

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

Case No: A106/2014

In the matter between:-

FALLO SAMUEL MOFOKENG

Appellant

and

PHINEAS LETLATSA MOLOI

Respondent

CORAM: RAMPAL, AJP *et* TSATSI, AJ

JUDGMENT BY: TSATSI, AJ

HEARD ON: 29 JULY 2014

DELIVERED ON: 4 SEPTEMBER 2014

INTRODUCTION

[1] This is an appeal against the judgment of the learned magistrate, who granted absolution from the instance in favour of the defendant/respondent on 25 October 2013.

[2] In the main action the appellant was the plaintiff and the respondent was the defendant. For the sake of convenience the parties will be addressed as appellant and respondent.

- [3] The appellant's cause of action was a claim for payment in the sum of R85 992, 00 in respect of damages caused as a result of a collision between his motor vehicle, and a cow on the 10th of September 2009. His motor vehicle was driven by his son, S.P. Mofokeng.

FACTS

- [4] It is common cause that:

- 4.1 An accident occurred on 10 September 2009 at about 19h00 on the public road between Villiers and Frankfort a short distance from Villiers.
- 4.2 The accident occurred between the appellant's motor vehicle and a cow that belonged to the respondent.
- 4.3 At a place where the accident occurred the road was fenced and that the cow was within the road boundaries of the public road.
- 4.4 The respondent gave no explanation on the scene of the collision as to how the cow came to be on the road.
- 4.5 At the time of the collision there was a suspicious vehicle on the scene which quickly drove off after the collision.

- [5] The appellant alleged that the collision was caused solely by the negligence of the respondent in that:

- “4.1 Nagelaat het om sy beeste met spesifieke verwysing na die betrokke bees behoorlik in ‘n kamp te hou waar dit nie toegang tot die openbare pad het nie.
- 4.2 Nagelaat het om toe te sien dat die bees nie op die openbare pad is sonder toesig nie.
- 4.3 Die beeste aangejaag het op ‘n openbare pad sonder om behoorlik beheer daaroor te hou.
- 4.4 Die beeste aangejaag het op ‘n openbare pad sonder om voertuie wat die pad gebruik het behoorlik te waarsku daarvan.”

[6] The respondent denied each and every allegation by the appellant and pleaded to the appellant’s particulars of claim as follows:

- “4.1 Defendant denies each and every allegation therein contained as if herein so set out, and particular that the Defendant was negligent either as alleged or at all.

Defendant specifically pleads that he acted as a reasonable person would have in his position by taking every precautionary steps reasonably expected from him to prevent any livestock to escape from the enclosed areas or his kraal.

- 4.2 Defendant denies each and every allegation therein contained as if herein so set out, and particular that the Defendant was negligent either as alleged or as all.

Defendant specifically pleads that he acted as a reasonable person would have in his position by taking every precautionary steps reasonably expected from him to prevent any livestock to escape from the enclosed areas or his kraal.

- 4.3 Defendant denies each and every allegation therein contained as if herein so set out, and particular that the Defendant was

negligent either as alleged or as all.

Defendant specifically pleads that none of his live stock was hastened over any public road at 19:00 on the 10th of September 2009 as all his livestock was already in his kraal locked up.

4.4 Defendant denies each and every allegation therein contained as if herein so set out, and particular that the Defendant was negligent either as alleged or as all.

Defendant specifically pleads that none of his live stock was hastened over any public road at 19:00 on the 10th of September 2009 as all his livestock was already in his kraal locked up.”

- [7] In the alternative the respondent pleaded that the appellant’s driver was negligent in that, he failed to keep a proper look out; that he failed to take the conditions of the road into account, when approaching an informal settlement and that he failed to apply his brakes timeously or at all.
- [8] In the court *a quo* there was separation of merits and quantum and the trial proceeded only on the merits.

ISSUES

- [9] The crux of the matter is whether the appellant had *prima facie* established that a collision was occasioned by the respondent’s negligence.

THE APPELLANT'S EVIDENCE

[10] The version of the appellant was narrated by two witnesses, the first one is the driver Mr Shorty Pikinini Mofokeng, and the appellant himself who is the owner of the vehicle.

[11] The first witness was the driver who testified as follows: That he was driving from Johannesburg to Frankfort. There were about ten passengers in the mini bus taxi. It was dark when he reached Villiers. There was no rain, shortly before the collision. He was driving at a speed of about 95 km per hour, at the zone where the speed limit was 100 km per hour. The accident happened after the off ramp leading to Frankfort direction and on the right there is a road leading to Villiers. The road was steep. He was travelling downhill when the accident happened. The grass was tall on the shoulders of the road. He noticed cattle on the left hand side of the road. One of them unexpectedly ran across the road in front of the motor vehicle. The motor vehicle and the cow collided on his path of travel. He could not avoid the collision for three reasons. The first was that he was very close when the cow ran across the road. The second reason was that he could not slow down because the brakes of the vehicle were hopelessly defective. The third reason was he could not swerve to the right as there was an oncoming motor vehicle. The cow and the vehicle ended on the right hand side of the road between the tarmac and the fence. The police were called. The police arrived at night and took a statement from him. They advised him to remain on the scene for the night, which he and his father did.

[12] The appellant also testified. He went to the scene of the accident. He was already there when the police arrived. The Police advised them to remain on the accident scene to see who will come looking for the dead cow. According to the police the person looking for the dead cow would possibly be the owner. The respondent visited the accident scene the next day. His visit raised the suspicion that he was the owner of the dead cow and that he was possibly the driver of the suspicious vehicle that was parked next to the road at the time of the collision. That car drove off without offering assistance. He testified that his suspicion was strengthened by the conduct of the respondent. The respondent was able to locate exactly where the dead cow was without any struggle, despite the tall grass which was supposed to be a hindrance. The presence of the suspicious motor vehicle mentioned above, was viewed by the appellant as the respondent himself waiting in the motor vehicle to see how events were going to unfold after the collision. According to the appellant this was because the respondent was trying to avoid liability.

This concluded the appellant's version, thereupon the respondent applied for absolution from the instance, before the respondent testified. The respondent's application was successful. The appellant was aggrieved.

THE RESPONDENT'S EVIDENCE

[13] The respondent did not lead evidence, as I have already indicated.

THE MAGISTRATE'S RULING

[14] The learned magistrate concluded that no negligence at all had been established by the appellant against the respondent. In the cause of giving a ruling, the magistrate said the following:

“Wat die feite dan nou in die saak aanbetref is dit my mening dat die Eiser nie ‘n sweempie van nalatigheid bewys het tot hier waar sy saak gesluit is nie.”

[15] After the decision the appellant applied for leave to appeal the learned magistrate's ruling. Leave was granted. Among the other grounds of appeal, the appellant contended that:

- “6. The Honourable Magistrate erred in not taking into consideration properly that the uncontested evidence of the facts by the Plaintiffs witnesses present a case scenario as prohibited by Regulation 313.
7. The Honourable Magistrate erred in not taking into consideration properly that the Defendants contradiction (**sic**) of Regulation 313 as set out in the Plaintiffs particulars of claim and supported by evidence constitute prima facie negligence.
8. The Honourable Magistrate therefore erred in not finding that grounds for negligence on the part of the Defendant had been proven by the Plaintiff.
9. The Honourable Magistrate erred in the circumstances in not applying the principles set out in the **Jamneck v Wagner** case namely to find that there was a rebuttal duty on the Defendant which he had to comply with”.

[16] On behalf of the appellant Mr Marais submitted that the trial magistrate erred in making the finding that the evidence tendered by and for the appellant hardly disclosed any negligence on the part of the respondent. Therefore Mr Marais, urged us to uphold the appeal.

[17] On behalf of the respondent Mr Hefer differed. He submitted that the finding of the trial magistrate was correct. Therefore he urged us to dismiss the appeal.

THE LAW

Absolution from the instance

[18] Rule 39(6), (7), and (8) of the Uniform Rules of the High Court provides as follows:

- “(6) At the close of the case for the plaintiff, the defendant may apply for absolution from the instance, in which event the defendant or one advocate on his behalf may address the court and the plaintiff or one advocate on his behalf may reply. The defendant or his advocate may thereupon reply on any matter arising out of the address of the plaintiff or his advocate.
- (7) If absolution from the instance is not applied for or has been refused and the defendant has not closed his case, the defendant or one advocate on his behalf may briefly outline the facts intended to be proved and the defendant may then proceed to the proof thereof.
- (8) Each witness shall, where a party is represented, be examined, cross examined or re-examined as the case may be by only one (though not necessarily the same) for such party.

- [19] The test to be applied by the trial court was: Was there evidence upon which a court might reasonably find for the plaintiff? (See: McCarthy Ltd v Absa Bank Ltd 2010 1 All SA 435 (SCA); Carmichele v Minister of Safety and Security 2001 10 BCLR 995 (CC); 2001 4 SA 938 (CC) 951).
- [20] The test to be applied by the trial court was to inquire whether the plaintiff has made out a *prima facie* case which calls for the respondent to answer. To the extent that the plaintiff relies upon inferences, it is sufficient if the inference the plaintiff wishes to draw is a reasonable one; it need not be the only reasonable inference. (Marine and Trade Insurance Co Ltd v Van der Schyff 1972 1 All SA 144 (A); 1972 1 SA 26 (A); Alli v De Lira 1973 4 All SA 547 (T); 1973 4 SA 635 (T).)
- [21] The court has a discretion to grant or refuse absolution from the instance (Fedgas (Pty) Ltd v Rack-Rite Bop (Pty) Ltd 1997 3 All SA 68 (B). In the exercise of this discretion it will normally not have regard to the credibility of witnesses unless there is a serious issue regarding the credibility of such witnesses to the extent that the court is unable to place any reliance upon them. The court may also have regard to the possibility that the plaintiff's case may be strengthened by evidence emerging during the defendant's case. (Ruto Flour Mills (Pty) Ltd v Adelson (2) 1958 4 All SA 252 (T); 1958 4 SA 307 (T).
- [22] Absolution from the instance can only be granted if the onus rests upon the plaintiff. If the onus rests on the defendant, there can be no order for absolution from the instance either at this stage or

later (**Schoeman v Moller** 1949 4 All SA 60 (O); 1949 3 SA 949 (O).

[23] In **Gafoor v Unie Versekeringsadviseurs (Edms) Bpk** 1961 (1) SA 335 (A) at 340D-G the court stated as follows:

“Another observation that may be made is that as a rule when a trial Court refuses absolution at the close of the plaintiff's case, it avoids unnecessary discussion of the evidence, lest it seem to take a view of its quality and effect that should only be reached at the end of the whole case. In the same way on appeal it is generally right for the Appellate Tribunal, when allowing an appeal against an order granting absolution at the close of the plaintiff's case, to avoid, as far as possible, the expression of views that may prematurely curb the free exercise by the trial Court of its judgment on the facts when the defendant's case has been closed.”

Negligence

[24] In **Enslein v Nhlapo** 2008 (5) SA 146 SCA at 148J to 149 Ponnann JA said the following:

“It must be accepted, it seems to me, that the defendant had to have been aware of the fact that, if the cattle on his farm were to stray onto the adjoining public road, they could endanger the lives of road users. A reasonable person in the position of the defendant would thus have taken steps to prevent the cattle from straying onto the public road particularly at night.”

and at 150C – D:

“The real question in this case is whether a reasonable person would have taken further precautions to prevent the cattle from straying onto the public road. It is unfortunately a fact of life that, even though most people act with reasonable care most of the time, a normal degree of negligence is an everyday occurrence (see *Mkhwanazi v Van der Walt* 1995 (4) SA 589 (A) at 594A - B).”

- [25] A question of negligence was discussed in an unreported judgment in **Van Zyl v Conradie** (case no 1536/1988 ECD delivered on 14 March 1991):

“The defendant is not automatically liable if it is found that his cattle got into the road at night and caused a collision. This does not give rise to a presumption of negligence. There is no room for applying the maxim *res ipsa loquitur*... The plaintiff can only succeed by establishing by means of credible and acceptable evidence that the defendant was negligent and that his negligent conduct caused damage to the plaintiff.”

- [26] The decision in **Van Zyl**, *supra*, is clearly not compatible with the decision in **Enselin**, *supra*. The latter is more authoritative. The former has no binding force on me. Moreover the Road Traffic Regulation 313 of 1996 was clearly enacted to enhance public protection from the foreseeable danger posed by stray animals roaming on a public road. The decision in **Van Zyl** had eroded the public protection of road users. The Regulation creates statutory negligence, albeit *prima facie*. (see **Klaas v Serfontein** 1940 CPD 616 at 621).

- [27] In terms of the decision in **Jamneck v Wagener** 1993 (2) SA 54 (C) the onus of rebuttal is placed on the defendant. Should the

defendant fail in this instance, *prima facie* inference of negligence becomes conclusive.

National Road Traffic Regulation

[28] Regulation 313 of the National Road Traffic of 1996 reads as follows:

“(1) Subject to the provisions of subregulation (2), no person shall leave or allow any bovine animal, horse, ass, mule, sheep, goat, pig or ostrich to be on any section of a public road where that section is fenced or in any other manner closed along both sides, and no person shall leave such animal in a place from where it may stray into such section of a public road.

...

(3) In any prosecution for a contravention of subregulation (1), it shall, in the absence of evidence to the contrary, be presumed that any animal referred to in subregulation (1) was left or allowed to be on the section of the public road or place concerned by the owner of such animal, and a section of a public road shall be regarded as fenced or analysed along both sides even though there is an opening providing access to such road in the fence or other enclosure.

...

(5) A person in charge of an animal on a public road shall tend the animal in such a manner as not to constitute an obstruction or danger to other traffic.”

ARGUMENTS

The Appellant

[29] According to Mr Marais, the magistrate incorrectly stated that there was no evidence as to whether the road was fenced as the specific evidence of the witness was that they found the cow afterwards lying near the fence on the side of the roadway. Accordingly the magistrate erred and should have found in the appellant's favour and not granted absolution from the instance in favour of the respondent.

The Respondent

[30] In consideration of the appellant's argument, Mr Hefer for the respondent, argued that there was no evidence of respondent leaving the cow on the public road without proper supervision. He further submitted that the appellant failed to prove negligence on the part of the respondent.

APPLICATION OF THE LAW TO THE FACTS

[31] In my view, and in light of the preceding submissions of counsel, absolution from the instance should not have been granted. There was evidence upon which the court could have decided in the appellant's favour. There are also authorities that our courts have relied on in the past in instances where it has to be decided whether or not absolution should be granted.

[32] One of the reasons why absolution should not have been granted was because of the fact that at the trial, the respondent did not seriously challenge the appellant's evidence. On behalf of the respondent no suggestions, contrary to the appellant's case were

put to the appellant's witnesses. In my view the appellant had given sufficient evidence which indicated *prima facie*, that the respondent was causally negligent (Enselin, *supra*). Therefore it became necessary for the respondent to rebut the appellant's *prima facie* case of negligence.

[33] Absolution granted in the case in question may open flood gates for other similar cases and set a bad precedent where an owner of an animal may not be obliged to take reasonable steps to prevent the animal from straying onto a public road, putting the lives of unsuspecting and vulnerable road users at risk. The reasons that the learned magistrate gave for granting absolution in the respondent's favour are not supported by what the law provides regarding absolution.

[34] In terms of Regulation 313 of the National Road Traffic, the provision is pre-emptive, in the sense that the word "shall" is used, not "may". The provision clearly indicates that "no person **shall** leave or allow any bovine animal.....on any section of the public road...." Therefore any owner of an animal is obliged to take reasonable steps to prevent his animals from freely roaming on a public road unsupervised.

[35] I am inclined to accept the appellant's submission that there was a *prima facie* case of negligence made out against the respondent. An appellate tribunal, when allowing an appeal against an order whereby absolution was granted midway, has to avoid expressing views that may curb or inhibit a trial court from freely exercising its

open mind on all the facts after the defendant has also closed his case (**Gafoor**, *supra*.)

[36] The courts have frequently emphasized that absolution should not be lightly granted at the end of the plaintiff's evidence except in very clear cases (**South African Law of Evidence: Zeffet & Others** P.164- 166). There are various authorities emphasizing that, in the ordinary course of events, absolution will be granted sparingly, but when the occasion arises, a court should order it in the interest of justice. This appeal was not such a case. I have therefore come to the conclusion that, this is untenable and the finding cannot stand.

[37] Accordingly the following order is made:

37.1 The appeal is upheld.

37.2 The order of the court *a quo* is set aside and substituted with the following:

“The defendant’s application for absolution from the instance is refused.”

37.3 The costs occasioned by the appeal is costs in the cause.

37.4 The matter is remitted to the trial court to deal with it accordingly.

E. K. TSATSI, AJ

I agree.

M. H. RAMPAL, AJP

On behalf of appellant:

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On behalf of respondent:

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