

# SUMMARY OF THE JUDGMENT

## TENUOUS OWNERSHIP OF WILD THINGS

### Eastern Cape Parks and Tourism Agency v Medbury (Pty) Lts t/a Crown River Safari and Another (1466/2013) [2016] ZAECGHC 2 (18 February 2016)

*Ownership of game is only protected when game is held on land that is considered to be sufficiently enclosed. The land is considered to be sufficiently enclosed when it has been issued a formal 'certificate of sufficient enclosure' by the provincial premier. The case is illustrative of the consequences if no such certification is in place.*

*The Judgment can be viewed [here](#).*

#### FACTS

The Thomas Baines Nature Reserve vests in the Eastern Cape government. It is managed by the Eastern Cape Parks and Tourism Agency (the Agency), an organ of state.

The common boundary between the reserve and the neighbouring Medbury Game Reserve includes the Settlers Dam.

The Agency indicated that during the course of its management of the reserve, it had enclosed the reserve sufficiently to contain its buffalo within its boundaries. That enclosure included fencing the boundary of the reserve, except for the common boundary formed by the dam. It considered that it was not necessary to fence off that part of the reserve because the water formed a natural barrier over which the buffalo would not have been able to pass under normal circumstances.

During the period of a protracted drought (about December 2010 to February 2011), when the level of the dam was at a historical low, all the buffalo, except for one, escaped to the Medbury Game Reserve. When the drought was subsequently broken and the dam had risen to its usual levels, the buffalo remained on the Medbury Game Reserve.

The Game Theft Act 105 of 1991 is applicable and determines that:

#### *"2. Ownership of game*

##### *(1) Notwithstanding the provisions of any other law or the common law –*

*(a) A person who keeps or holds game or on behalf of whom game is kept or held on land that is sufficiently enclosed as contemplated in subsection (2), or who keeps game in a pen or kraal or in a vehicle, shall not lose ownership of that*

*game if the game escapes from such enclosed land or from such pen, kraal or vehicle;*  
*(b) ...*

*(2) (a) For the purpose of subsection (1) (a) land shall be deemed to be sufficiently enclosed if, according to a certificate of the Premier of the province in which the land is situated, or his assignee, it is sufficiently enclosed to confine to that land the species of game mentioned in the certificate."*

The Agency did not obtain a certificate of sufficient enclosure as required in section 2(2) (a) of the Act.

The Agency argued that despite the fact that the buffalo remained on the Medbury Game Reserve, it still owned them as:

- on a reasonable and contextual reading, the Act provided that a person who keeps or holds game on land which is in fact adequately enclosed or covered by a certificate of sufficient enclosure as contemplated in section 2(2)(a), shall not lose ownership of that game if the game escapes from the land. In other words, the certificate of sufficient enclosure is not the only prerequisite for the protection afforded against loss of ownership of escaped game and a land owner who is able to establish through evidence that the game had in fact been sufficiently enclosed, is also entitled to the protection against loss of ownership; or
- that the buffalo were wild animals sufficiently contained in a protected area (the Thomas Baines Reserve) managed by an organ of state in terms of legislation aimed to promote conservation. The common law must be developed by the court in terms of the Constitution - to promote the spirit, purport and object of the Bill of Rights - to provide that wild animals which are sufficiently contained on a protected area managed by an organ of state charged with the management thereof in terms of relevant nature conservation legislation in order to promote conservation are *res publicae* owned by such organ of state.

Medbury Game Reserve argued, on the other hand, that the protection against loss of ownership only avails land owners when a certificate of sufficient enclosure had been issued (regardless of whether or not the land is in fact adequately enclosed).

**HELD:**

***Requirement to have a certificate***

- Our law regarding the interpretation of documents, including statutes, was summarised in *Natal Joint Municipal Pension Fund v Endumeni Municipality*. That

court stated that: *“Interpretation is the process of attributing meaning to the words used in documents, be it legislation, some other statutory instrument or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in light of the ordinary rules of grammar and syntax, the context in which the provision appears; the apparent purpose to which it is directed in the material known to those responsible for its production.”*

- It is also accepted that where the language of a statute is clear and unambiguous, effect must be given thereto unless to do so would lead to absurdity so glaring that it would never have been contemplated by the Legislature.
- When the section is interpreted in accordance with these legal principles, the clear and unambiguous language of section 2 compels the following construction:
  - 1) section 2(1)(a) of the Act protects ownership of game only when such game is held on land that is sufficiently enclosed as contemplated in subsection (2) (b); and
  - 2) in terms of subsection 2 (1) (a), land is deemed to be sufficiently enclosed if according to a certificate issued by the Premier, it is sufficiently enclosed to confine to that land the species of game mentioned in the certificate.
- The protection against loss of ownership is thus not extended generally to land that is sufficiently enclosed, but only when the species of game mentioned in the certificate is kept on land in respect of which the certificate has been issued.

The Agency’s argument in this regard had to fail.

#### ***Development of the common law***

- In terms of the common law, wild animals are *res nullius* (belongs to no one) and ownership can only be acquired through occupation, namely capturing and exercising effective control over them with the intention to possess them. When, however, they manage to escape from the controlled environment they revert to their natural state and again become *res nullius*. The Act effectively amended this common law rule to the extent that protection is afforded against loss of ownership of those wild animals defined as “game” and in respect of which a certificate of sufficient enclosure had been issued.
- The Agency contends for the development of the common law so as to provide that public nature conservation animals that escape from a protected area managed by an organ of state, remain the property of that organ of state.

- On the facts of this case, it was not necessary nor appropriate to develop the existing common law rule. It had not been shown that the rule is in conflict with any constitutional provision, or that it fell short of the spirit, purport, or objective of the Constitution.

The Agency's argument in this regard also failed.

#### CONTACT US

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|----------------------------------|--------------------------------------|-------------------------------------|------------------------------------|
| ■ CAPE TOWN<br>Tel: 021 406 9100 | ■ SOMERSET MALL<br>Tel: 021 850 6400 | ■ TYGER VALLEY<br>Tel: 021 943 3800 | ■ FOURWAYS<br>Tel: 010 001 2632    |
| ■ CLAREMONT<br>Tel: 021 673 4700 | ■ STELLENBOSCH<br>Tel: 021 001 1170  | ■ MENLYN<br>Tel: 012 348 1682       | ■ CENTURION<br>Tel: 012 001 1546   |
| ■ FISH HOEK<br>Tel: 021 784 1580 | ■ BLOUBERG<br>Tel: 021 521 4000      | ■ ILLOVO<br>Tel: 011 219 6200       | ■ BEDFORDVIEW<br>Tel: 011 453 0577 |