THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 816/2016

In the matter between:

EASTERN CAPE PARKS AND TOURISM AGENCY **APPELLANT**

and

MEDBURY (PTY) LTD t/a CROWN RIVER SAFARI **RESPONDENT**

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

Coram: Navsa, Seriti, Saldulker and Swain JJA and Schippers AJA

Heard: 28 February 2018

Delivered: 27 March 2018

Summary: Interpretation of s 2 of the Game Theft Act 105 of 1991 (the GTA) : whether ownership of animals which escape from land on which they have been contained is lost in the absence of a certificate provided for in s 2(2)*(a)* of the GTA stating that land sufficiently enclosed to contain species of game : deeming provision interpreted in context and with regard to legislative purpose : deeming provision not precluding owner in absence of certificate from proving that land sufficiently enclosed to contain species.

ORDER

On appeal from: Eastern Cape High Court, Grahamstown (Smith J sitting as court of first instance).

The following order is made:

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

2 The order of the court below is set aside and replaced with the following:

'(a) The separated issue set out in para 27.1 is decided in favour of the plaintiff.

(b) The defendant is ordered to pay the plaintiff's costs, including the costs of two counsel.'

JUDGMENT

Navsa JA (Seriti, Saldulker and Swain JJA and Schippers AJA concurring)

[1] This dispute concerns the ownership of a valuable herd of Cape Buffalo, which escaped from the Thomas Baines Nature Reserve in the Eastern Cape, a provincial nature reserve managed in the public interest by the appellant, the Eastern Cape Parks and Tourism Agency (the Agency). The Agency asserted that despite the escape of the buffalo and the consequence that 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 is entitled to the return of the herd, either in terms of prevailing legislation, or by way of a decision by the court, after developing the common law, in line with constitutional principles relating to conservation. The respondent, Medbury (Pty) Ltd t/a Crown River Safari (Medbury) contended that since the buffalo, after their escape, had been confined within its property it legitimately acquired ownership of the herd. The appeal is before us with the leave of this court. The background is set out hereafter.

[2] The Agency instituted action in the Eastern Cape High Court, Grahamstown, for the return of the buffalo and the parties agreed to have the dispute adjudicated on the basis of a stated case from which two issues, set out below, arise for decision.

Although some of the material allegations in the stated case are disputed by Medbury the parties were agreed that for the purposes of the adjudication of the separated issues the allegations in the agreed stated case should be assumed to be correct. The relevant parts of the stated case appear in the paragraphs that follow.

[3] The Agency was established in terms of s 10 of the provincial Eastern Cape Parks and Tourism Agency Act 2 of 2010 (the ECPTAA). On 19 December 1980, acting under s 6(1) of the Nature and Environmental Conservation Ordinance 19 of 1974 (the Ordinance), the then Administrator of the Cape Province established the Thomas Baines Nature Reserve (the reserve) as a provincial nature reserve.

[4] With effect from 17 June 1994, acting in terms of s 235(8) of the Interim Constitution, the President assigned the administration of the Ordinance to a competent authority, which vested in the Provincial Government. On 23 March 2005 the management of the reserve was assigned to the Eastern Cape Provincial Parks Board in terms of s 41 of the Provincial Parks Board Act 12 of 2003 (Eastern Cape).

[5] On 1 July 2010 the Agency, in terms of the ECPTAA, was established as successor to the Provincial Parks Board and assumed responsibility for the management of the reserve. The Agency's statutory brief is to promote conservation in the province and, in so doing, to protect the environment for present and future generations, as contemplated in s 24*(b)*(ii) of the Constitution. The Agency charged the general public an entry fee upon visits to the reserve and was entitled to engage in commercial activity to meet its statutory and constitutional objectives.

[6] At all material times the reserve was a protected area as contemplated in the ECPTAA and a provincial protected area, as envisaged in the National Environmental Management: Protected Areas Act 57 of 2003 (NEMPAA).

[7] At relevant times Medbury was the owner of a property known as the Medbury and Aloe Ridge Game Farm and as the Medbury Game Reserve. The property abuts the reserve. The common boundary between the Medbury property and the reserve has always been the Settlers Dam (the dam). According to the Agency the water in the dam formed a barrier between the adjoining properties. Before the events

referred to in the next paragraph, there was within the reserve a herd of Cape Buffalo, which in terms of our law are wild animals. There were approximately 20 buffaloes in the herd. The reserve was enclosed by a fence save for the part of the common boundary with Medbury that was the dam. The dam was historically considered by the Agency to be sufficient to contain the buffalo because the water level did not allow the buffalo to cross. The Agency alleged that it was the owner of the buffalo because they are wild animals sufficiently contained on the reserve, with the intention that they should be and remain its property.

[8] During the period December 2010 and February 2011 and in the course of an extreme drought in the area in question the water in the dam dropped to such a level that some of the buffalo found their way onto Medbury's property. After the water level was restored the buffalo remained there. Medbury contended that it thus acquired ownership of the buffalo and refused to return the herd to the agency. That led to the action instituted by the Agency for the return of the herd.

[9] It is necessary at this point to have regard to statutory provisions essential in the adjudication of the dispute, namely s 2 of the Game Theft Act 105 of 1991 (the GTA), which provides:

'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.

(b) A certificate referred to in paragraph (a) shall be valid for a period of three years.'

[10] The buffalo are game as defined in the GTA.[1] At no relevant time has the Premier of the Province issued a certificate in terms of s 2(2)*(a)* of the GTA stating that the reserve was sufficiently enclosed. Medbury adopted the attitude that such a certificate was a prerequisite for the operation of s 2(1)*(a)* of the GTA, which provides that 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 s 2(2)*(a)*, or who keeps game in a pen or kraal or vehicle, shall not lose ownership of that game if that game escapes from any of the confines referred to. Absent such a certificate, so it was contended on behalf of Medbury, the Agency, because of the operation of the common law, is to be regarded as having lost its rights in relation to the herd, and Medbury subsequently having exercised control over the herd of buffalo was now the owner.

[11] The issues identified by the parties for adjudication by the court below were as follows:

(i) Whether 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) whether the common law must be developed to promote the spirit, purport and object of the Bill of Rights in the Constitution, more specifically s 24*(b)*(ii) thereof 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 organs of state.

[12] The court below (Smith J), had regard to the provisions of s 2 of the GTA and concluded as follows (paras 24 and 25):

'Mr Smuts has, however, in my view correctly submitted that subsection (2)(a) does not constitute a deeming provision of something that is not in fact what it purports to be. It simply means that if, for the purposes of subsection (1)(a), it is considered whether or not there is protection against the loss of ownership of escaped game, the certificate referred to in subsection (2)(a) is deemed to be the protective mechanism. It is thus not a deeming provision that can be rebutted by evidence.

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[1] The following is the definition of game in s 1 of the GTA:
'**"game"** means all game kept or held for commercial or hunting purposes, and includes the meat, skin, carcass or any portion of the carcass of that game.'
The *Concise Oxford English Dictionary* (12 ed) 2011 defines 'game' as:
'wild mammals or birds hunted for sport or food.'

In addition, the certificate is clearly a practical mechanism to obviate the need for forensic investigation into the adequacy of fencing, and thus serves to avoid unnecessary disputes between land owners. A construction of the section which would allow rebuttal of the certificate by contrary evidence, or allow a land owner who had failed to obtain a certificate of sufficient enclosure to establish, through evidence, that the game were in fact sufficiently enclosed, would in my view distort and frustrate the objectives of the Act. Furthermore, the provisions of the Act had the effect of amending an existing common law rule and should thus "*not be interpreted so as to alter the common law more than it is necessary unless the intention to do so is clearly reflected in the enactment, whether by expression or by necessary implication*." (*Nedbank Limited v National Credit Regulator* 2011 (4) All SA 131 (SCA), at paragraph 38). In my view the intention of the legislator was clearly to limit protection against loss of ownership only to circumstances where a certificate of sufficient enclosure had been issued in terms of subsection (2)(a) of the Act. When construed in this manner, the Act provides a practical and effective mechanism to protect compliant game owners against loss of ownership. The absurdity contended for by the plaintiff does accordingly simply not arise. The first separated issue is therefore decided in favour of the defendant.'

[13] In relation to the development of the common law the court below had regard to the submissions on behalf of the agency that, ss 8(1), 39(2), 173 or 24*(b)*(ii)[2] of the Constitution compel the conclusion that wild animals that are sufficiently contained in a protected area managed by an organ of state charged with the management thereof are *res publicae.* Smith J rejected that contention after he took into account that at common law wild animals are *res nullius* (i.e. things owned by no-one) and that ownership could only be acquired through occupation, namely capturing and exercising effective control over them with the intention to possess them, but when, however, they managed to escape they reverted to once again become *res nullius.*

[2] Section 8 deals with the binding nature of the Bill of Rights. Section 39(2) provides:
'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit purport and objects of the Bill of Rights.'
Section 24*(b)*(ii) of the Constitution reads as follows:
'*(b)* to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that –
. . .
(ii) promote conservation . . .'

[14] The court below also had regard to the contention on behalf of the Agency that maintaining the aforesaid principles would undermine rather than promote the spirit, purport and object of s 24(2)*(b)* of the Constitution, which provides that everyone has the right to have the environment protected for the benefit of present and future generations, which includes conservation. As stated above it was submitted that the common law should be developed 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 the State. Smith J considered the submissions on behalf of Wildlife Ranching South Africa, admitted as amicus curiae, that to develop the common law as contended would be to usurp the function of the legislature. On behalf of Medbury it was submitted that the classification of wild animals as *res publicae* was inappropriate as the term is employed to refer to things that are *extra commercium*, rather than to animals and that to develop the common law as suggested would expose the State to far-reaching delictual liability in respect of damage caused by animals that escape from national parks.

[15] The court below concluded as follows:

'[33] I am not convinced that on the facts of this case it is either necessary or appropriate to develop the existing common law rule. In my view the plaintiff has been unable to show that the rule is in conflict with any constitutional provision, or that it falls short of the spirit, purport, or objective of section 24 of the Constitution. First, the common law, as amended by the provisions of the Act, provide effective protection to an owner of land on which game had been sufficiently enclosed. All that is required of the owner is to obtain a certificate of sufficient enclosure mentioned in subsection (2)(a). The applicant has all along contended that the reserve had in fact been sufficiently enclosed to contain the buffalo. All that was therefore required of it was to apply for the certificate. It has failed to avail itself of this statutory protection and now instead impermissibly seeks development of the common law to obtain *ex post facto* protection.

. . . .

35. Second, it appears that the plaintiff is in effect seeking a legislative amendment without following due processes. . . .

. . . .

37. It is nevertheless clear that the implications of the existing common law rule (and the provisions of the Act) are being reviewed by the legislature. During the course of that legislative process the department will no doubt consult extensively with all role players

regarding the implications of such legislative changes. The resultant statutory provisions will no doubt take account of various difficulties which may be caused by ill-advised changes to the common law, mentioned in the Law Commission's report and also during argument in this court. It is, in my view, thus inappropriate for this court to develop the common law to the extent contended for by the plaintiff without the benefit of sufficient evidence regarding the consequences of such an amendment, and in circumstances where an effective statutory remedy was available to the plaintiff. In the result I am of the view that the plaintiff has failed to make out a case for the contended development of the common law, and this issue must accordingly also be decided in favour of the defendant.'

[16] Consequently, the court below made the following order:

'(a) The separated issues mentioned in paragraph 27 of the stated case are both decided in favour of the defendant.

(b) The plaintiff's action is dismissed with costs, including the costs of two counsel.'

[17] It is against that order and the conclusions reached by the court in relation thereto that the present appeal is directed.

[18] In adjudicating the appeal a good starting point is what has already been referred to by the court below, namely, that, at common law, wild animals such as the buffalo in question are *res nullius* and that ownership can only be acquired through *occupatio* (i.e. capturing and exercising effective control over them with the intention to possess). In this regard see Van der Merwe & Rabie 'Eiendom van wilde diere'[3] 1974 *THRHR* 38, Rabie & van der Merwe 'Wildboerdery in Regsperspektief – Enkele Knelpunte'[4] (1990) *Stell LR* 112 at 115 para 3.1, *S v Mdaba & others* 2002 (1) SACR 556 (ECD) 558a-c and Swan & Labuschagne 'Eiendomsreg op en Diefstal van Wilde Diere' (2002) 23 2 *Obiter* 401 at 403-404. At common law ownership was retained for as long as the person who captured the wild animal exercised sufficient control over it and it did not regain its natural freedom. See Rabie & Van der Merwe *op cit* at 115 para 3.1.1. The exercise of sufficient control is, of course, a factual question.

[3] Ownership of wild animals.
[4] Game farming in legal perspective.

[19] At common law, a wild animal which had been captured regains its natural state of freedom once it escapes. It reverts to *res nullius*, with the result that any person can acquire ownership of it anew through *occupatio*.[5] That is the basis of the claim of ownership by Medbury in this case.

[20] The present appeal turns on the provisions of the GTA, which came into operation on 5 July 1991. It is necessary, before turning to its material provisions, to have regard to its genesis. In this regard the report of the then South African Law Commission's report on the 'Acquisition and loss of ownership of game' is instructive.[6]

[21] On 26 October 1988 the Law Commission was requested by the then Minister of Justice to carry out an investigation into the acquisition and loss of ownership of wild animals. The request was as a result of calls by various interested parties for 'more effective protection of game farmers'. During its first congress in 1982 the South African Agricultural Union had requested the Minister's department to deal with this question. It appears that game farmers were aggrieved that they did not receive protection of the kind awarded by the Stock Theft Act 57 of 1959 to farmers who lost stock due to theft.

[22] As already recognised in the Commission's report in 1990, game farming has developed into a very promising part of agriculture and the economy. Very few people living in this country can be unaware of the phenomenally burgeoning eco-tourism and game farming industry. In the report, which is now almost two decades old, the rand values attached to a range of game, show how lucrative game farming and consequently, how financially devastating the loss of ownership can be. It bears noting that the position in Roman-Dutch law that loss of possession resulted in loss of ownership was inspired by the fact that during those times it was difficult to identify, amongst other game, an escaped wild animal.[7] Due to technological advances that is no longer the case.

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[5] CG Van der Merwe & MA Rabie 'Animals' (2014) 1 LAWSA para 399.
[6] Project 69-report dated March 1990.
[7] See p13 of the report and the authorities there cited.

[23] In the oft cited case of *Richter v Du Plooy* 1921 OPD 117 at 119, the court said the following in relation to the wildebeest that featured in that case:

'the confinement of these animals . . . is not sufficient to take them out of the category of wild animals, and if they emerge from their place of detention they become *res nullius* – liable to be appropriated by the first person who has the acquisitive instinct and the means to gratify it.'

In motivating the need for legislative steps the Law Commission said the following (at 2.48):

'It can be inferred from the above that, irrespective of whether the game was acquired by occupatio or by delivery, ownership is lost as soon as the game escapes. The unjust result of such a rule is obvious. A person who has paid R15 000 for a hippopotamus at a game auction would find himself in an unenviable position should his hippopotamus escape and be taken into possession by another. The problem is that it may be difficult for him to prove ownership. The problem of proof may possibly be reduced if he was the only person in the vicinity who owned a hippopotamus, or if he had identified the hippopotamus by a clear mark. Even then however, it would be possible for the accused to claim that the animal became res nullius and therefore susceptible to being acquired in property by occupatio. This obvious contradiction in the case of ownership of wild animals was already dealt with by the Roman-Dutch authorities. It is suggested that a measure be implemented in terms of which mere loss of possession does not necessarily establish loss of ownership.'(Footnotes omitted.)

[24] Past authorities and present commentators are divided about whether a person may acquire ownership of game in contravention of legislation regulating the capture, the killing or possession of game. In this instance, we were not called upon to decide whether the possession by Medbury of the game in question is in contravention of regulating legislation and it is not necessary to explore this aspect any further other than to reflect that the principle of legality may intrude upon that question.

[25] In the Law Commission's report, under the heading 'Summary and discussion of problem areas', the following appears at para 3.6:

'It would appear that the common law should be adjusted by legislation to keep pace with present-day needs with regard to the acquisition and loss of ownership of game.'

A draft bill introduced in parliament by the then Minister of Justice followed upon the Law Commission's report. It is necessary to consider the wording of s 2 of the draft bill and compare it to s 2 of the GTA, set out in para 10 above. Section 2 of the draft bill reads:

'2. (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 holds game in a pen or kraal or in or on a vehicle, shall not lose ownership of that game merely because the game escapes from such enclosed land or from such pen, kraal or vehicle;

(b) ownership of game shall not vest in any person who, contrary to the provisions of any law or on the land of another without the consent of the owner or lawful occupier of that land, hunts or catches or occupies game.

(2) For the purposes of subsection (1)(a) land is sufficiently enclosed if it is, according to a certificate by the Administrator of the province in which the land is situated, or his representative, sufficiently enclosed to detain the game in respect of which the enclosure was erected on that land.'

[26] I pause to note that the explanation provided by the Law Commission for legislative intervention in the terms set out in its proposed draft bill, more particularly clause 2, was that it was aimed at laying down a criterion in accordance with which it could be established whether a person exercised sufficient physical control over game to be regarded as the owner thereof. It had suggested that land upon which game was found should be enclosed in such a manner that game could not readily and spontaneously escape from it. The Commission avoided laying down specifications for enclosures 'because the Commission considered that it should be left to the game farmer to prove that his land was enclosed in such a manner. It should be reasonably easy for the game farmer to prove that his land is sufficiently enclosed to detain blesbok, for example'. See para 6.5 at 53-54 of the report. Para 6.18 at 57-58 of the report is also significant.

[27] The Law Commission went on to have regard to the view of the then Directorate of Nature and Environmental Conservation of the Orange Free State and the Natal Parks Board; that a certificate by a regulating authority should be issued 'since it will alleviate the onus on the game owner in an ownership action to prove that his fence is sufficient'. The Commission then, somewhat contradictorily, if regard

is had to what is set out in the preceding paragraph, recorded its view that the provisions of clause 2 of the draft bill, required a certificate as a pre-condition for the retention of ownership of game. See para 6:19 and 6.26 at 61 of the report.

[28] The essential difference between clause 2(2) of the Law Commission's draft bill and s 2(2)*(a)* of the GTA is that the latter contains a deeming provision and the former not. I am unpersuaded that the Law Commission's view, set out in the preceding paragraph, that clause 2(2) of its proposed bill could be read to mean that a certificate by the Administrator, is a pre-condition for the retention of ownership, is correct. More particularly because of its explanation, earlier in the report, that it should be left to a game farmer to prove that his land was sufficiently enclosed to enable him or her to exercise sufficient control over game and that in relation to certain species it would be fairly easy to do. However, we are not called upon to interpret the Law Commission's draft bill but rather s 2(2) of the GTA. It is to that task that I now turn.

[29] At the outset it is necessary to have regard to how deeming provisions in legislation, have been dealt with in case law and by commentators. Bennion *Statutory Interpretation* 3 ed 1997 says the following about deeming provisions at 735:

'*Deeming provisions* Acts <u>often</u> deem things to be what they are not.[8] In construing a deeming provision it is necessary to bear in mind the legislative purpose.' (My underlining.)

The first sentence of the quote is demonstrated by the facts in *Mouton v Boland Bank Ltd* 2001 (3) SA 877 (SCA). In that case the court was dealing with a deeming provision contained in the Close Corporations Act 69 of 1984, relating to the reregistration of a close corporation. The deeming provision there in question read as follows:

'The Registrar shall give notice of the restoration of the registration of a corporation in the *Gazette*, and as from the date of such notice *the corporation shall continue to exist and be*

[8] In this regard see also *Chotabhai v Union Government (Minister of Justice) and Registrar of Asiatics* 1911 AD 13, in which the following is stated at 33:
'The use of the word "deemed" was perhaps not a very happy one, because that term *may* be employed to denote merely that the persons or things to which it relates are to be considered to be what really they are not, without in any way curtailing the operation of the Statute in respect of other persons or things falling within the ordinary meaning of the language used.' (Emphasis added.)

deemed to have continued in existence as from the date of deregistration as if it were not deregistered.' (Emphasis added.)

That provision deemed something to be what in fact was not so, namely, that the close corporation was never deregistered.

[30] An exposition of types of deeming provisions and how they should be construed is to be found in the decision of this court in *S v Rosenthal* 1980 (1) SA 65 (A). Trollip JA said the following at 75G-H:

'The words "shall be deemed" ("word geag" in the signed, Afrikaans text) are a familiar and useful expression often used in legislation in order to predicate that a certain subject-matter, eg a person, thing, situation, or matter, shall be regarded or accepted for the purposes of the statute in question as being of a particular, specified kind whether or not the subject-matter is ordinarily of that kind. The expression has no technical connotation. Its precise meaning, and especially its effect, must be ascertained from its context and the ordinary canons of construction.'[9]

[31] The court in *Rosenthal* went on to explain:

'Some of the usual meanings and effect [deeming provisions] can have are the following. That which is deemed shall be regarded or accepted (i) as being exhaustive of the subject-matter in question and thus excluding what would or might otherwise have been included therein but for the deeming, or (ii) in contradistinction thereto, as being merely supplementary, ie, extending and not curtailing what the subject-matter includes, or (iii) as being conclusive or irrebuttable, or (iv) contrarily, thereto as being merely *prima facie* or rebuttable. I should add that, in the absence of any indication in the statute to the contrary, a deeming that is exhaustive is also usually conclusive, and one which is merely *prima facie* or rebuttable is likely to be supplementary and not exhaustive.'[10]

[32] Trollip JA considered the deeming provision in issue in *Chotabhai* to be an example of an exhaustive deeming provision. In that case 'certain classes of Asiatics' were deemed lawfully resident for the purposes of the statute there in

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[9] See also *Statutory Interpretation* at 736 where the following is stated:
'The intention of a deeming provision, in laying down an hypothesis, is that the hypothesis shall be carried as far as necessary to achieve the legislative purpose, but no further.'
This quote was cited with approval in *Mouton* para 13.

[10] 75H-76A.

question and the court held that the deeming provision intended to exhaust the list of those who were to be included in that expression.[11]

[33] The court in *Rosenthal*, at 76B-77A, had regard to *R v Haffejee & another* 1945 AD 345, in which a War Measure empowered a price controller to calculate and determine the cost, percentage of gross profit, price or factor of any goods. The controller's determination could be '*prima facie* proved' by the production of a statement in writing, purporting to have been issued by or on the authority of the controller, setting forth the determined cost, price, etc. Such cost, price, etc. in terms of the relevant provision was 'deemed' to be the true cost, price, etc. At 352-353, Watermeyer CJ, in considering the meaning and effect of deeming provisions, with reference to English case law, said the following:

'It is difficult to extract any principle from these cases, except the well-known one that the Court must examine the aim, scope and object of the legislative enactment in order to determine the sense of its provisions. Applying that principle to the present case, it seems that Regulation 14 was clearly a provision to *facilitate proof of matters* which might otherwise be difficult to prove in a Court of Law. It is an encroachment, and presumably a necessary one, on the rules of evidence, but I am not prepared to hold that the legislator intended to make the Controller's certificate *conclusive evidence* against an accused person. If it were conclusive, then an accused person would be precluded from establishing his innocence in a case in which the Controller's "determination" is in fact wrong, even if the error is merely due to a mathematical mistake. This is an unreasonable result which would follow from holding that the Controller's certificate is conclusive, and it is one which should be avoided if the words of Regulation 14 can be given a reasonable meaning which does not lead to such a result. (See the remarks of Lord Cairns in the case of *Hill v East & West India Dock Co* 9 AC at p 456.) In the present case there is no difficulty in construing the words to mean that the Controller's certificate must be accepted as correct, unless the contrary is proved by the accused and that, in my judgment, is the meaning of the regulation.' (Emphasis added.)[12]

[34] From what is set out above, it follows that a deeming provision must always be construed contextually and in relation to the legislative purpose. I leave aside the

[11] at 33.

[12] See also the Australian case of *Muller v Dalgety & Co Ltd* (1909) 9 CLR 693 at 696, where the following is stated:

'The words "deem" and "deemed" when used in a statute thus simply state the effect of meaning which some matter or thing has – the way in which it is to be adjudged. This need not import artificiality or fiction. It may be simply the statement of an indisputable conclusion.'

question whether the validity of the certificate by the Premier of the province or his assignee can be rebutted, as for instance where it was procured by fraud or where a lax official issued it without due regard to whether the facts justified the certification. That is not an issue before us. The primary question posed, as agreed by the parties, and set out in para 11 above, is whether the certificate by the Premier of the province in which the land is situated, in terms of s 2(2)*(a)* of the GTA, is the sole prerequisite for the protection against loss of ownership provided for in s 2(1)*(a)*. The question is more accurately posed as follows: whether a certificate in terms of s 2(2)*(a)* is the only basis for the protection, afforded by s 2(1)*(a)*, against loss of ownership.

[35] It is 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 purpose of the GTA, which is to ensure that owners of game, who had 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 result of following Medbury's construction would be that even where the land is *in fact* sufficiently enclosed to confine a species to it, the protection provided for by s 2(1)*(a)* would be rendered nugatory. The production of a certificate was meant, in the words of Watermeyer CJ, 'to facilitate proof'' that the land in issue is sufficiently enclosed to confine the species in question. It was not meant to deprive owners who had taken the necessary measures to sufficiently enclose game on land. 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. In that respect, it cannot be conclusive or indisputable.

[36] There is no justification for reading s 2(1)*(a)* to mean that where it states 'sufficiently enclosed' as contemplated in s 2(2)*(a)* it must mean that it refers to the certificate. In my view it is clear that what was intended was that 'sufficiently enclosed as contemplated in subsection 2' means that the species of game is sufficiently enclosed to confine it to the land in question. The contention on behalf of Medbury that the interpretation set out in this and the preceding paragraph is a strained attempt to avoid the application of the *res nullius* principle is thus fallacious.

[37] The interpretation of the deeming provision in question set out in the two preceding paragraphs is not only consistent with existing authority and serves the legislative purpose; but it is also consonant with the policy underlying the introduction of the GTA as described earlier, which is to protect ownership, and is consonant with constitutional values, including those relating to conservation as provided for in s 24 of the Constitution.[13]

[38] The parties were agreed that in the event of the primary question being answered in favour of the Agency, it would not be necessary to answer the second question posed, namely, whether the common law should be developed. The effect would be that the matter would proceed in the court below in relation to the outstanding issues, including the question whether the land was sufficiently enclosed so as to confine the buffalo to that land.

[39] The following order is made:

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

2 The order of the court below is set aside and replaced with the following:

'(a) The separated issue set out in para 27.1 is decided in favour of the plaintiff.

(b) The defendant is ordered to pay the plaintiff's costs, including the costs of two counsel.'

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M S Navsa

Judge of Appeal

[13] A court interpreting legislation is bound to promote the spirit, purport and object of the Bill of Rights. See *Fraser v ABSA Bank Ltd (National Director of Public Prosecutions as Amicus Curiae)* 2007 (3) SA 484 (CC) para 43.

Appearances:

On behalf of the Appellant:	R G Buchanan SC (with him A M Breitenbach SC) Instructed by: Nettletons, Grahamstown Honey Attorneys, Bloemfontein
On behalf of the Respondents:	I J Smuts SC (with him N Molony) Instructed by: Waldick Jansen van Rensburg Inc, Centurion Symington & De Kok, Bloemfontein