REPUBLIC OF SOUTH AFRICA

IN THE GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~ / NO.
(2) OF INTEREST TO OTHER JUDGES:
~~YES~~ / NO.
(3) REVISED.
DATE 19/8/14 **SIGNATURE**

CASE NO: A798/2012

DATE HEARD: 30/07/2014

25/8/2014

In the matter between:

MICHAEL SAM LAFORET N.O.	First Appellant
PATRICIA JULIET LAFORET N.O.	Second Appellant

and

THE DEPARTMENT OF ECONOMIC DEVELOPMENT ENVIRONMENT AND TOURISM: LIMPOPO	First Respondent
OBED MOAGI	Second respondent

JUDGMENT

J.W. Louw J (Msimeki J and Ratshibvumo AJ concurring):

[1] This appeal concerns the fate of a cheetah. The first and second appellants are the trustees of the Harmony Trust. During 2006, the appellants found an injured cheetah on the trust's farm Harmony. The cheetah was darted and placed in an enclosed camp on the farm where it was kept and fed. The camp had a hole in the fence so that it could move in and out of the camp. On 25 January 2008, officials of the first respondent confiscated the cheetah while the first and second appellants were not present on the farm. The second respondent was employed by the first respondent as an environmental compliance officer in terms of the Limpopo Environmental Management Act, 7 of 2003, and was in charge of the confiscation operation. The reason for the confiscation was that the appellants did not have a permit to keep the cheetah as is required by the Act.

[2] During June 2008, after letters written by the appellants' attorney failed to persuade the first respondent to return the cheetah, the appellants brought a successful spoliation application in the Tzaneen magistrates' court. The cheetah was then fetched and taken back to the farm by the appellants' attorney after the respondents failed to return it. The first respondent then provided the appellants with a 30 day temporary permit to keep the cheetah. Thereafter, a further temporary permit was issued which was valid until 31 October 2009. On 17 October 2009, shortly before the expiry of the permit, the appellants released the cheetah from the camp into the wild where, according to the appellants, it could roam freely on the farm Harmony, which is 342 hectares in extent, and on neighbouring farms.

[3] On 12 February 2010, the first respondent obtained an *ex parte* order against the first and second appellants, in their capacities as the trustees of the Harmony Trust, authorizing the sheriff, with the assistance of the first respondent's environmental compliance officers, to remove the cheetah from the farm and to place it at the Kapama Cheetah Breeding

Project for safekeeping. The order, granted by Makgoba J, was an interim order pending the finalization of the main application (which was issued on the same day as the *ex parte* application) in which the first respondent sought a final order that the cheetah be returned to it to be kept at its facilities for purposes of its rehabilitation. Pursuant to the order, the cheetah was removed by the first respondent's officials on 24 March 2010. During a first attempt, on 16 February 2010, the first appellant advised the first respondent's officials that the cheetah had been released into the wild. The second respondent thereafter, on 22 March 2010, received a tip-off that the cheetah was still on Harmony. This then gave rise to the capture of the cheetah by the second respondent and other officials on 24 March 2010.

[4] On the same day, 24 March 2010, the appellants issued a counter-application to the main application in which they, *inter alia*, sought an order that the *ex parte* order granted on 12 February 2010 be set aside, that the second respondent be found to be in contempt of court and be incarcerated for 30 days and that the first and second respondents be ordered to take all necessary steps to return the cheetah to the farm Harmony within 14 days of the grant of the order.

[5] The main application and the counter-application were heard by Thlapi, J. The court found no reason to set aside the *ex parte* order because Makgoba J, when considering the application, was asked to have regard to the main application in respect of which the appellants would have had the opportunity to ventilate their case. The counter-application was dismissed by Thlapi J and the parties were ordered to pay their own costs. The court did not need to make any order in respect of the main application, probably because the cheetah had already been removed by the first respondent pursuant to the grant of the *ex parte* order. The appellants appeal against the whole of the judgment and order with the leave of the court *a quo.* They have applied for condonation for the late

filing of the appeal record. They have, in my view, provided sufficient reasons for the late filing of the record, but in order to succeed with the condonation application they also have to show that they have prospects of success in the appeal.

[6] The argument on behalf of the appellants was limited to the issues of whether the *ex parte* order should have been set aside by the court *a quo*, whether the counter-application for the return of the cheetah to the appellants should have been granted and whether the second respondent should have been found to be in contempt of court. It is convenient to first deal with the issue whether the counter-application for the return of the cheetah to the appellants should have been granted.

[7] The appellants' case for the return of the cheetah was based on the submission that the ownership of the cheetah vested in them. There are two requirements to establish ownership of a *res nullius* such as a wild cheetah. The prospective owner must take control thereof (*occupatio*) with the intention of becoming the owner (*animus possidendi*). The argument on behalf of the appellants was that, although the appellants released the cheetah into the wild on 17 October 2009, thereby allowing it to roam freely on the farm Harmony and on neighbouring farms, it being known that cheetahs cannot be contained by a fence, the cheetah was owned by the trust on the day on which it was captured by the first respondent's officials because the farm was fenced and the trust therefore controlled the cheetah and had the intention to own it. This appears to me to be a self-defeating argument. A land owner cannot have the intention to release a cheetah so that it can roam freely over his farm and neighbouring farms, i.e. to roam freely in the wild, and at the same time have the intention to control and own the cheetah.

[8] The argument that the appellants had the intention to control and own the cheetah after its release is also not supported by the evidence filed on

behalf of the appellants. The only evidence which appellants' counsel could point to, was a letter written by the appellants' attorney to the state attorney two days after the capture of the cheetah on 24 March 2010 in which it is stated that the application to be brought by the appellants "*will probably include a rei vindicatio for the return of the cheetah*". That statement is no proof of ownership. In the affidavit which was filed on behalf of the appellants in answer to the main application and in support of their counter-application, which was deposed to by the appellants' attorney, the following is stated in regard to the attempt by the first respondent's officials on 16 February 2010 to capture the cheetah:

> "*They* (the first respondent's officials) *were looking for a cheetah which my client allegedly was keeping illegally in an enclosure. This allegation was completely unfounded. After I had brought the cheetah back from Kapama, my client was originally given a thirty (30) days permit to keep the animal, and thereafter the permit was replaced/extended with a permit valid until the end of October 2009. As the time of the validity of the permit was running out, the cheetah was released by my client on the 17th of October 2009. The release of the cheetah is common knowledge on the farm and the release was attended to by a number of staff and was also recorded on video. Since the cheetah was rehabilitated and returned to the wild, no further permit was necessary – as the cheetah is free-roaming on a farm of three hundred and forty two hectares (if it is still on the farm). As appears from the documents in the Spoliation Application, cheetahs were known to roam between Harmony farm and neighbouring farms. The cheetah could therefore be roaming over a much larger area. My client does not need any permit for an unidentified free-roaming cheetah on his farm.*"

[9] If anything, this evidence indicates an absence of control and an intention of not owning the cheetah.

[10] In support of the argument that the trust controlled the cheetah and was therefore the owner of the cheetah when it was removed by the first respondent, appellants' counsel referred to the decision of the Supreme Court of Appeal in *Mathenjwa NO and Others v Magudu Game Co (Pty) Ltd.*[1] That judgment does not, in my view, assist the appellants. The evidence in that case showed that the game in issue, which by agreement between the parties was limited to specific species, was confined within the boundaries of the private game reserve in question as a result of the perimeter fence being upgraded and electrified. The court held[2] that such confinement, coupled with the purpose of carrying on large-scale game farming, constituted the requisite control to vest ownership. In the present matter the cheetah, by being allowed to roam freely, was not confined to the farm Harmony. The requisite control by the appellants was therefore absent. Upon its release from the camp into the wild, it again became *res nullius.*

[11] It follows from this conclusion that the appellants were not entitled to claim that the respondents be ordered to return the cheetah to them. The claim was therefore correctly dismissed by the court *a quo.*

[12] The appellants' claim that the *ex parte* order should be set aside was founded on the same ground as their counter-application, namely that they were the owners of the cheetah, which I have found they were not. The appellants also sought the setting aside of the *ex parte* order on the ground that the application had been brought on incorrect facts as it was alleged in the affidavit deposed to by the second respondent that the cheetah was being kept in a small enclosure whereas the second

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[1] 2010 (2) SA 26 (SCA)
[2] At par. [59] of the judgment

respondent knew at the time when the application was brought that the cheetah had been released. This allegation is not correct. The second respondent deposed to the affidavit in support of the *ex parte* application on 29 January 2010 and was only informed on 16 February 2010, when the first attempt was made to capture the cheetah pursuant to the granting of the *ex parte* order, that the cheetah had been released. It follows, therefore, that the claim for the setting aside of the *ex parte* order was also correctly dismissed by Thlapi J.

[13] The third issue in the appeal was whether the court *a quo* should have found the second respondent to be in contempt of court and ordered his incarceration. The alleged contempt was the failure by the respondents in the spoliation application, including the second respondent, to return the cheetah to the appellants as was ordered by the magistrates' court. We were informed by appellants' counsel that the second respondent is deceased. The issue has therefore become moot and is accordingly no longer justiciable.[3] It is, any event, questionable whether the court *a quo* would have exercised its discretion to make such an order where the alleged contempt was of an order of the magistrates' court. Proceedings for committal for contempt should be brought in the court that made the order which is alleged to have been disobeyed. Although the high court does have a discretion to enforce an order of another court, it will not ordinarily do so where there are effective remedies in that other court which can be used.[4] It was submitted by counsel for the appellants that because the parties were already involved in the high court litigation, the court *a quo* should have dealt with the application for committal. In my view, there is no reason why the appellants could and should not have brought the committal application in the magistrates' court. The application for the committal of the second respondent was, in my view, correctly dismissed by the court *a quo*.

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[3] See *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000(1) SA 1 (CC) p. 18 fn 18.

[4] See *Dreyer v Wiebols and Others* 2013 (4) 498 (GSJ) par. [9]

[14] I find, therefore, that the appellants have failed to show that they have prospects of success in the appeal. The application for condonation is accordingly dismissed with costs, such costs to include the costs of two counsel.

For appelants : Adv. R. du Plessis SC
Instructed by : Steyn & Clarke Attorneys

For first respondent : Adv. S. Joubert SC
Adv. T. Motshwane
Instructed by : The State Attorney, Pretoria