IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED. ✓
6/12/11
DATE SIGNATURE

CASE No. 66601/2010

9/12/2011

In the matter between:

PETER JOHN GUTHRIE	First Applicant
LESLIE GUTHRIE	Second Applicant

and

ETANGO GAME LODGE (PTY) LTD	First Respondent
PETE LOURENS	Second Respondent

JUDGMENT

Van der Byl, AJ:-

Introduction

[1] The two Applicants are, by virtue of a Certificate of Registered Title dated 14 July 2007, the registered owners of a unit consisting of a section described and identified as Section No. 43 on Sectional Plan No. SS 422/09 in the scheme known as Etango Private Game Reserve on the farm Rhenosterhoekspruit situate in the municipal area of Bela Bela in the Limpopo Province ("the Scheme") and an undivided share in the

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common property in the Scheme.

[2] The First Respondent is admittedly the developer of the Scheme.

[3] The two Applicants purchased the portion on which the unit was constructed from the First Respondent in terms of a deed of sale concluded between the parties on 15 March 2007.

[4] In terms of the deed of sale (**record p. 29**), read together with the conditions of sale (**record p. 22**) -

(a) the purchase price was a sum of R650 000;

(b) the Applicants warranted to commence with the construction of a unit within five years and that such construction shall be completed within one year (**clause 3.4**);

(c) the Applicants will be liable from date of transfer for the payment of a monthly levy to the body corporate (**clause 5**);

(d) the First Respondent will, within a period of six months after the date of registration or on completion of the construction of the unit, provide for household purposes a water point (**clause 6.2**);

(e) the Applicants shall be allowed to use only the safari vehicle allocated by the body corporate to their unit (upon completion thereof) on the property (**clause 12.2(a)**;

(f) no hunting of any kind is allowed on the property or anywhere in the scheme save for such selective culling as may be directed by the body corporate (**clause 12.2(j)**);

(g) the First Respondent undertakes and warrants that certain specified game will reside on the common property (**clause 13**);

(h) the First Respondent or body corporate will supply an electrical connection point at any border of the unit, the connection fee and other expenses in respect of the electrical box and cables to be borne by the Applicants (**clause 19.2**).

Applicant's case

[4] It is the Applicants' case, as set out in their founding affidavit -

(a) that they were approached during or about March 2007 by representatives of the First Respondent to invest in a share of a private game reserve;

(b) that on the basis of a brochure (**record p. 46, Annexure G2**) setting out details pertaining to the purchase of such share provided to them at the time it was

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represented to them, inter alia -

(i) that the game reserve will be fully stocked with game;

(ii) that a new clubhouse or wellness centre would be build which would include a gymnasium, squash court, beauty salon, lounge and a rock faced heated swimming pool;

(iii) a six seater game drive vehicle would be included in the purchase price of the stand;

(c) that they were by these representations induced to purchase the section i question and concluded the deed of sale to which I have already referred to;

(d) they completed the building of their unit and took occupation during December 2008 and have at the time the application was launched expended an amount of approximately R3 329 817 on improvements of the property;

(e) that during or about June 2010 they noticed a drastic decrease in the game roaming in the reserve and were upon enquiry informed by the game rangers that the Second Respondent had been selling the game;

(f) that the First Respondent failed to provide the erection and installation of an electrical connection and to make available the six seater game vehicle as

provided in the deed of sale;

(g) that they on 30 July 2008 contacted the two Respondents and enquired when the electricity would be connected and the safari vehicle be delivered;

(h) that the Respondents in a reply by way of an email dated 31 July 2008 indicated (1) in relation to the electricity, that the Second Respondent was in a meeting with the electrical engineers and that Eskom are allowing only 3KVA per house, but that they have come up with a system that will supply 6KVA per house, and (2), in relation to the vehicle that they will supply them with their vehicle once they have taken occupation of their unit.

[5] The Applicants' attorneys of record on 18 August 2010 addressed a letter to the First Respondent in which it was contended that the First Respondent breached the agreement of sale in that -

(a) it failed to provide the Applicants with a safari vehicle;

(b) it failed to erect and install an electrical connection point;

(c) it failed to erect the clubhouse / wellness centre;

(d) certain game has disappeared from the reserve and that they were advised that it has sold the game without their consent.

[6] In view thereof the First Respondent was requested to provide the Applicants with a written undertaking within 48 hours -

(a) that no game will be sold or hunted without the written consent of the Applicants;

(b) that the clubhouse / wellness centre is erected and in use on 1 December 2010;

(c) that the Applicants will be provided with a safari game vehicle within six weeks from date of the letter;

(d) that the electrical connection will be erected and stalled within seven days from date of the letter.

[7] The First Respondent failed to respond to this letter. It is the Respondents' contention raised in their answering affidavit that they did not respond because they were under no obligation to give any undertakings. In my view, apart from being bad manners not to respond, the Respondents should, at least as a matter of courtesy, have responded to the letter.

[8] I can now turn to the relief claimed by the Applicants and the Respondents' response thereto as set out in the answerings affidavit:-

Prayers 1, 2, 3 and 4

...i.

[9] In these prayers the Applicants seek an order -

(a) prohibiting the First and Second Respondents from capturing, selling or allowing hunting of game on the Etango Private Game Reserve without the prior written consent of all the members iof the body corporate (**prayer 1**);

(b) ordering the First and Second Respondents to supply, within 30 days as from date of this order, comprehensive records to the Body Corporate and all its members of game captured, sold, hunted and culled (**prayer 2**);

(c) ordering the First and Second Respondents to provide, within 30 days as from date of this order, comprehensive records and information to the Body Corporate or its members in respect of the proceeds from the sale of game from 15 July 2009 to date of this order (**prayer 3**); and

(d) ordering the First and Second Respondents to restore, within a period of one year from date of this order, all such games as had been captured and sold during the period referred to in prayer 3 (**prayer 4**).

[10] These prayers are obviously based on clause **12.2(i)** (**record p. 42**) of the Conditions of Sale which reads as follows:

> "*No hunting of any kind is allowed on the property or anywhere in the scheme, save for such selective culling as may be directed by the body corporate in a manner prescribed by the body corporate.*".

[11] As already indicated the Applicants during or about June 2010 noticed a drastic decrease in the game roaming in the game reserve and upon enquiries made they were informed by the game rangers that the Second Respondent had been selling the game.

[12] In response the Respondents admit that approximately 12 wildebeest were, as allegedly witnessed by the First Applicant, captured during or about the end of 2009 and were sold to a third party (**record p. 96, paragraph 12.5.2**) and, furthermore, admit that, in addition to the 12 wildebeest, they also removed and sold two giraffe and culled four impala (**record p. 98, para 12.10**).

[13] In defence of their actions they contend that there is no body corporate in existence and that the Applicants failed to show that they are entitled to enforce rights that only the body corporate can exercise (**record p. 99, para 12.12**) and that they had to do that because the Reserve is because of its size limited to a maximum of so-called "*large stock units*" (**record p. 95, para 12.5**).

[14] As far as the existence of a body corporate is concerned, I have been referred to section 36(1) of the Sectional Titles Act, 1986 (Act 95 of 1986) ("*the Act*") which reads as follows:

> "*With effect from the date on which any person other than the developer becomes an owner of a unit in a scheme, there shall be deemed to be established for that scheme a body corporate of which the developer and such person are members, and every person who thereafter becomes an owner of a unit in that scheme shall be a member of that body corporate.*".

[15] These provisions are echoed in paragraph 11.1 of the Conditions of Sale (**record p. 39**) which reads as follows:

> "*The Purchaser hereby records that he is aware of the fact that he will become a member of the Body Corporate of the Scheme not later than the date upon which the Dwelling is built and the Sectional Plans thereof are registered at the Deeds Office.*".

[16] A similar indication appears from clause 7.1 which reads as follows:

> " ... *The purchaser shall be deemed to be a member of the Body Corporate from the date of registration of the aforesaid real right in his name and thus be liable for the payment of levies.*".

[17] The expression "*Corporate Body*" is defined in paragraph 1 of the Conditions of Sale (**record p. 33**) as "*the Body Corporate as contemplated in section 36 of the Act*". As already indicated, the Applicants completed the building of their unit on or about December 2008. This allegation is not disputed by the Respondents.

[18] It is clear that the First and Second Applicants are the first and up to the date on which they became the registered owners of a unit in the Scheme, the only persons who became owners of a unit in the scheme.

[19] At the hearing of this matter, the Respondents seem no longer to have adhered to the their contention that no corporate body existed, but submitted that the Applicants failed to comply with the provisions with section 41(2), read with section 36(6), of the Act and with management rule 71

[20] Section 41(1), (2) and (3) of the Act in so far as it is relevant for present purposes reads as follows:

> " *(1) When an owner is of the opinion that he and the body corporate have suffered damages or loss or have been deprived of any benefit in respect of a matter mentioned in section 36(6), and the body corporate has not instituted proceedings for the recovery of such damages, loss or benefit, or where the body corporate does not take steps against an owner who does not comply with the rules, the owner may initiate proceedings on behalf of the body corporate in the manner prescribed in this section.*
>
> *(2) (a) Any such owner shall serve a written notice on the body corporate calling on the body corporate to institute such proceedings within one month from the date of service of the notice, and stating that if the body corporate fails to do so, an application to the court under paragraph (b) will be made.*
>
> *(b) If the body corporate fails to institute such proceedings within the said period of one month, the owner may make application to the Court for an order appointing a curator ad litem for the body corporate for the purposes of instituting and conducting proceedings on behalf of the body corporate.*
>
> *(3) The court may on such application, if it is satisfied -*
>
> *(a) that the body corporate has not instituted such proceedings;*
>
> *(b) that there are prima facie grounds for such proceedings; and*
>
> *(c) that an investigation into such grounds and into the desirability of the institution of such proceedings is justified,*
>
> *appoint a provisional curator ad litem and direct him to conduct such investigation and to report to the Court on the return day of the provisional order.*".

Section 36(6) of the Act referred to in section 41(1) reads as follows:

> "*(6) The body corporate shall have perpetual succession and shall be capable of suing and of being sued in its corporate name in respect of -*

(a) any contract made by it;

(b) any damage to the common property;

(c) any matter in connection with the land or building for which the body corporate is liable or for which the owners are jointly liable;

(d) any matter arising out of the exercise of any of its powers or the performance or non-performance of any of its duties under this Act or any rule; and

(e) any claim against the developer in respect of the scheme if so determined by special resolution.".

[21] First of all, although this contention is in the nature of a legal contention, it is a contention not raised in the papers.

[22] It is, however, dependent on facts on which it can be based. In this case the legal point is based on the question whether a written notice was served on the body corporate or whether it was requested to institute action (***Swissborough Diamond Mines (Pty) Ltd v Govt of the RSA 1999 (2) SA 279 (T) at 323F***). The only allegation that it had not been done is made in the Heads of Argument filed on behalf of the Respondents.

[22] I am accordingly unable to consider the application of subsection (3) of section 41.

[23] Furthermore, it is contended that the Applicants failed to comply with management rule 71 providing for a dispute between a body corporate and the body corporate to be resolved by way of arbitration and that the game on the nature reserve remain the property of the First Respondent. It is not correct as contended in the Heads

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of Argument filed on behalf of the Respondents that the management rules are annexed to the Respondent's opposing affidavit. As in the case of the Respondents' reliance of section 41 of the Act, this is also an issue not raised by the Respondents in the papers.

[24] I am in any event of the opinion that this is not a matter where section 41 or rule 71, as explained in the Respondents' heads of argument, can find any application. In view of the fact that, as matters currently stand, the Applicants as owners of their unit and the First Respondent, as developer, are the only members of the corporate body. The dispute is not a dispute between a member and the body corporate. It is in fact a dispute between two members of the corporate body. The damages allegedly suffered are suffered because of the actions by the First Respondent, albeit through the Second Respondent, obviously for the benefit of the First Respondent. The damages suffered are accordingly not damages suffered by the Applicants and the First Respondent as another member of the body corporate. The Applicants' case is in fact that the First Respondent in its capacity as developer has acted contrary to the provisions of the Conditions of Sale by capturing and selling game without the permission of the one or the other of the Applicants in his or her capacity as a member of the corporate body.

[25] The conditions of sale in any event do not correspond with the provisions of Rule 71 as it allegedly provides. I have not been placed in possession of the rules and facts relevant to the application of those rules and am accordingly unable to determine the force and effect of those rules. Apart from this consideration the Applicants are, as provided in section 1(3A) of the Act, entitled to approach this Court for relief in so far as the parties are unable to come to a unanimous decision on any dispute between the

Applicants and the First Respondent.

[26] In the circumstances I am satisfied that the Applicants have made out a case in support of the relief claimed in prayers 1, 2 and 3 of the Notice of Motion.. As far as prayer 4 is concerned, I am unable on the papers to determine to what extent the game can be restored to numbers which may not exceed the limitations of game the reserve may carry. This is an issue which may be resolved as soon as the First Respondent reported to the body corporate in accordance with prayers 2 and 3.

Prayer 5

[27] In this prayer the Applicants seek an order ordering the First Respondent to give, within 30 days as from date of this order, proper notice of and hold an annual meeting of the body corporate of Etango Private Game Reserve.

[28] No allegations are contained in the founding affidavit (or even in the replying affidavit) in support of this prayer. There is no indication in the papers that the have indeed called for such a meeting and that the First Respondent failed or declined to do so.

[29] The Applicants are entitled and were at all times that they were entitled to call for a meeting of the corporate body.

[30] There is in my opinion no basis or reason for the granting of an order in terms

of which the First Respondent is ordered to call such a meeting.

Prayer 6

[31] In tis prayer the Applicants seek an order rectifying the Conditions of Sale by the insertion after paragraph 13.2 thereof an additional paragraph which shall read as follows:

> "*A new clubhouse/welness centre will be build which will include a gymnasium, squash court, beauty salon, lounge and a rock faced swimming pool.*".

[32] The Applicants' case in this regard is based on the contents of a brochure (**record p. 46**) provided to them at the time the conclusion of the agreement of sale was negotiated in which under the heading "*Expansions*": it is indicated that "*a new Clubhouse/Wellness centre will be built, which will include a gymnasium, squash court. beauty salon, lounge and rock faced heated swimming pool*".

[33] The object of rectification is to have a contract conform to the common intention of the parties.

[34] If regard is had to the First Respondent's answering affidavit (**record pp. 91 to 92, para 8**), it would appear that the parties indeed had a common intention that a clubhouse/.wellness centre would be constructed, but there was no agreement as to when it should be constructed. In this regard the First Respondent explains that the First Respondent in fact contemplated the addition of a clubhouse on the presumption that

the total of 47 transactions were to be concluded with third party purchasers resulting in the construction of 47 houses before the end of 2016.

[35] In any event the representation made to the Applicants by way of the brochure contains no indication when it would be constructed.

[36] I am accordingly satisfied that a clause to the one suggested in this prayer be incorporated in the agreement by way of rectification of the agreement, but certainly not one providing for such facility to be constructed within one year as from the date of any order granted in this regard as suggested in prayer 7.3 of the Notice of Motion.

Prayer 7

[37] In this prayer the Applicants seek an order (**prayer 7.3**) ordering the First Respondent to comply with its obligations in terms of the Conditions of Sale to the Deed of Sale, as rectified, by constructing, within one year as from the date of this order, a new clubhouse/wellness centre will be build which will include a gymnasium, squash court, beauty salon, lounge and a rock faced swimming pool.

[38] In so far, as I have already indicated, that there is no basis for an order directing the First Respondent to construct a clubhouse or wellness centre within any specified period, there is no basis for an order in those terms.

[39] In relation to the provision of an electrical connection (**prayer 7.1**), it is in my

view clear that the First Respondent is by virtue of clause 19.2 of the Conditions of Sale indeed bound to provide such a point.

[40] In relation to the provision of a safari vehicle (**prayer 7.2**), it is in my view clear from clause 12.2(a) of the Conditions of Sale, as seems to be conceded by the First Respondent in its email dated 31 July 2008 (**record p. 62, Annexure G5**), that it bound itself to supply such a vehicle as soon as the unit is completed and to allocate such vehicle to their unit.

Prayer 8

[41] In my view there is no basis for the relief claimed under this prayer, being in effect a claim for damages.

[42] In any event if relief is granted under prayers 7.1 and 7.2 there is no need for relief in these terms.

Order

[43] In the result I make the following order:-

1. **THAT** the Respondents be prohibited from capturing, selling or allowing hunting of game on the Etango Private Game Reserve without the prior written consent of all the members of the body corporate.

2. **THAT** the First Respondent be ordered to supply, within 30 days as from date of this order, comprehensive records to the First or Second Applicant in his or her capacity as member of the body corporate of the Etango Private Game Reserve of game captured, sold, hunted and culled on the Reserve since 15 July 2007..

3. **THAT** the First Respondent be ordered to provide, within 30 days as from date of this order, comprehensive records and information to the First or Second Applicant in his or her capacity as member of the body corporate of the Etango Private Game Reserve in respect of the proceeds from the sale of game since 15 July 2009.

4. **THAT** the Conditions of Sale to the Deed of Sale concluded between the First Respondent and the Applicants during or about March 2007 be rectified by the addition of the following subclause to clause 13 of the Conditions of Sale"

> "*13.3 "A new clubhouse/welness centre will be build which will include a gymnasium, squash court, beauty salon, lounge and a rock faced swimming pool.".*

5. **THAT** the First Respondent be ordered -

   (a) to supply or install, within 30 days as from the date of this order, an electrical connection point at the border of section No. 43 on Sectional Plan No. SS 422/09 in the scheme known as Etango Private Game Reserve (of which the Applicants are the registered owners);

(b) to obtain and allocate, within 30 days as from the date of this order, a six-seater game drive vehicle to the section referred to in paragraph (a) above.

6. **THAT** the First Respondent be ordered to pay the costs of this application.

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P C VAN DER BYL
ACTING JUDGE OF THE HIGH COURT

ON BEHALF OF APPLICANTS	**ADV A G JANSE VAN RENSBURG**
On the instructions of:	**DVD INC ATTORNEYS** **c/o BOTHA & HUMAN INC** **Suite 508, 5th Floor** **Olivetti House** **Pretorius Street** **PRETORIA** **Ref: M Engelbrecht /MK/JB0121** **Tel: (012) 0861 74 75 76**
ON BEHALF OF THE RESPONDENTS	**ADV R F DE VILLIERS**
On the instructions of:	**FRONEMAN ROUX & STREICHER** **2nd Floor, Soetdoring Building** **cnr Lupin Street & Protea Avenue** **Doringkloof, Centurion** **PRETORIA** **Ref: Mr. Streicher/jf/AE214** **Tel: 012 667 6158**
DATE OF HEARING	**5 December 2011**
JUDGMENT DELIVERED ON	**9 December 2011**