

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 53514/2011

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

6/08/2019
DATE

SIGNATURE

In the matter between -

ICELAND INDUSTRIAL PROJECTS (PTY) LTD

Plaintiff

and

HENDRIK MATTHEWS

Defendant

JUDGMENT

STRYDOM AJ

[1] This is an action in which Iceland Industrial Projects (Pty) Ltd ("the plaintiff")

claims damages from the defendant suffered as a result of the non-return and/or death and destruction of 769 African Grey Parrots (hereinafter referred to as "the parrots"), which the plaintiff alleged belonged to it.

- [2] During the course of the trial, the plaintiff and the defendant applied for the amendment of their respective pleadings. Such amendments were granted.
- [3] Mr Benjamin Moody ("Moody") testified on behalf of the plaintiff. He is the shareholder and director of the plaintiff. He testified that during 2010, he decided to import African Grey parrots from the Democratic Republic of Congo (the "DRC") to South Africa for the purpose of reselling them for a profit. He appointed Gideon Fourie ("Fourie") as his agent to assist him in importing the parrots. Fourie and a veterinarian, Dr Blunden, went to the DRC to inspect the parrots. The parrots were marked with rings for identification purposes. The plaintiff was invoiced for 1650 parrots at a price of USD 70 each. The invoice was referred to during evidence as well as documents evidencing transfer of US Dollars bought in South African Rand from Absa Bank. The invoice amount for the 1650 parrots was USD115, 500. According to the evidence, the plaintiff made three transfers of money to the seller on three different dates in part payment for the parrots. The total amount paid when the 800 parrots were imported into South Africa amounted to USD90, 000. This represented payment for more than what was imported as part of the first batch. On a perusal of the Forex-Branch Deal Receipts of Absa, the exchange rate between the Dollar and South African Rand was approximately R7, 20 to USD1 when payment was made.

- [4] The 800 parrots arrived in South Africa during or about November 2010 and were placed in quarantine in Kempton Park which is close to the airport. The prescribed quarantine period was 30 days.
- [5] The witness testified that the plaintiff spent a further approximately R200, 000 to construct cages for the parrots and incurred further transport costs.
- [6] Whilst the parrots were in quarantine, he received a call from Fourie informing him that a Court Order was issued in terms of which the parrots were attached by the defendant. The reason for the attachment was stated to be that Fourie owed the defendant money and that the parrots were attached on the basis to provide security to the defendant for the alleged debt.
- [7] The attachment order was made by my sister Judge Masipa on 12 December 2010, and reads as follows:
- "1. That the 800 African Grey parrots ('parrots') currently at the Quarantine Station, Kempton Park, 3 Mudfish Road, Bonaero Park and imported by the respondent, remain at the abovementioned address, alternatively at the address of a third party until such time as an action brought by the applicant to inter alia determine the ownership of the parrots is finalised;*
 - 2. That the applicant brings such an action within 14 days of the date of this Order;*
 - 3. That the costs of this application are costs in the main action."*
- [8] In response to this Court Order, the plaintiff launched an urgent application alleging that it was the owner of the parrots, and not Fourie as alleged by defendant. The plaintiff's application was for setting aside of the previous Court

Order and the release of the parrots to plaintiff. The defendant, being aware of the fact that the Kempton Park quarantine facility was closing down for the year suggested in an answering affidavit that the parrots could be transferred to a quarantine facility in KwaZulu-Natal, with which defendant already made arrangements. On 23 December 2010, Claassen J made the following order:

- "1. It is held that the application is not urgent;*
- 2. That the respondent is to transfer the 800 ringed African Grey parrots currently held at the Quarantine Station at 3 Mudfish Road, Kempton Park forthwith to the Toucano Quarantine Centre at Gateway, KwaZulu-Natal.*
- 3. The respondent is held responsible for the safety, transfer and upkeep of such birds paying all costs in regards thereto pending the finalisation of this matter.*
- 4. The respondent is to submit a bank guarantee in an amount of R2 million in favour of the applicant to the applicant's attorney VAN DEN BOEGERT GOLDNER INC, by not later than 16h00 on Wednesday 29 December 2010.*
- 5. Upon the respondent's failure to comply with any portion of the Order in paragraphs 2, 3 and 4 above, this Order will lapse and the birds will be released forthwith to the applicant.*
- 6. It is ordered that the application will stand as summons and the respondent is to file a declaration as plaintiff within 20 calendar days whereafter the Uniform Rules of Court will apply to such action.*
- 7. Costs of the application will be costs in the aforesaid action unless the relief in paragraph 5 above becomes applicable in which event the applicant is granted leave to set this matter down for argument regarding costs."*

[9] Moody testified that after the Court Order, the defendant's brother, Willem

Matthews, took the Court Order to the Kempton Park Quarantine Station and handed it over to the Quarantine Master. Pursuant to that, the parrots were taken to the OR Tambo airport to be flown to KwaZulu-Natal. He testified that the next thing he heard was that the parrots died. Later it was established that 31 parrots survived and the plaintiff's claim was amended to claim damages suffered as a result of the destruction and death of 769 parrots.

[10] Moody testified that the guaranteed amount of R2 million mentioned in the Court Order was never paid by the defendant.

[11] Subsequent thereto, the plaintiff, through its attorneys, asked for the return of the parrots whether dead or alive. However, the plaintiff received nothing. He testified that he had his doubts whether in fact the parrots were dead. He was at the Quarantine Station on 24 December 2010, but was not there when the parrots were taken to the airport for their transfer to KwaZulu-Natal. Later it was put to him that he was there, and he replied that he will not argue about that as things happened a long time ago.

[12] During cross-examination, Moody was referred to a document on a SARS letterhead indicating that Naauwpoort Parrot Breeders, the business of Fourie, was the importer. Moody testified that the plaintiff paid the R30, 893.94 mentioned in this document and that the plaintiff was the importer. He testified that Fourie only acted as the agent of the plaintiff and on this basis certain documents were made out in the name of Fourie.

[13] Khayaletu Mackson Limba testified that he was the Quarantine Master at the Kempton Park Quarantine Station. He said that the parrots arrived on 20

November 2010 and had to stay in quarantine for 30 days. He said by 23 December 2010, the quarantine period was over. He testified that then a Mr Matthews (the brother of the defendant) came to fetch the parrots. He was informed that he was not the owner. The Court Order was then shown to him and after speaking to his head office, it was confirmed that the parrots had to go to KwaZulu-Natal. He escorted the parrots to the airline. He said that it was transported in the defendant's brother's vehicle. Later he said he was uncertain about this. He testified that he signed some kind of release form but did not have a copy available. It was put to him that Moody was also there that day when the defendant's brother arrived. This was denied.

[14] Fourie testified that he acted as the agent for the plaintiff and in fact introduced the plaintiff to the exporter from the DRC.

[15] At some stage he received documents from certain traffic officers and signed for it. Unknowingly, he signed an acknowledgement of debt and received the first Court Order simultaneously. He said the parrots at all relevant times belonged to the plaintiff. He testified that he was not at the Quarantine Station when the defendant's brother was there.

[16] He only heard later that the parrots died. It later became common cause that the parrots were flown by One Time airline and during the flight the 769 birds died as a result of an unknown reason.

[17] Mr Dieter Horstman testified that he is an expert in the field of exotic birds and that the value of an adult breeding parrot pair was between R5,000 and R6,000. According to him, this is the price which a breeding pair would get in

the open market in South Africa. He was not cross-examined.

[18] This concluded the plaintiff's case.

[19] The defendant, Hendrik Matthews, testified that when he heard that Fourie was importing parrots he decided to attach these parrots as he was owed money by him. He obtained a Court Order on 11 December 2010 from Judge Masipa sitting in this division.

[20] He was aware that the Kempton Park Quarantine Station was closing down on 24 December 2010 and in anticipation, he started to arrange for another facility in KwaZulu-Natal. He testified about the Court Order which was made on 23 December 2010 by Judge Claassen. He never paid the guaranteed amount of R2 million as the parrots died before the time which was set for payment.

[21] The defendant testified that he never took possession of the parrots and stated that they were transferred in quarantine to another quarantine facility. All of this happened while he was on holiday in Mauritius and only on his return from Mauritius heard that the parrots had died. He testified that he was still not convinced that Fourie was not the owner of the parrots as some of the import and SARS documents were made out in his name or the name of Fourie's business. He testified that he never took possession of the parrots, they were never handed to him or to his brother. He filed a claim against the airline on which the parrots died, but nothing came of it.

[22] Willie Matthews testified that he is the brother of the defendant. On 24 December 2010, he went to the Quarantine Station on the request of the

defendant. There he found Moody, Fourie and his son, as well as Mr Limba. Mr Limba said the parrots will be loaded on an aircraft. The witness completed the waybill and payment was made. The crates with the birds were transported by the Quarantine Station to the airport by way of two trips using its transport. He left after the first trip and emphasised that he never took transfer or possession of the parrots. He later heard from Duncan from the Quarantine Station in KwaZulu-Natal that almost all the birds had died during the flight. He denied that he is the person that handed the Court Order to Mr Limba.

[23] This concluded the evidence in this matter.

[24] After the evidence was led, the court afforded the parties an opportunity to file heads of argument. The matter stood down and on resumption, counsel on behalf of the parties argued the matter on its merits and on quantum. During the argument on quantum, the court raised with the plaintiff whether the method of calculation of the quantum based on the re-sale value of breeding pairs in South Africa was in fact the correct way to calculate damages.

[25] This issue pertaining to the manner of calculation of damages became contentious and the court afforded the parties a further opportunity to file short heads of argument on this issue.

[26] Instead of filing heads of argument, the plaintiff gave notice that it intended to re-open its case and that the issue in respect of the determination of the quantum of the claim should be separated from the remaining issues in dispute between the parties and be postponed *sine die*. The defendant did not oppose this application.

[27] On the resumption of the matter, the Court heard argument and dismissed the application. The Court gave an *ex tempore* judgment which is not repeated herein; save to state that the Court found that both parties closed their cases and that the plaintiff at that stage already led evidence pertaining to the quantum of damages suffered by it. It would not have been in the interests of justice to provide the plaintiff with a further opportunity to lead evidence pertaining to quantum.

[28] After the dismissal of the plaintiff's application, the defendant then moved for an amendment of its plea, by the addition of a further paragraph to read as follows:

"21. Despite the fact that there was a Court Order in place, the death of the birds was caused by vis majeure and the negligence of the plaintiff can be seen in all the annexures attached to the various Applications and Summonses in that it could be nowhere established who the real owners (owner) of the birds were."

[29] The defendant intended to establish a whole new defence by relying on *force majeure*. It was argued that the destruction of the parrots during the flight amounts to *force majeure* and the defendant cannot be held liable as a result of that.

[30] The Court considered the application which was also dismissed as no reasons were provided why its defence was not properly pleaded initially. The introduction of the amendment would have caused an application for re-opening of the case and the leading of further evidence. This matter has been pending since 2010 and the plaintiff would have been prejudiced by a further delay. Moreover, the death of the birds during a flight could, in my view, not be

an event which could be regarded as *force majeure*. The proposed introduction of a further defence would have been excipiable.

[31] The parties were then again invited to file short heads of argument on the quantum issue. The Court never received further heads of argument.

[32] The main questions to be answered in this matter is whether the plaintiff was the importer and owner of the parrots who suffered the loss and whether the defendant is legally liable for the damages suffered by the plaintiff. If these questions are found in favour of the plaintiff the further question arises as to the extent of the plaintiff's damages.

Was the plaintiff the importer and owner of the parrots?

[33] Considering the evidence as a whole, the court is satisfied that, although certain documents indicated that Fourie was the importer, the plaintiff was the importer and became the owner of the parrots. The plaintiff paid for these parrots and has indicated on a balance of probabilities that Fourie merely acted as the plaintiff's agent.

The defendant's liability

[34] The plaintiff relied on the Court Order made on 23 December 2010, in terms of which the defendant was held responsible for the safety, transfer and upkeep of the parrots and had to pay all costs in regard thereto from date of the Order. The plaintiff further relied on the *actio ad exhibendum* on the basis that the plaintiff was the owner of the birds and the defendant, with the knowledge of the plaintiff's ownership, or at the very least, the plaintiff's claim to ownership,

took possession of the parrots and failed to return the parrots.

[35] On behalf of the defendant it, was argued that the *actio ad exhibendum* is not available to the plaintiff as the defendant never took possession of the parrots and the defendant never acted with any *mala fides*. There is no evidence to suggest that the defendant intentionally disposed of the parrots or caused their destruction intentionally or negligently. It was argued that the defendant had all the reasons to believe that Fourie was the owner of the parrots as certain documents pertaining to the import indicated Fourie as the importer. It was conceded on behalf of the defendant that the Court Order of Judge Claassen placed the risk on the defendant. It was argued that the defendant however was always *bona fide* and did everything in his power to take the necessary steps to safeguard and feed the parrots and attend to their general wellbeing. As the parrots were never in the defendant's possession, he fulfilled his obligations in terms of the risk. He never acted negligently. The defendant could never have assumed the risk of a third party's actions, being One Time Airlines ("One Time") who flew the parrots to Kwazulu-Natal during which flight the parrots died. It was argued that the plaintiff should have acted against One Time as it is most probably the airline's negligence that caused the death of the parrots.

The *actio ad exhibendum*

[36] The plaintiff has failed to prove that the defendant acted *mala fide* and disposed of the property of the plaintiff. There is also no indication that the defendant intentionally or negligently caused the destruction of the parrots. Accordingly, I am of the view that the plaintiff failed to prove this cause of

action.

Liability of the defendant

[37] The Court Order made on 23 December 2010 made the defendant responsible for the safety, transfer and upkeep of the parrots. This court order would have lapsed on 29 December 2010 if the defendant failed to comply therewith. Before this date, the parrots died and it became impossible for clause 5 of the order to be complied with. The defendant was no longer in the position to return the parrots. Fact is, the court order pertaining to the safety, transfer and upkeep of the parrots was still effective.

[38] In my view, the risk was placed on the defendant should anything happen to the parrots either before the conditions were fulfilled or thereafter if fulfilled. The liability of the defendant is established not by way of an assumption of the risk but in terms of a Court Order which was made in line with the defendant's request to keep the parrots at a quarantine station in Kwazulu-Natal. The source of the assumption of risk vests in the Court Order. This liability would be one where fault plays no role. The court does not have to consider whether the defendant acted intentionally or negligently or whether the defendant took possession of parrots. In fact, on the evidence it can be accepted that the defendant never acted as such and that the parrots died in transit as a result of a cause totally out of the control of defendant. What caused the death of the parrots is unknown to this Court. Whether the airline acted negligently is also irrelevant for purposes of the plaintiff's claim.

[39] On an interpretation of the court order, the defendant was made responsible for

the safety, transfer and upkeep of the parrots. The intention of the court making the order can be gauged from the wording of the order itself. The court ordered that a guarantee should have been paid in the amount of two million rand. This is a clear indication that should defendant wanted to keep his security in the parrots for the amount he was allegedly owned by Fourie, he had to take the risk as far as the safety and upkeep of the parrots were concerned. This will include the risk of the death and destruction of the parrots. Unfortunately for the defendant, an event he could not control took place, but the risk of such an event taking place rested squarely on the defendant.

[40] A link between wrongfulness and damage can exist only when both are required for liability. In my view, where risk under these circumstances rests with a party, proof of wrongfulness is not required. This will be similar to a so-called strict liability or a liability which vests without fault.

[41] Accordingly, this Court finds that the defendant is liable for the damages suffered by the plaintiff as a result of the destruction of the 769 parrots.

Damages

[42] The only questions which remain for consideration are, first, what is the legally correct method of calculation of damages and, second, what damages have been proven by the plaintiff.

[43] According to the particulars of claim, the plaintiff sued for the market price per parrot which was stated to be R2 500 per parrot.

[44] Evidence was lead that a parrot breeding pair could be sold for between R5

000 and R6 000 in the open market.

[45] If the price which was paid per parrot in US dollars is converted into South African Rand, at the rate of 7.2 Rands per dollar when the parrots were imported, the purchase price per parrot was approximately R 504 per parrot. No evidence in relation to the other expenses such as veterinarian costs, transport and other costs incurred relating to the import of the parrots was lead. Also, no evidence was lead to indicate that it would not have been possible for plaintiff to import replacement parrots. The court must accept that plaintiff could again have imported parrots at similar prices. There was evidence relating to import tax paid to SARS in the amount of R30 893,94. Although exhibit "H" 48 indicates that Naauwpoort Parrot Breeders as the importer the court is satisfied that plaintiff used the former as its agent and would have been responsible for the import duty. Plaintiff, however, never included in its claim a claim for expenses incurred. The plaintiff's claim is limited to the parrots alone.

[46] I am of the view that the plaintiff would be entitled to damages as measured in delict, i.e. its negative interesse. An amount of money must be calculated which was required at the time to have placed the plaintiff in the hypothetical financial position it would have enjoyed had the destruction of the parrots not happened. In this instance, it would be the cost to replace the birds at the time of the destruction by importing the parrots and for expenses actually incurred. The plaintiff would not be entitled to contractual damages as it claimed for. The assessment of damage for breach of contract is done in terms of positive interesse and this refers to actual as well as prospective losses. This will include the loss of profit.

[47] In this instance, it is clear that the market value, in the sense of what each breeding pair could have been sold for in South Africa, included a substantial profit margin. Moreover, this calculation can only be used in a contractual scenario if all the parrots could have been sold within a short period of time. If not, expenses to keep the parrots and other costs of sale should have been deducted from the selling price.

[48] This brings me to the calculation of damages using the amount which the plaintiff paid per parrot. If this is done, the plaintiff at the time of the destruction of the parrots, suffered damages to the extent of R504 per parrot, (USD70 multiplied by 7, 2 being the exchange rate) multiply by 769, (the number of parrots) plaintiff never received. This calculate to an amount of R387 576. The plaintiff's claim was always made in South African Rand. From the inception of the matter the plaintiff has elected not to claim for other expenses incurred. Insufficient evidence was placed before this court to calculate other expenses incurred to which the plaintiff would have been entitled to as part of its damages.

[49] The plaintiff claimed for interest at the 15.5 % (which was the legal rate at the time of the summons) per annum calculated from 24 December 2010, alternatively, 29 December 2010, further alternatively from the date of service of the summons to date of final payment. I am of the view that in terms of section 2A (2) (a) of the Prescribed Rate of Interest Act,¹ the plaintiff would be entitled to interest from date of serving of the summons being 29 September 2011. The summons was served approximately 8 years ago and the interest in

¹Act 55 of 1975

all likelihood may be more than the capital debt. In such case, the plaintiff's claim will be limited to no more than double the capital amount.

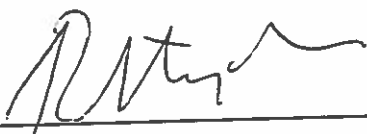
[50] As far as cost are concerned, the order must follow the result. This will include costs of the urgent application dated 23 December 2010, but exclude cost of the unopposed application for re-opening of the plaintiff's case.

[51] The following order is made:

[51.1] The defendant is ordered to pay the plaintiff the amount of R 387 576;

[51.2] The defendant is ordered to pay interest on the amount of R387 576 at the legal prescribed rate calculated from 30 September 2011 to date of payment;

[51.3] The defendant is ordered to pay the plaintiff's cost of suit, including the cost incurred on 23 December 2010.


STRYDOM
JUDGE OF THE HIGH COURT

Appearances:

Applicant's Counsel

: Adv Lafras Uys

Applicant's Attorneys

: Gildenhuys Malatji Inc

The Respondents' Counsel

: Adv Louis Mattysen

The Respondents' Attorneys

: Chris Kotze & Partners

Date of hearing

: 27, 28 May and 25 June 2019

Date of judgment

: 15 August 2019 at 10h00