

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape High Court, Kimberley)**

CASE NO: 429/2013

**DATE HEARD: 12/05/2015
DATE DELIVERED: 22/05/2015**

In the matter between:

BRANDON ANDREW WHITE

Plaintiff

and

KHEIS! MUNICIPALITY

1st Defendant

JAN MOUTON

2nd Defendant

Coram: Olivier, J

JUDGMENT

Olivier J:

A. INTRODUCTION

[1.] The plaintiff, Mr B A White, instituted an action for damages against the first defendant, the Kheis! Municipality, and the second defendant, Mr J Mouton.

- [2.] The plaintiff's claim is basically that the second defendant's horse escaped from the commonage belonging to the first defendant and collided with his vehicle on the N10 national road and that this happened because a fence separating the commonage from the area of the national road had not been properly maintained.

B. SPECIAL PLEA AND STATED CASE

- [3.] In a special plea the first defendant pleaded that it had been misjoined, that section 26 of the **South African National Roads Agency Limited and National Roads Act**¹ (*"the Roads Act"*) empowered the South African National Roads Agency Limited (*"the Agency"*)² to, *inter alia*, *"provide, establish, erect and maintain facilities on national roads for convenience and safety of road users and to fence any national road"*, that the collision occurred on the N10 national road, and not on a municipal public road, and that the plaintiff should therefore have joined and sued the Agency, and not the first defendant.

- [4.] The special plea also made reference to section 21 of the **Fencing Act**³ and to the duties of the owner of a fence crossing a public road.

- [5.] A stated case regarding the special plea was then agreed upon and that is what has to be decided at this stage⁴.

¹ 7 of 1998.

² Established and incorporated in terms of the provisions of sections 2 and 3 of the Roads Act.

³ 31 of 1963.

- [6.] The second defendant has indicated that it will abide by the Court's decision.
- [7.] The question here is really whether the first defendant, as a matter of law, could be proven to have had the duty to maintain the fence between its property and the area of the road where the collision occurred.
- [8.] It is common cause that the road is a national road, as envisaged in the **Roads Act**.

C. THE ROADS ACT

- [9.] Sections 25 and 26 of the **Roads Act** form part of Chapter 3, titled *"Functions, powers and responsibilities of the Agency"*.
- [10.] Section 25⁵, under the heading *"Main functions of Agency"*, provides that the Agency is *"responsible for ... the national roads system, as well as the planning, design, construction, operation, management, control, maintenance and rehabilitation of national roads for the Republic"* (My emphasis).

⁴ An order separating the issues regarding *quantum* for later determination was granted by agreement.

⁵ Sub-sections (1) and (3).

- [11.] Sub-section (2) of section 25 deals with the transfer of responsibilities and powers from the erstwhile South African Roads Board⁶.
- [12.] It is clear therefore that the responsibilities pertaining to the *“planning, design, construction, operation, management, control, maintenance and rehabilitation of national roads”* are the main functions of the Agency.
- [13.] It is in this context that the provisions of section 26(h) of the **Roads Act**, upon which the special plea is based, must be considered.
- [14.] The heading of section 26 is *“Additional powers of Agency”* (My emphasis). It provides that *“In addition to the Agency’s main powers and functions under section 25, the Agency is competent”* (My emphasis) to perform certain functions, one of which is:
- “(h) to fence any national road”*
- [15.] The word *“fence”* as a verb means to *“surround or protect with a fence”* or to *“enclose or separate an area with a fence”*⁷, in other words to erect a fence. The plaintiff’s case is however not based on a failure to erect a fence. It is in fact common cause that there was a fence between the commonage and the national road. The plaintiff’s case is based on an alleged failure to maintain that fence.
- [16.] While sub-sections (e) and (f) of section 26 do clothe the Agency with the competency to maintain facilities and toll plazas on a

⁶ As envisaged in the repealed **National Roads Act**, 54 of 1971.

⁷ **Concise Oxford English Dictionary**, 10th Edition (Revised), p521.

national road, the provisions of section 26 do not provide for a competency or power to maintain any fences, let alone a responsibility to do so.

[17.] Furthermore, the wording of section 26 makes it very clear that the Agency will be “*competent*” to perform the functions listed in its sub-sections in addition to the main functions provided for in section 25. It does not, like in the case of the wording of section 25, provide that the performance of those functions will be the “*responsibility*” of the Agency.

[18.] Mr Tshavhungwa, counsel for the first defendant, argued that the use of the word “*competent*” in the introductory part of section 26 is misleading and wrong, and that the legislature’s intention had been to make the functions listed in the sub-sections to section 26 responsibilities, and obligations, just like the responsibility and obligation provided for in section 25.

[19.] I disagree. The wording of section of 26 is in my view very clear and unambiguous. An interpretation of the word “*competent*” to denote a right, and not a responsibility or an obligation, would not lead to any absurdity and therefore the wording of section 26 does not leave any room for the reading into section 26 of the word “*responsible*” in the place of the word “*competent*”⁸.

[20.] To read the word “*responsible*” into section 26, in the place of the word “*competent*”, and then to interpret section 26 as creating an

⁸ Compare **Protective Mining & Industrial Equipment Systems (Pty) Ltd (Formerly Hampo Systems (Pty) Ltd) v Audiolens (Cape) (Pty) Ltd** 1987 (2) SA 961 (A) on 991 G – H.

obligation to perform the functions listed in the sub-sections of section 26, would *inter alia* mean that the Agency would, for instance, be obliged to operate all national roads as toll roads⁹ and to grant bursaries, loans and subsidies as envisaged in sub-section (u). This could never have been the legislature's intention.

- [21.] Sub-section (w) of section 26 provides the Agency with the competency and power "*to do anything else which is reasonably ancillary to any of its main functions and powers in terms of section 25*". This makes it clear that all the other additional functions referred to in sub-sections (a) to (v), including that of erecting fences, are intended to provide the Agency with subsidiary¹⁰ means of fulfilling its main responsibility to construct and maintain national roads, should that prove to be necessary.
- [22.] To interpret the provisions of section 26 to mean that the Agency is obliged not only to erect fences along all national roads, but also to maintain them, would lead to the absurd result that the Agency would have to patrol, inspect and maintain thousands of kilometres of fences that not only serve to safeguard the national roads, but also benefit the owners of all the properties abutting national roads.
- [23.] Mr Tshavhungwa tried to avoid this absurdity by arguing that the obligation to maintain a fence would only rest upon the Agency in

⁹ Sub-section (f) of section 26 of the Roads Act.

¹⁰ **Concise Oxford English Dictionary**, 10th Edition (Revised), p48.

respect of fences erected by it¹¹ and by blaming the plaintiff for not having alleged by whom this particular fence had been erected.

[24.] Mr Tshavhungwa did not, however, provide any authority for the proposition that the responsibility to maintain a fence along a national road would rest solely on whoever had erected the fence there, or on his or her successors in title.

[25.] Even on Mr Tshavhungwa's argument, however, it would mean that if the fence along the N10 national road had been erected by the Agency or its predecessor, the Agency would have the sole responsibility, to the exclusion of owners of land abutting the N10 national road, to patrol, inspect and maintain the fences along that road. This could never have been the intention of the legislature and it does not require much imagination to see that it would burden the Agency with an impossible task and financial burden.

D. ROADS ORDINANCE

[26.] Section 12(6) of the **Cape Roads Ordinance** (*"the Ordinance"*)¹² which applies in the Northern Cape Province and the administration of which was assigned to this Province¹³, possibly provides the answer and reads as follows:

"Subject to the provisions of the Fencing Act ... the owner of the land abutting on the boundary of the

¹¹ And presumably by its predecessors, like the erstwhile Board in terms of the repealed **National Roads Act**.

¹² 19 of 1976.

¹³ By Proclamation 108 of 1994, published in Government Gazette 15813 of 17 June 1994.

statutory width of any public road or public path shall be responsible for the maintenance of any fence lawfully erected on or within such boundary”.

- [27.] None of the provisions of the **Fencing Act**, and certainly not those of section 21, are applicable to the facts of the present matter and Mr Tshavhungwa wisely advanced no argument as far as the provisions of that Act are concerned.
- [28.] Mr Tshavhungwa conceded that it can be assumed that the fence concerned in this matter had been lawfully erected.
- [29.] The commonage is land abutting the N10 national road.
- [30.] In view of the admission that the first defendant is the owner of the commonage, it is unnecessary to consider the definition of the word “owner” in section 2 of the **Ordinance**, read with the definition of that word in Section 2 of the **Cape Divisional Councils Ordinance**¹⁴.
- [31.] Mr Tshavhungwa submitted that in order to establish who had to maintain the fence in terms of section 12(6) it would once again first have to be determined who had erected the fence. This is however not a jurisdictional requirement of section 12(6). The only requirements, as far as the fence is concerned, are that the fence must have been lawfully erected and must be on or within the

¹⁴ 18 of 1976.

boundary of the statutory width of the public road¹⁵. Once these jurisdictional facts exist, the owner of such property will be obliged to maintain such a fence.

[32.] Mr Tshavhungwa's argument regarding the special plea was premised on the submission that as a matter of law the Agency alone had been responsible for the maintenance of the fence, to the exclusion of the first defendant, and that it should therefore have been joined, and not the first defendant.

[33.] The allegation in the special plea that the plaintiff was "*not entitled to bring an action against the first defendant*" was premised on allegations:

33.1 that the Agency was responsible for the maintenance of the fence; and

33.3 that the cause of action did not arise on a municipal public road.

[34.] What a "*Municipal public road*" is, is not clear, and was never addressed by Mr Tshavhungwa in argument. The special plea contains no reference to the requirement in section 12(6) that the road concerned must be a public road, as defined in section 2 of the **Ordinance**.

[35.] In my view it is not, however, necessary for me to decide whether the N10 national road is a public road for the purposes of section 12(6) of the **Ordinance**. The special plea only requires a ruling on

¹⁵ It was not the first defendant's case that this fence is not on or within such boundary.

whether the Agency was, on the basis of the provisions of the **Roads Act** and of the **Fencing Act**, solely responsible for the maintenance of this fence, in other words to the exclusion of the first defendant.

[36.] In my view the provisions of the **Roads Act** did not burden the Agency with the responsibility of maintaining this fence.

[37.] As already mentioned the argument based on the **Fencing Act** was for all practical purposes abandoned.

[38.] That would already dispose of the special plea, but insofar as it may be necessary I find that the first defendant could in law on the basis of section 12(6) of the **Ordinance** be held responsible, provided that the jurisdictional requirements in that sub-section are proved, including the requirement that the road concerned was a public road.

E. COMMON LAW

[39.] The first defendant could in my view in any event in law be proved to have been responsible for the maintenance of the fence on the basis of the common law if as the owner of the commonage and of the property it exercised control over the fence and on the principle that, if it allowed animals to be kept there, it had a legal duty to ensure that the fence was in such a condition as to safeguard road users from the presence of animals on the road¹⁶.

¹⁶ Compare **Jamneck v Wagener** 1993 (2) SA 54 (C).

[40.] This makes it unnecessary for me to consider Mr Tshavhungwa's submissions regarding section 12(1) of the **Ordinance** in any detail. It is clear that those provisions could apply to the first defendant in its capacity as a council, but they have no relevance to the first defendant in its capacity as an owner of immovable property abutting the national road. The absence of an allegation that the Administrator had directed the first defendant, in its capacity as a council, to erect this fence, is therefore of no relevance at all.

[41.] In any event, we are here concerned with the duty to maintain a fence, and not the duty to erect a fence.

F. CONCLUSION

[42.] To summarise therefore I find:

42.1 that the first defendant can in law, and provided that the statutory or common law requirements are proved, be held to have been responsible for the maintenance of the fence; and

42.2 that neither the provisions of the **Roads Act** nor those of the **Fencing Act** would have relieved the first defendant of such a responsibility.

[43.] It follows that the special plea should be dismissed.

G. COSTS

[44.] There is no reason why costs should not follow such a result.

[45.] On the other hand there is, however, also no merit in the argument of Mr Botha, counsel for the plaintiff, that the first defendant should, as a punitive measure, be ordered to pay such costs within a specified period of time. It cannot be said that the special plea was devoid of merit to such an extent as to have been vexatious or in bad faith.

H. ORDERS

[46.] The following order is therefore made:

THE FIRST DEFENDANT'S SPECIAL PLEA IS DISMISSED WITH COSTS.

C J OLIVIER
JUDGE
NORTHERN CAPE DIVISION

For the Appellant:	ADV. C BOTHA
Instructed by:	ELLIOTT MARIS WILMANS & HAY
For the Respondent:	ADV. TSHAVHUNGWA
Instructed by:	MJILA & PARTNERS