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**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

CASE NO.: CA&R 8/2019
Date heard: 16-11-2020
Date delivered: 26-03-2021

In the matter between:

Tommy Robertson

Appellant

And

Schalk Willem Fourie

Respondent

CORAM: WILLIAMS J et LEVER AJ:

JUDGMENT

WILLIAMS J:

1. The respondent (plaintiff in the court *a quo*) had instituted an action in the Magistrates Court, Kimberley against the appellant/defendant for payment of the balance of the purchase price of two Tsessebe cows in terms of an oral agreement entered into between the parties during September 2015. The salient terms of the agreement were that the respondent would deliver to the appellant two Tsessebe cows, both of which were to be pregnant and in good condition, for the purchase price of R80 000, 00 (exclusive of VAT) per animal. The respondent

alleged that the appellant had waived the requirement of pregnancy on 28 September 2015 and despite performance in terms of the amended agreement the appellant failed to pay the full purchase price.

2. The appellant denied that he had waived the requirement of pregnancy. He pleaded that the respondent had breached the agreement by failing to deliver two pregnant animals and tendered payment of the full purchase price upon delivery of two pregnant Tsessebe, alternatively the return of the purchased animals and further alternatively payment of the reasonable and fair market value of two Tsessebe cows not pregnant and not in a good condition, taking into account the payment already made to the respondent.
3. After hearing evidence the court *a quo* found in favour of the respondent that the appellant waived the requirement that the animals be pregnant and ordered that he pay the amount of R71 200,00 (the balance of the purchase price) plus interest and the costs of suit. The appellant thereafter filed a notice to appeal the judgment and orders of the court *a quo*.
4. On appeal before us the only issue to be determined was whether the court *a quo* was correct in finding that the appellant had waived the contractual requirement of pregnancy.

Background

5. The appellant, Mr Tommy Robertson, henceforth referred to as Robertson approached, Mr Schalk Fourie (Fourie), the respondent, who is a livestock agent, to procure and deliver two certified pregnant Tsessebe cows, in good condition. Fourie found a seller, Mr Julius Gers, and proceeded to negotiate the purchase price with Robertson. The parties agreed to R80 000, 00 per Tsessebe, exclusive of VAT. It was further agreed that Robertson would pay for one Tsessebe, inclusive of VAT, equalling R91 200, 00 within a few days of delivery, plus R20 000, 00 deposit on the second Tsessebe. The balance of the purchase price, would be paid by Robertson by the first week of December 2015.
6. On the morning of 28 September 2015 the parties arrived at the farm of Gers, where the Tsessebes were to be darted and certified pregnant by the veterinarian employed by Gers for this purpose, Dr Janine Porter. The ensuing events, largely common cause between the witnesses, Fourie, Gers and Porter for the respondent and Robertson for the appellant follows.
7. Porter darted and anaesthetised two Tsessebes on the farm from a helicopter. The Tsessebes were loaded onto a vehicle and taken to a shed to keep them out of the sun. When Porter arrived at the shed to examine the animals she realised that she had left her scanner in her vehicle some 15 to 20 kilometres away. The half an hour or so it would take to get the scanner would be too long to leave the animals anaesthetised

as Tsessebes are apparently very sensitive creatures. Effectively this meant that Potter would not be able to certify that the animals were pregnant.

8. Robertson insisted that he wanted the Tsessebes certified pregnant. Gers then suggested that Robertson did not have to take the animals and that they could be put back in the veld – the camp fence was only about 100 meters away – and be given the antidote, which would awaken them. Robertson was not keen on this idea. Porter then examined the Tsessebes and found them to be healthy. Both Porter and Gers said that the animals were probably pregnant, given the time of year and the fact that they came from a breeding herd. They could however not confirm or guarantee pregnancy without the animals being scanned.
9. After being informed that the Tsessebes were probably pregnant and after being given another opportunity to have the animals released into the veld, Robertson decided to take the Tsessebes. Thereafter the animals were loaded onto Fourie's trailer, administered the antidote and transported to Robertson's farm.
10. Robertson made the first payment as per the agreement with Fourie, but failed to pay the balance of the purchase price. Upon enquiry Robertson informed Fourie that one of the Tsessebes had died on the farm and the other had failed to calve. Fourie had obtained legal advice and refused to pay the balance of the purchase price.

Discussion

11. The only issue to be determined is whether the magistrate was correct in finding that Robertson had waived the requirement of pregnancy. I must at this stage mention that the Tsessebe which died on Robertson's farm was of no consequence at the trial. Robertson accepted that he bore the risk once the Tsessebes were removed from Gerses farm.

12. There is a presumption against waiver. This is so since in general it is unlikely that a party, having acquired contractual rights, would give it up. The onus is thus on the party asserting waiver to prove it. In *Laws v Rutherford* 1924 AD 261, Innes CJ said at 263"
"The onus is strictly on the appellant. He must show that the respondent, with full knowledge of her right, decided to abandon it, whether expressly or by conduct plainly inconsistent with an intention to enforce it."

13. Both counsel for Robertson, Mr Eillert and counsel for Fourie, Mr Olivier, referred us to *Road Accident Fund v Mothupi* 2000 (4) SA 38 (SCA), a most useful judgment wherein Nienaber JA discusses inferred waiver and distills from the cases the test to determine whether there was an intention to waive. At paragraphs 15 to 19 the following is stated:
"Waiver is first and foremost a matter of intention. Whether it is the waiver of a right or a remedy, a privilege or power, an interest or benefit, and whether in unilateral or bilateral form, the starting point invariably is the will of the party said to have waived it."

- [16] **The test to determine intention to waive has been said to be objective** (cf *Palmer v Poulter* 1983 (4) SA 11 (T) 20C-21A; *Multilateral Motor Vehicle Accidents Fund v Meyerowitz* 1995 (1) SA 23 (C) 26H-27G; *Bekazaku Properties (Pty) Ltd v Pam Golding Properties (Pty) Ltd* 1996 (2) SA 537 (C) 543A-544D). **That means, first, that intention to waive, like intention generally, is adjudged by its outward manifestations** (cf *Traub v Barclays National Bank Ltd* 1983 (3) SA 619 (A) 634H-635D; *Botha (now Griessel) and Another v Finanscredit (Pty) Ltd* 1989 (3) SA 773 (A) 792B-E); **secondly, that mental reservations, not communicated, are of no legal consequence** (*Mutual Life Insurance Co of New York v Ingle* 1910 TS 540, 550); **and thirdly, that the outward manifestations of intention are adjudged from the perspective of the other party concerned, that is to say, from the perspective of the latter's notional *alter ego*, the reasonable person standing in his shoes.**
- [17] The third aspect has not yet been finally settled by this court, or so it would seem (cf *Thomas v Henry and Another* 1985 (3) SA 889 (A) 896G-898C). What the one party now says he then intended and what his opposite number now says he then believed, may still be relevant (*Thomas v Henry and Another*, *supra*, 898A-C) although not necessarily conclusive. **The knowledge and appreciation of the party alleged to have waived is furthermore an axiomatic aspect of waiver** (*Martin v De Kock* 1948 (2) SA 719 (A) 732-733). With those two qualifications I propose, in this judgment, to apply the test of the notional *alter ego*.
- [18] **The outward manifestations can consist of words; of some other form of conduct from which the intention to waive is inferred; or even of inaction or silence where a duty to act or speak exists.**
- [19] **Because no one is presumed to waive his rights** (cf *Ellis and Others v Laubscher* 1956 (4) SA 692 (A) 702E-F), **one, the onus is on the party alleging it and, two, clear proof is required of an intention to do so** (*Hepner v Roodepoort-Maraisburg Town Council* 1962 (4) SA 772 (A) 778D-9A; *Borstlap v Spangenberg en Andere* 1974 (3) SA 695 (A) 704F-H). **The conduct from which waiver is inferred, so it has frequently been stated, must be unequivocal, that is to say, consistent with no other**

hypothesis.”

14. Mr Eillert correctly contended that the outward manifestation of the choice that Robertson made that day can be found in the words that he used at the time and the fact that he decided to take delivery of the Tsessebes and had it transported to his farm.
15. Robertson's own evidence was that he knew that an animal can only be certified pregnant if it had been confirmed by a scan. He was also aware that no other pregnancy test had been performed on the animals. He was given the option, on his own evidence, not to take the animals. Fourie, Gers and Porter testified that this option was willingly extended by Gers several times. Despite being aware that there was no guarantee that the animals were pregnant, Robertson decided to accept them.
16. During his evidence in the court *a quo*, Robertson appeared to blame pressure of circumstances on his decision. That the trailer was standing at the ready, that the day was getting hotter, that the animals had to be revived without undue delay and that he had been guided by the opinions of experts in the field such as Gers, Dr Porter and Fourie, that the animals were most likely pregnant. He however denied having waived his right to delivery of pregnant Tsessebes.
17. Mr Eillert, during argument before us, reiterated the circumstances under which Robertson had to make the choice

of taking or leaving the animals and contended that at most Robertson had waived his right to have the Tsessebes **certified** pregnant. He based this argument partly on the fact that Gers had testified that he had told Robertson that he had one of two options. Either that "*ons maak die diere wakker en ons sit hulle terug in die kamp*" or "*hy aanvaar hulle as hulle dragtig is soos hulle nou daar is.*" Whereupon Robertson apparently answered "*ek aanvaar hulle so*". For the other part, Mr Eillert argued that the fact that Robertson did not negotiate a reduced price for the animals was evident of his intention not to waive the requirement of pregnancy. It was common cause among Fourie, Gers and Robertson, who were all farmers, that a pregnant animal commanded a higher price than one which was not.

18. This argument by Mr Eillert could have been persuasive had it not been for the fact that Robertson knew that there could be no guarantee of pregnancy without the animals being scanned and that neither Gers nor Porter were willing to commit themselves to that effect without the animals being scanned. The argument also disregards what was termed in *Mothupi supra* as the outward manifestation of intention as adjudged from the perspective of the other party concerned. From the perspective of Fourie and Gers the acceptance of the animals and the fact that Robertson did not negotiate a reduced price, should the animals turn out not to be pregnant, could reasonable have been interpreted, in the midst of the uncertainty as to pregnancy, that he had accepted the risk of

the animals not being pregnant. This was in effect their evidence.

19. What makes matters worse for Robertson is that it would reasonably have been expected of him, if he intended to enforce his right to pregnant Tsessebes, to have been proactive in having them scanned for pregnancy within a reasonable time after taking delivery of the animals or, as suggested by Gers, to keep them enclosed in a boma, to monitor their progress instead of letting them roam freely in the veld on his farm and complaining after about six weeks that the remaining Tsessebe had failed to calve. In Christie's Law of Contracts in South Africa; 7th ed, at 515 it is stated *"If delay in enforcing a right conferred by the terms of a contract has induced a reasonable belief that there is an agreement not to enforce the right, then enforcement has been waived by quasi-mutual assent."*
20. In my view and in the circumstances of this matter, the court *a quo* was correct in finding that Robertson had waived the contractual requirement of pregnancy and in the event the appeal should be dismissed.

The following order is made:

The appeal is dismissed with costs.



CC WILLIAMS
JUDGE

I concur



LG LEVER
ACTING JUDGE

For Appellant: Adv A Eillert
Engelsman Magabane Inc

For Respondent: Adv. D Olivier
Van de Wall Inc