



SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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Eastern Cape Parks and Tourism Agency v Medbury (Pty) Ltd (816/2016) [2018] ZASCA 34 (27 March 2018)

Today the Supreme Court of Appeal (SCA) upheld an appeal against a judgment of the Eastern Cape High Court, Grahamstown. The issue on appeal concerned the ownership of a valuable herd of Cape Buffalo, which escaped from the Thomas Baines Nature Reserve in the Eastern Cape (the reserve), a provincial nature reserve managed in the public interest by the appellant, the Eastern Cape Parks and Tourism Agency (the Agency).

A brief background of the matter is that, the first respondent, Medbury (Pty) Ltd t/a Crown River Safari (Medbury) was the owner of a property known as the Medbury Aloe Ridge Game Farm (the Medbury property), the property abuts the reserve. The common boundary between the Medbury property and the reserve was the Settlers Dam (the dam). The reserve was enclosed by a fence save for the part of the common boundary with the Medbury property which was the dam. Between December 2010 and February 2011, and in the course of an extreme drought in the reserve, the water in the dam dropped to the extent that some of the buffalo found their way onto the Medbury property. After the water level was restored the buffalo remained there and Medbury claimed ownership. This led to the institution of legal action by the Agency for the return of the herd.

The relevant statutory provision is s 2 of the Game Theft Act 105 of 1991 (the GTA). The buffalo are game as defined by the GTA. Section 2(1)(a) of the GTA, in essence, provides that a person who keeps game on land that is sufficiently enclosed shall not lose ownership of such game if the game escapes from such enclosed land. Section 2(2)(a), goes further and

provides that land shall be 'deemed' to be sufficiently enclosed if according to a certificate, of the Premier of the Province or his assignee in which the land is situated, it is sufficiently enclosed to confine to that land the species of game mentioned in the certificate.

The questions on appeal were whether: (i) a certificate in terms of s 2(2)(a) of the GTA is the sole prerequisite for the operation of s 2(1)(a) of the GTA; and (ii) the common law must be developed to promote the spirit, purport and object of the Bill of Rights in the Constitution, to provide that wild animals which are sufficiently contained within a protected area managed by an organ of state in terms of nature conservation legislation are *res publicae* owned by such organ of state. It was agreed that In the event of the SCA finding in favour of the Agency in respect of the first question, it would not be necessary to answer the second question.

At no time had the Premier of the Province or his assignee issued a certificate in terms of s 2(2)(a) of the GTA, stating that the reserve was sufficiently enclosed. The Agency contended that despite the escape of the buffalo, and the consequences which might otherwise have followed at common law, it, as an organ of state which manages the reserve, has the right to exercise control over the buffalo and was entitled to the return of the herd. Medbury contended that such a certificate was a prerequisite for the operation of s 2(1)(a) of the GTA and that, absent such a certificate the Agency, because of the operation of the common law, is to be regarded as having lost its rights in relation to the herd of buffalo. Medbury having exercised control over the herd of buffalo was now the owner, so the argument went.

At common law, a wild animal which was captured regained its natural state of freedom once it escaped. It reverted to *res nullius*, with the result that any person could acquire ownership of it anew through *occupatio*. This was the basis of the claim of ownership by Medbury.

The SCA took into consideration how deeming provisions have been dealt with in case law and by commentators. Deeming provisions must always be construed contextually and in relation to the legislative purpose. The SCA held that it would be absurd to construe the deeming provision in the manner contended for by Medbury, namely, that the certificate is a prerequisite for the protection afforded by the GTA to apply. This would defeat the legislative purpose of the GTA which is to ensure that owners of game who have *in fact* taken adequate measures to enclose land in order to confine game do not lose ownership in the event of loss of control due to escape.

The SCA found that the production of a certificate was meant to facilitate proof that the land in issue was sufficiently enclosed to confine the species in question. It was not meant to prevent owners who had taken the necessary measures to sufficiently enclose game on land from proving that fact. The SCA concluded that the deeming provision in question cannot be

extended to preclude another form of proof that the land was sufficiently enclosed so as to confine the relevant game. The first question was thus answered in favour of the Agency.

The appeal was upheld with costs, including the costs of two counsel.