfer of ownership. Otherwise stated, the validity of transfer of ownership is not dependent on the validity of the underlying transaction, such as, in this case, the contract of sale (see eg Commissioner of

> Customs and Excise v Randles, Brothers and Hudson Limited 1941 AD 369 at 398 – 9 (Watermeyer J.A.) and at 411 (Centlivres, J.A.); Trust Bank van Afrika Bpk v Western Bank Bpk en Andere NNO 1978(4) SA 281(A) at 301 H – 302 A). Generally speaking, the requirements for the valid passing of ownership of a movable thing are: delivery – actual or constructive – of the thing by the owner – or someone duly authorised to act on his behalf – coupled with a so-called real agreement or 'saaklike ooreenkoms', consisting of the intention on the part of the transferor to transfer ownership and the intention on the part of the transferee of accepting ownership of that thing…"

[21] In *causu,* the parties were *ad idem*, or it was at least not disputed, that the game on the individually fenced properties of the original founders, before the dropping of the fences, belonged to those founders and were not *res nullius*.

[22] It is the applicant's case that in terms of the arrangements amongst the original founders and also subsequently with Mr Bouwer, the applicant would own and control the game on the Magudu Game Reserve.

[23] In support of this contention, the applicant argues that the required element of control over the game is satisfied by the game being confined to the geographically fenced in area of the Magudu Game Reserve as it has existed from time to time. The so-called "real agreement", consisting of the intention on the part of the transferor to transfer ownership and the intention on the part of the transferee of accepting ownership of the game, applicant contends, is evidenced by

the conduct of the various owners of land who contributed land to the Magudu Game reserve in dropping their internal fences, thus allowing their game, previously confined to their properties, to cross onto the adjoining land and inter-mingle. A valid underlying legal transaction is not required by law. To the extent that the series of agreements concluded would constitute an underlying transaction, it is largely irrelevant to the question of the passing of ownership, unless, it was submitted, such agreements detract from the notion of an intention to transfer ownership.

[24] The aforesaid legal submissions are clearly correct. I have also not understood the Trust to dispute those principles.

[25] Nor did I understand the Trust to dispute that the nature and extent of the external fences were such as to sufficiently confine the game now forming the subject of the application, for the purpose of saying that the game was under the effective control of the applicant as the party managing and controlling the veld and game resources on the land constituting the Magudu Game Reserve. (Some questions were posed to Mr Greef in cross-examination as to the impossibility of confining and hence controlling certain species namely Wild dog, Hyena and Leopard, which he readily conceded and which ultimately resulted

in the circumscribed “definition” of “game” forming the subject matter of the present application).

[26] One simply has to pose the rhetorical question, whether it was the intention of the initial founders, and later also Mr Bouwer, in dropping the internal fences, that ownership in the game which they previously owned on their fenced in properties would be lost, and the game would revert to their natural wild state and again become *res nullius* (ignoring for that argument the physical limitation imposed by the external boundary fences of the reserve), or whether it was intended that ownership of the game passed to the applicant. The latter is, in my view, clearly the more probable.

[27] The opposition by the Trust to the relief claimed was threefold and embodied in the following formulation of the issues:

(a) did the applicant acquire ownership in the game in terms of the original arrangement between the founder members;

(b) did ownership in and to the game of Mr Bouwer pass in respect of the dealings and various executory agreements the applicant had with Mr Bouwer;

(c) if ownership had so passed, with the transfer of the Trust properties without any prior securing of rights, can it be said that the control required by the common law for ownership of wild animals,

persists.

[28] As regards the first issue, the Trust argued that what the agreements did, was simply to transfer to the applicant certain rights associated with the incidence of ownership, but which, even if viewed in totality, fall short of the actual transfer of ownership. In what actual respects it fell short, could not be identified by counsel. It was argued that these agreements conferred only personal but not real rights. Further, nowhere do the agreements say it in so many words, that "ownership" in the game would pass to the applicant (although there is a reference to individual land owners waiving any rights to ownership in respect of the game in favour of the applicant). Any such waiver of rights of ownership, the Trust contends, is superfluous if ownership in the game had in fact passed to the applicant.

[29] The contractual provisions to which reference was made included the following :

(a) each signatory to the umbrella agreement undertook to conclude a user agreement with applicant (clause 6);

(b) as soon as possible after the effective date, the parties in consultation with the relevant land owners agreed to take all steps necessary to remove all boundary fences between their properties other than external boundaries (clause 7.1);

(c) the parties agreed that from the time of the signature of the

umbrella agreement they would ensure that no hunting or shooting of wild game would be permitted on their respective properties (clause 7.4);

(d) to the extent that the umbrella agreement provides for ongoing obligations after the effective date, any third party who purchases land in the Reserve from a party to the agreement or any third party owning land which is included in the Reserve subsequently shall be obliged to agree in writing to become a party to the umbrella agreement (clause 16);

(e) membership of the Magudu Game Reserve Association is confined to owners of land in the Reserve (paragraph 5.1);

(f) no member shall grant a lease or usufruct over his land without the written consent of the executive committee other than to the applicant (clause 7.3.1);

(g) save as specifically provided in the Constitution and the use agreements between the members and the applicant, members would have the rights and privileges flowing from their ownership of their ground at common law and the members would respect each others privacy (clause 22.1);

(h) the applicant is irrevocably appointed to manage all veld and wild game resources within the Reserve for its own benefit and account including without derogating from the generality of the aforegoing, conservation of all flora and fauna within the Reserve, management and control of all natural water (clause 27.1);

(i) it is a condition of membership of the Association that each member has concluded a use agreement with applicant relating to the use of his land by applicant (clause 27.2);

(j) no member is entitled to erect or construct any fence or barricades (except a fence around his camp complex) to ensure the free movement of game (clause 29.1);

(k) the applicant is responsible for the issue of all shooting and

hunting permits and may in its discretion decide to prescribe and direct culling for its own benefit (clause 29.2);

(l) no member may without the prior written consent of the applicant and subject to such conditions as it may determine shoot any game in the Reserve for the purpose of dealing therein commercially (clause 29.3);

(m) any member who kills or wounds any wild life otherwise than in accordance with the terms of a valid permit which has been approved by the applicant and not withdrawn by it shall be liable to the applicant in addition to any fine or penalties imposed on him for a compensatory fine of an amount not exceeding the costs required to be incurred by the applicant in replacing the animals so killed or harmed (clause 29.5);

(n) in terms of the use agreement, the applicant will be responsible for the management and conservation of all veld and wild game resources in the Reserve including the land and will perform these functions on a commercial basis for its own account (clause 2.2);

(o) land owners grant to the applicant all the rights to use the land for the applicant's benefit as if a personal servitude of usufruct was registered in favour of the applicant including without detracting from the generality of the aforegoing, to carry out all necessary nature conservation activities on the land in relation to the soil, veld, natural water resources and wild game situated on the land and to be entitled to dispose of culled game for its own benefit (clause 4.1);

(p) the land owner expressly waives any right to or claim of ownership of any wild game traversing his land from time to time, such waiver to be in favour of the applicant (clause 4.4);

(q) if a land owner ceases to own land, he is obliged to re-erect fences on his land in terms of clause 8.9 of the Constitution and the applicant shall be entitled to a reasonable period of time to capture and remove all wild game from the land such that as and when the re-fencing exercise has been completed there shall be to the opinion and satisfaction of the applicant, no wild game remaining on the land. In that event, the land owner shall be entitled to no compensation in respect of game so captured and removed other than through the compulsory sale and purchase of any shares he has in the applicant in terms of the Constitution and the shareholder's agreement (clause 5);

(r) in terms of the shareholder's agreement, in the event of a party disposing of his land to a person or legal person who is not willing to become a party to the shareholder's agreement or is not acceptable as a party to all the other shareholders, the provisions of clause 9.3 of the Constitution will apply to the party disposing of his land (clause 2.5).

[30] I do not intend analysing the arguments in regard to the various contractual provisions referred to in argument in any detail because:

(a) the agreements, in my view, constitute at best an underlying legal transaction, not required for the valid transfer of ownership;

(b) the intention to transfer ownership of the game is manifest from

the decision to drop the internal fences;

(c) the various contractual provisions need to be read in totality against the overall scheme envisaged by the agreements – see Wynns Car Care Products (Pty) Limited v First National Bank Limited 1991(2) SA 754 (AD). In many instances, the provisions are detailed stipulations expressly stated to be interpreted not to detract from the generality of terms preceding them. The waiver of ownership referred to is a provision which was included, in my view, *ex abundante cautela* to place it beyond all doubt that no rights of ownership, not even some residual rights of the bundle of rights making up ownership, would remain vested in the land owners in respect of the game;

(d) a generous interpretation of the provisions of the various agreements do not detract from the notion of ownership having passed to the Applicant when the internal fences were dropped.

[31] After the initial dropping of the internal fences by the founders of the Reserve, the ownership in the respective game passed to the applicant.

[32] The same argument as in paragraphs [30] and [31] above applies when Mr Bouwer's land was included in the Reserve and his internal fences dropped. The Trust contended that this would not be so in view of the fact that:

(a) Mr Bouwer did not sign all the agreements, notably the use agreement;

(b) there is ongoing litigation between the applicant and Mr Bouwer regarding the enforceability of the agreements between them.

In my view, the enforceability or otherwise of the agreements between the applicant and Mr Bouwer do not affect the real agreement to transfer ownership of Mr Bouwer's game on his land to the applicant, when the internal fences were dropped. The cold facts are that Mr Bouwer's internal fences were dropped. When his game left his land and/or were allowed to intermingle with the other game in the reserve, they were no longer under his exclusive control. Ownership would either be lost, possibly to some form of joint ownership with the owners of the other game on the Reserve, or alternatively ownership of that game was intended to be transferred to the applicant. The latter seems more probable.

[33] Considerations such as that Mr Bouwer had not yet been issued with his 20% shareholding in the applicant, are not relevant to the aspect of the intention to transfer ownership, certainly do not detract from an intention to transfer ownership and should in any event be viewed in the context of the bi-lateral personal rights and obligations arising, in this case from the Record of agreement, as an obligation on the part of the applicant to issue such shares only when certain

agreements *inter alia* the Use agreement was signed, which Mr Bouwer has not done yet. Mr Bouwer has other remedies, but it does not mean that ownership did not pass.

[34] I did not have the benefit of hearing the oral evidence of Mr Bouwer. An affidavit was filed on his behalf. In that affidavit he confirms the purchase of a 20% shareholding for R4 874 000 and states that:

> "… Pursuant to this agreement I paid the R1 769 160 and signed the Constitution of the Magudu Game Reserve Association and the shareholders' agreement. We also dropped the fences between the properties. Since then the applicant used all the game in its operation … I am advised that it will be argued that ownership in the game did not pass to the applicant. I obviously cannot comment on the legal conclusions to be drawn from the facts which I have set out. …"

He had however also stated in the affidavit that "*the applicant purchased the game from me…".*.

[35] In my view, ownership in the game of Mr Bouwer passed to the applicant on the dropping of the internal fences separating Mr Bouwer's land from the rest of the Reserve.

[36] Regarding the third issue raised by the trust, the agreements imposed various obligations, in varying form, dealing with the situation

where a land owner such as Mr Bouwer sells his land. Mr Bouwer had not signed any Use agreement. At the very least, the provisions in the shareholders' agreement read with the Constitution would apply. That would entail that on the sale of land by a member such member would be obliged to forthwith erect a fence and a gate or gates along the boundary of his land which borders on the rest of the Reserve and to bear the cost thereof and should such member fail to erect such a fence, the Association or the applicant would be entitled to erect such a fence and the former member or his estate would be liable to the Association or the applicant for the full cost of such fence as well as 50% of the maintenance thereof. The Trust maintains that this is the only remedy available to the applicant, namely a contractual remedy which would give rise to interdictory relief or damages, should Mr Bouwer as land owner sell part of his land and the terms of the agreement regarding re-erecting the internal fence be breached.

[37] On registration of transfer of ownership of the Trust's properties into the name of the Trust, the Trust now had unrestricted access to its land as owner (physical access could apparently be gained through a gate or gates on the trust's properties along the external boundary fence of the Reserve, the keys to which Mr Bouwer could make available to the Trust).

[38] The Trust contends that from the time that the applicant and its representatives were denied access and were not allowed to go on the Trust properties, the Applicant could no longer exercise such control over the game as would be required to retain ownership of the game, and hence effectively that such ownership as the Applicant may have had, was lost. That argument presumably implies either that the trust became the owner (except that the game would not be confined to the trust's properties, as the absence of an internal fence would not confine the game to the trust's properties and they could roam onto the reserve) or that the game reverted to their natural state of being wild animals (except that they would still be confined to the original area of the reserve by the external fence to the former reserve)..

[39] In this context, I was also referred to the provisions of section 2(1)(b) of the Game Theft Act No. 105 of 1991 which reads :

> "**Ownership of Game** – (1) Notwithstanding the provisions of any other law or the common law –
>
> a) …
>
> b) the ownership of game shall not vest in any person who, contrary to the provisions of any law or on the land of another person without the consent of the owner or lawful occupier of that land, hunts, catches or takes possession of game, but it remains vested in the owner referred to in paragraph (a) or vests in the owner of the land on which it has been so hunted, caught or taken into possession, as the case may be."

[40] This section would only find application if the applicant, without the consent of the Trust, as owner of its properties, sought to hunt, catch or take into possession game on the Trust properties. This section suggests that ownership of game hunted or caught or taken possession of on land without the consent of the owner or lawful occupier of that land, shall vest in the owner of that land. But this section must be read against the background of the common law principle, which it seeks to qualify, that a hunter who trespasses on the land of another would still become the owner of game he captures there. The applicant has not hunted on the Trust's properties. Nor does the statutory provision, in my view, in the absence of any such hunting, catching or taking possession, independently confer ownership of all and any game which merely come onto the property of a landowner, upon that landowner.

[41] The applicant had ownership of the game. Some of its game has moved onto the properties now registered in the name of the trust, but still within the original fenced reserve area. The game has not "escaped" from the fenced area which confined it and vested the Applicant with effective control and ownership. The sole question is whether the denial of access to portion of the former reserve and the Trust's refusal to surrender whatever game might be on its land, means

that the applicant has now lost its former ownership.

[42] Loss of ownership of wild animals is explained thus in Lawsa Vol. 27 at pg 406 :

> "Ownership in a thing is lost if the thing becomes a *res nullius*. In Roman Dutch Law, it was accepted that a wild animal which escaped from physical control and disappeared from the site of its previous owner became *res nullius* with a consequent loss of ownership. … Only when these animals regain their natural state of freedom is ownership lost …"(my underlining)

[43] The applicant contends that the mere formal act of registration of transfer of the Trust land to the Trust does not constitute a loss of physical control as contemplated in the common law, at least so as to result in a loss of ownership. The game has not disappeared from the sight of the applicant and it has certainly not, in my view, regained its natural state of freedom, such as to amount to a loss of ownership. If freedom has not been regained, then it follows, in my view, that the Applicant's ownership in and to the game was not lost

[44] Having concluded that the applicant had the ownership of the game prior to the transfer of the properties to the Trust, the applicant also enjoyed the constitutionally protected right to property. The

development of the common law to this situation where game is on land of a new registered land owner, but still within the physical boundaries of a fenced area which conferred ownership in respect of the game upon a specific party, does not warrant an interpretation and a development of the common law principles that ownership is lost. Even on common law principle, the applicant wished and continues to want to pursue its game. It was prevented from doing so by threats that this would constitute trespass and ultimately the court interdict. To suggest that in the absence of flouting the law by trespassing onto the Trust's properties or flouting the provisions of the interdict, the applicant would lose its ownership of the game which is still within its sight but unable to escape back into the wild because of the external perimeter fence of the reserve, is in my view untenable and would disregard the applicant's right of ownership.

[45] The applicant was and remains the owner of the game on the Trust's properties.

[46] The Trust has argued that in the event of my deciding the matter in favour of the applicant that a time limit be placed on the opportunity to be afforded to the applicant to remove its game, of one winter season. The applicant on the other hand has asked for a minimum of two winter

seasons to capture the game. What a reasonable period to capture the game would be, was not canvassed in the papers or in evidence and might very well require input from experts. I am not prepared, in the absence of this point being fully ventilated between the parties, to make an arbitrary determination. I propose granting the relief in the form sought and if either party acts unreasonably, then regrettably, in the absence of agreement, the court will have to be approached for this issue to be determined.

[47] The order I grant is therefore as follows :

(a) it is declared that the applicant is the owner of all the Buffalo, Giraffe, Kudu, Nyala, Common reedbuck, Mountain reedbuck, Impala, Warthog, Waterbuck, Bushpig, Blue wildebeest, Zebra, Grey duiker, Blue duiker, Hartebeest, Tsessebe, Ostrich, Bush buck, Red duiker, White rhinoceros, Elephant, Steenbuck, Caracal, Serval, Antbear, Porcupine, Lynx, Hippopotamus and Blesbuck on the properties described as :

i) the remainder of the farm Uitgevallen 599 situated in the district of Vryheid, measuring 521,1674 hectares; and

ii) the farm Burgersrust No. 672 situate in the administrative district of Vryheid measuring 1305,4861 hectares

(hereinafter referred to as “the properties”)

as well as all game as may in the future until the relocation of all game to the Magudu Game Reserve enter upon the properties from the Magudu Game Reserve;

(b) the respondents, their employees and/or any associate through the respondents are interdicted from disposing, dealing, hunting or removing any of the game found on the aforesaid properties at present, and in the future until such time as the applicant has removed its game from the properties;

(c) the applicant shall be entitled to enter upon the properties for the purpose of removing its game and relocating same to the Magudu Game Reserve, in accordance with accepted game catching and relocation practices;

(d) the first to eleventh respondents are directed to pay the costs of this application, such costs to include the costs consequent upon the employment of two counsel, where applicable.

Date of Hearing	:	10 December 2008
Date of Judgment	:	23 January 2008
Counsel for Applicant	:	J. Ploos van Amstel SC A.P. Den Hartog
Instructed by	:	Harvey Nossel & Turnbull
Counsel for 1st – 11th and 13th Respondents	:	M. Pillemer SC

V. Voormoolen

Instructed by	:	Brett Purdon Attorneys