

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

Case no.4633/2021

In the matter between:

LUTHER KING ARMSTRON RALIKONYANA

PLAINTIFF

and

LOUIS DE VILLIERS

FIRST DEFENDANT

MERIBA BOERDERY

SECOND DEFENDANT

CORAM: VAN RHYN J

HEARD ON: 14 NOVEMBER 2023

DELIVERED: 2 JANUARY 2024

- [1] At around midnight of Friday, 12 October 2018 or in the early hours of 13 October 2018 the plaintiff, Luther King Armstrong Ralikonyana, was driving his Opel Corsa motor vehicle with registration letters and numbers LR1[...] when he collided with a calf that strayed onto the road. The incident occurred on the N8 road between Bloemfontein and Petrusburg, approximately 45 kilometres from Bloemfontein. The plaintiff was driving from Bloemfontein, where he resides, in a westerly direction to Kimberley. The plaintiff, who was born on 1[...] O[...] 1969, suffered bodily injuries as a result of the collision with the calf.
- [2] The collision gave rise to a claim for damages against the defendants, Louis De Villiers (“Mr De Villiers”), cited as the first defendant and Meriba Boerdery as the second defendant. The calf was the property of, and under the control of the first

defendant and/or the second defendant. In formulating his cause of action, the plaintiff alleges that the defendants were under a legal duty to take reasonable steps to prevent his or its cattle, such as the calf in question, from entering the public road between Bloemfontein and Petrusburg, in order to prevent collisions between vehicles and cattle on the road.

- [3] The plaintiff alleges that the fact that the calf strayed onto the road and the consequential collision was the direct result of the negligence of the first defendant and/or the second defendant and/or the employees of the first defendant and/or the second defendant acting within the course and scope of their employment with the first and/or second defendant. The grounds of negligence relied upon by the plaintiff can concisely be summarized as follows:

3.1A failure to erect and maintain proper cattle proof fences so as to prevent the cattle from escaping from the farm and stray onto the public roads;

3.2A failure to erect and maintain proper gates in the fences and a failure to keep the gates closed or locked;

3.3A failure to employ and utilise any or sufficient staff to act as herdsman and failing to have a system or proper system of inspection and repair in place to ensure that the fences are kept in a cattle proof state;

3.4 A failure to ensure that newly weaned calves are kept in a kraal and/or enclosure to prevent them from breaking out and/or escaping to their mothers;

- [4] The defendants denied ownership of the calf and that a collision occurred between the plaintiff's vehicle and the calf. The defendants however admitted that in certain circumstances a legal duty may be found to exist on an owner, alternatively a person in control of cattle in respect of motorists using a public road. The negligent breach of this duty were denied and that neither the first nor the second defendant were negligent in any of the respects alleged.

- [5] At the commencement of the proceedings I granted an order, by agreement between the parties, in terms of which I am only required to determine the liability of the parties and that the issue regarding the quantum of damages, if any, would stand over for later determination.
- [6] Plaintiff testified that on the night in question he left his residence in Bloemfontein at approximately 11h30. At the time he was employed at the Department of Police, Roads and Transport, Free State Province. He was due to arrive at Kathu, Northern Cape Province the following morning for work related purposes. He planned to travel to Kimberley where he would stay over until he would complete his trip to Kathu later during the morning of the 13th of October 2018.
- [7] At around midnight and while descending a small hill, he suddenly noticed a black animal in front of him. He swerved to the left in an endeavour to avoid a collision with the animal, which later appeared to be a black calf. He was unsuccessful in his effort to avoid an accident. It was dark and his vehicle's lights were switched to bright. There is only one lane for traffic in the direction of Kimberley and one lane from Kimberley in the direction of Bloemfontein. Prior to the collision with the calf he was travelling between 100 to 120 km/h.
- [8] The plaintiff testified that he did not observe any other motor vehicles in front or behind him immediately prior to the collision. The collision with the calf, which was in the middle of the lane in which he was traveling, occurred so quickly that the only evasive action possible was to swerve to the left. He did not apply the brakes of his motor vehicle. In his opinion, it would have caused the motor vehicle to roll if he had applied the brakes when he noticed the calf. In any event, according to his observation, if he had applied brakes, he would not have been able to avoid the collision with the calf. The right front fender of the vehicle was damaged as indicated on photographs 14 and 15 of the plaintiff's Photo Bundle, Exhibit "A". Damage to the left front side and the right side of the front windscreen is visible.

- [9] The vehicle came to a standstill on the gravel next to the left lane in which he was travelling immediately prior to the collision. The plaintiff testified that he sustained injuries as a result of the incident. While being trapped inside the vehicle he made several calls to obtain help. An unknown motorist stopped at the scene and called for assistance. Members of the South African Police Services arrived soon thereafter. He was transported to the hospital by the emergency services.
- [10] During cross examination it was established that the plaintiff had travelled on the N8 road on numerous occasions in the past. The plaintiff was unable to give an estimation of the distance between his vehicle and the calf when he noticed the calf for the first time. He furthermore cannot recall whether the calf was facing him or not.
- [11] It was put to the plaintiff that if he had swerved to the right he would have been able to avoid the collision with the calf. The plaintiff rejected this version by indicating that according to him, and having regard to the little time available to decide what to do under the prevailing circumstances, the only option was to swerve to the left.
- [12] Warrant Officer Blaauw, stationed at the Petrusburg South African Police Services, testified that he and his colleague, Constable Billy, attended the scene of the accident during the early hours of the morning on 13 October 2018. At their arrival at the scene he noticed a vehicle on the left side of the road facing Petrusburg as well as a dead, black calf lying on a painted island in the middle of the road. He tried to ascertain who the owner of the dead calf was by tracking the footprints of cattle found at the scene and was able to ascertain that the tracks lead to a farm known as Meriba (the "farm"). Due to the lateness of the hour he decided to wait until daylight before he continued with his investigation.
- [13] The next morning he again attended the scene and found Mr De Villiers removing the dead calf from the scene of the incident. He furthermore noticed several farm workers

herding cattle. Mr De Villiers informed him that he is the owner of the dead calf and that he suspects that the calf, one of several recently purchased, escaped in an endeavour to reunite with their mothers.

- [14] The report compiled by Pieter Swanepoel ("Mr. Swanepoel"), appended to the plaintiff's Rule 36(9)(a) and (b) notice, where handed up by agreement between the parties. Mr Pretorius SC, counsel appearing on behalf of the defendants, confirmed that it is therefore not necessary to call Mr. Swanepoel as an expert witness during the trial. From the *curriculum vitae* of Mr. Swanepoel it is evident that he has extensive experience as an Agricultural Assessor and Fire Ecologist. This includes assessing the condition and efficacy of agricultural fences and gates normally utilised by the farming fraternity in fencing off animals ranging from cattle, sheep, goats and game as part of farming operations.

- [15] Mr. Swanepoel conducted an inspection *in loco* on the defendants' farm on 24 August 2023. The inspection was also attended by the plaintiff's attorney, a representative of the defendant's attorney, as well as Mr. De Villiers. Mr de Villiers pointed out the particular kraal where the weaning calves were kept and related certain information to Mr. Swanepoel and the other attendees at the inspection *in loco*.

- [16] Mr. De Villiers explained that the week before the incident he had purchased a number of weaning calves from his neighbour who farms just to the north, i.e. on the opposite side of the N8 road. After he had purchased the calves from his neighbour he transported the calves with a vehicle to the farm. The calves were then kept with other calves in a pen for a few days to enable them to adapt to the new surroundings. The calf killed in the incident was one of the weaning calves that he had purchased from his neighbour

- [17] After four (4) days they were taken to a larger kraal together with other older calves. According to Mr de Villiers the condition of the fencing of the larger kraal ("finishing

corral”) during the time of the inspection *in loco* was almost exactly the same as the condition of the fencing at the time of the incident during 2018. According to the observations made by Mr Swanepoel the condition of the barbed wire fence of the kraal was in a very poor and dilapidated state due to the following:

17.1 The wires were found to be “slack” and not properly tensioned;

17.2 The spacing in between the wires was insufficient and a calf could very easily move through it without much effort;

17.3 The fence appeared to be totally inadequate to prevent the weaning calves from straying from the kraal.

[18] Mr Swanepoel opined that young weaning calves will instinctively try to break out from an enclosure to return to their mothers. During the inspection *in loco* a corrugated iron sheet was found in an opening in the wire fence. The corrugated iron sheet, marked “F” can be seen on photograph 13. The width of the corrugated iron sheet is 60 cm and in Mr Swanepoel’s opinion a calf could have jumped over the partitioning in an attempt to escape from the kraal. In his opinion, the fences were not properly constructed, maintained and/or secured to reasonably prevent the calves from escaping from the defendants’ farm and from straying onto the N8 road.

[19] This concluded the evidence presented by the plaintiff. At the close of the plaintiff’s case an application for absolution from the instance was brought by the defendants. The plaintiff opposed the application. After hearing arguments on behalf of the parties I dismissed the application for absolution from the instance with costs. Having considered the evidence presented by the plaintiff and taking cognisance of the fact that the defendants did not raise a plea of contributory negligence, I was satisfied that a reasonable court can find in favour of the plaintiff. The reasons for the finding in favour of the plaintiff will be discussed in this judgment.

[20] The defendants closed their case and did not present any evidence during the trial. In the light of the evidence presented by the plaintiff, the defendants applied for an amendment of their plea. The application was not opposed by the plaintiff and the amendment was granted. The amendment amounted to the denial of the averments made in paragraphs 4 and 5 of the plaintiff's particulars of claim and the inclusion of paragraph 16.2 to the defendants' plea. Paragraph 16.2 reads as follows:

"16.2 In the alternative, and in the event of the court finding that the Defendants or any one of them were negligent in the respects alleged or at all, and that the said negligence resulted and/or contributed to the collision, all of which are denied, then, and under those circumstances, Defendants plead that the Plaintiff was also negligent in one, alternatively more, alternatively all of the following respects:

16.2.1 he drove too fast under the circumstances;

16.2.2 he failed to apply the brakes of his vehicle timeously or at all;

16.2.3 he failed to reduce the speed of his vehicle timeously or at all;

16.2.4 he failed to take proper, alternatively reasonable, alternatively adequate evasive action to avoid the collision, which having taken same, could have avoided the collision;

16.2.5 Plaintiff's claim accordingly stands to be reduced in accordance with the provisions of the Apportionment of Damages Act, 34 of 1956."

[21] The onus rests upon the plaintiff to prove on a balance of probabilities that the defendants were negligent in one or other of the respects alleged. Mr de Villiers is not *per se* liable if it is found that his calf got into the road at night and caused a collision. This does not give rise to a presumption of negligence. The plaintiff can only succeed by establishing by means of credible and acceptable evidence that the defendants were negligent and that his/its negligent conduct caused damage to the plaintiff.¹

[22] In his address, Mr Pohl SC, counsel on behalf of the plaintiff, argued that in order to discharge the onus the plaintiff relied upon the evidence of three witnesses, being his own testimony, that of warrant Officer Blaauw and the expert witness, Mr Swanepoel. The combined effect of the evidence of these three witnesses indeed established a *prima facie* case that the defendants negligently caused the collision. The most probable inference from the evidence established the following:

- that the plaintiff collided with the calf which belonged to the first defendant. The calf entered the N8 road from the defendants' farm according to the testimony of Warrant Officer Blaauw who followed the tracks of several calves/cows at the scene of the accident to the said farm;
- that the calf got onto the N8 road from the kraal located on the farm. The fences of the kraal were so dilapidated as to be completely inadequate for keeping the weaning calf from escaping and straying onto the N8 road;

[23] Having regard to the fact that the calves were removed from their mothers it is clear that a reasonable farmer in the position of the first defendant must have foreseen the possibility that the calves would attempt to break free and stray onto the N8. Therefore, a reasonable farmer would have taken the precaution of properly

¹ *Coreejes v Carnavon Munisipaliteit & Andere* 1964 (2) SA 454 (C); *Kruger v Coetzee* 1966 (2) SA 428 (A); *Jamnek v Wagener* 1993 (2) SA 54 (C).

maintaining the fence of the kraal to prevent the calves from escaping from the kraal in which they were kept prior to the collision on the night of 12 October 2018.

- [24] Mr Pohl SC further more contended that no contributory negligence on the part of the plaintiff was proved and therefore an order in favour of the plaintiff that the defendants are liable for any damages, which may be proved or agreed in future, as well as costs be granted.
- [25] Mr Pretorius SC conceded that the ownership of the dead calf is not disputed in that such admission was made by Mr de Villiers to Mr Swanepoel during the inspection *in loco*. It is furthermore conceded that the calf strayed from the kraal onto the N8 road on the night in question. On behalf of the defendants it was contended that the plaintiff was negligent in that he failed to take the necessary evasive action immediately prior to the collision.
- [26] The plaintiff left his home late at night and travelled on the N8 road, being a public road in between agricultural farmlands. He must have foreseen a possibility of encountering animals wandering across the N8 road at night. There are no street lights. The plaintiff should have adjusted the speed at which he was travelling according to his range of vision and the prevailing circumstances. Having regard to his evidence that he travelled at approximately 100 -120 Km/h, he would have been able to swerve to the right which would have been a safe option and thus have avoided the collision with the calf.
- [27] The plaintiff failed to apply the brakes of the motor vehicle in the fear that it might lead to the vehicle overturning. He furthermore simply persisted that his decision to swerve to the left was the only option under the prevailing circumstances. In the result it is contended on behalf of the defendants that there should be an apportionment of damages as a result of the plaintiff's contributory negligence.

[28] Plaintiff, in my view, presented his testimony in a satisfactory manner. He testified that he travelled the specific route to Kathu in the Northern Cape, his ultimate destination, on several occasions in the past. He was an experienced driver. His evidence that he travelled at 100 – 120 Km/h and that he feared that if he applied the brakes that it might cause the vehicle to overturn, was not seriously disputed. A reaction time of half a second as being a reasonable reaction time have been accepted in certain cases. However, a reaction time of as much as one and a half seconds has been accepted as being reasonable in other matters.²

[29] In **Sifhago v Santam Insurance Company Limited**³ Jansen JA held as follows:

“It is common knowledge that when a person is suddenly and unexpectedly called upon to make a decision, his reaction time is longer than when he is alerted and expecting the emergency. In considering what the reasonable driver would have done and in the one second available to him, allowance must be made for the limitations imposed by the inevitable time lag between observation and reaction, as affected by the agony of the moment, the element of surprise, the likelihood of momentary indecision...”

[30] Mr Pohl SC argued that the defendants failed to prove that plaintiff's negligent driving, if any, had caused or contributed to the collision. The defendants had to prove that the plaintiff's failure to keep a proper lookout was causally connected with the collision. Therefore, the defendants had to prove that, had the plaintiff reacted when the reasonable man would have reacted, the collision with the calf would not have occurred.

[31] The exact speed at which the plaintiff was travelling immediately prior to the collision with the calf was not determined during the trial. The plaintiff was not able to recall the exact speed. He was not able to say how far the calf was when he noticed same for the first time. He was not even able to say that it was in fact a calf. He merely saw

² Rodrigues v SA Mutual General Insurance company 1981 (2) SA 274 (A).

³ 1969 (1) PH J1 (A).

a black animal in the lane immediately in front of his motor vehicle. One person may react very quickly to what he observed whilst another person may be much slower.

[32] Mr Pretorius SC is correct in his contention that it is undoubtedly the duty of every person to avoid an accident, but when a person behaves reasonably, even by justifiable error of judgment he does not choose the very best course to avoid the collision as events afterwards show, then he or she is not on that account to be held liable for being negligent.

[33] Unless the facts pertaining to the speed at which the plaintiff travelled immediately prior to the accident and the distance of the calf from the motor vehicle can be established on a balance of probabilities, the court cannot find that if the plaintiff had reacted as a reasonable man would have, the collision would not have occurred.⁴ Having regard to the fact that the collision occurred at around midnight and apart from the headlights of the vehicle, it was dark, the fact that the calf was black, necessarily diminishes the chances of the calf being visible earlier in time so as to allow an opportunity to take evasive action.

[34] In **Van Der Westhuizen and Another v S. A. Liberal Insurance Co., Ltd**⁵ Ogilvie Thompson A.J (as he then was) explained the usefulness of mathematical calculations in collision cases as follows:

In my opinion, however, the strictly mathematical approach, though undoubtedly very useful as a check, can but rarely be applied as an absolute test in collision cases, since any mathematical calculations so vitally depends on exact positions and speeds; whereas in truth these latter are merely estimates almost invariably made under circumstances wholly unfavourable to accuracy."

[35] In accordance with the decision in **Jamnek v Wagener**⁶ this *prima facie* case places an onus of rebuttal (*'n weerleggingslas*) on the defendants. The defendants are

⁴ Guardian National Insurance Co Ltd v Saal 1993(2) SA 161(CPD) at 163 D-G.

⁵ 1949 (3) SA 160 (C) at p 168.

required to adduce evidence that the calf did not get on to the road as a result of the dilapidated condition of the fence of the kraal and strayed onto the N8 road at the place where the collision occurred. Failing that, the *prima facie* inference of negligence becomes conclusive.

[36] On the evidence presented by the plaintiff and the inferences drawn as set out above, I am satisfied that the defendants, more specifically Mr de Villiers, exercised control over the calf and the fences holding the weaning calves on the farm. In the circumstances Mr de Villiers therefore had a legal duty towards road users to take such steps as were necessary and reasonably possible to maintain the fence of the kraal in such condition that it could fulfil its function to keep animals from straying onto the N8 road. In the circumstances of the case it is reasonable to accept that if Mr de Villiers or any of the workers employed by either the first or second defendant had indeed inspected the fence of the kraal prior to the collision during October 2018 and differed from the evidence presented by Mr Swanepoel as contained in his expert report, such contradicting evidence would have been presented during the trial.

[37] It is therefore not unreasonable, in the absence of such evidence, to infer that such evidence did not exist. On the contrary, Mr de Villiers indicated to Mr Swanepoel that the state of the fence of the kraal at the time of the collision was not much better than at the time of the inspection *in loco* during August 2023. Accordingly, the inference is reasonably justified that the defendants could have prevented the dilapidated condition of the fence of the kraal and thus prevented the calf from straying onto the N8 road causing the collision by taking reasonable steps. I am therefore satisfied that the accident which occurred at around midnight on 12 October 2018 was due to the negligence of the first and/or second defendant.

[38] As to the argument presented by Mr Pretorius SC that the plaintiff should have opted to swerve to the right in light of the evidence that there was no oncoming traffic from the Kimberley direction and would then have been able to avoid the collision with the

⁶ 1993 (2) SA 54 (C).

calf, I agree with the argument by Mr Pohl SC that such a conclusion is based on mere speculation. There is no evidence of the exact speed at which the plaintiff travelled immediately prior to the collision nor to the exact position of the calf. The plaintiff was unable to say in which direction the calf was moving, if at all. I am of the view that the defendants failed to establish that the plaintiff took the wrong decision under the prevailing circumstances or that the decision not to apply the brakes of the motor vehicle but to swerve to the left was causally connected with the collision with the calf, in the sense that if he decided, in the limited time available to apply brakes or swerve to the right, he would have avoided the collision with the calf.

[39] For these reasons the defendants failed to establish causal negligence on the part of the plaintiff. The plaintiff proved on a preponderance of probabilities that the defendants negligently breached the duty of care to take further steps to prevent the weaning calf from escaping from the kraal in which it was kept and from straying onto the N8 road. The defendants' failure to maintain the fence of the kraal to prevent the calf to escape and from accessing the N8 road meant that the first and second defendants had been causally negligent in relation to such damages as may in due course be proved by the plaintiff.

[40] I accordingly make the following order:

1. In the absence of contributory negligence on the part of the plaintiff, the first and second defendants, jointly and severally are causally liable for any damages sustained by the plaintiff as a consequence of the collision which occurred between the motor vehicle driven by the plaintiff and a calf on 12 October 2018.
2. The first and second defendants, jointly and severally, the one paying the other to be absolved, are ordered to pay the costs of the action.

VAN RHYN J

On behalf of the Plaintiff:
Instructed by:

ADV L POHL SC
MHLOKONYA ATTORNEYS
BLOEMFONTEIN

On behalf of the Defendants:
Instructed by:

ADV. C PRETORIUS SC
BLAIR ATTORNEYS
BLOEMFONTEIN