

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No.: A370/2004

In the appeal between:

NGAKA JACOB NHLAPO

Appellant

and

HERMANUS FRANCOIS ENSLIN

Respondent

CORAM: EBRAHIM, J *et* MOLEMELA, AJ

JUDGMENT: EBRAHIM, J

HEARD ON: 19 SEPTEMBER 2005

DELIVERED ON: 2 FEBRUARY 2006

- [1] This an appeal against the judgement of the magistrate, Petrus Steyn dismissing with costs an action brought by the appellant against the respondent. The appellant's cause of action was a claim for payment in the sum of R38 825,76 in respect of damages caused as a result of a collision between his motor vehicle driven by himself at the time and

cattle owned, alternatively, under the control of the respondent.

[2] The appellant alleges that the collision was caused solely through the negligence of the respondent in that:

- 4.1 he failed to ensure that the said cattle were properly fenced in;
- 4.2 he failed to prevent the cattle from straying onto a public road;
- 4.3 he failed to warn approaching motorists of the presence of the cattle on the road surface although he could have done so.”

[3] Aside from the admission of the citation of the defendant (respondent) the respondent’s plea is a complete and bare denial of all the allegations in the particulars of claim.

[4] In the court *a quo* there was a separation of merits and quantum and the trial proceeded only on the merits. The merits embraced 3 issues,

1. The citation of the plaintiff;
2. The date, place and fact of the alleged collision;
and
3. The allegations of the causative negligence of the respondent.

[5] At the trial, the respondent did not seriously challenge the *locus standi* of the appellant. Notwithstanding his plea of a lack of knowledge of the collision, his own evidence confirmed the fact of the collision as he had been contacted by the local South African Police Services and visited the scene of the collision shortly after its occurrence.

[6] Although the respondent denied ownership of the animal in question (a Brahman bull), it was common cause that the animal was kept in a grazing encampment on the respondent's land and under the respondent's control, exercised through an employee of the respondent, one Molooi who gave evidence at the trial.

[7] The only issue in this appeal is whether the appellant established the alleged negligence and causation at the trial.

[8] The evidence led at the trial by both appellant and respondent may be briefly summarised as follows:

8.1 The appellant was driving along the main road between Petrus Steyn and Heilbron when he collided with an animal, a Brahman bull. This bull was kept in an encampment on the respondent's farm adjoining the public road. The camp was secured by a wire gate. The gate boarded on an access road on the farm used by a neighbour, one Kheswa. A second steel gate provided access from the access road on the respondent's farm to the public road.

8.2 Immediately after the collision the respondent's evidence established that both gates were open and several animals escaped onto the public road through the wire gate and the steel gate.

3. The evidence of Molooi was that on the Saturday morning of the collision, that is the 9th of February 2002, both gates, that is the wire gate as well as the steel gate were shut when he left the farm to spend the weekend at his home in the location. On the Monday morning when he returned to work he found that 5 head of cattle were missing. He followed the spoor of the cattle and recovered 4 of the cattle on the opposite side of the public road. The 5th animal was the Brahman bull which had been involved in the collision.

4. The evidence of the respondent was, that notwithstanding his ownership of the land and the fact that he maintained control over the animals in the grazing encampment through his employee, Molooi, he disavowed responsibility for the collision on the grounds that the steel gate giving access from the farm to the public road was open. In this regard his evidence was that he had an arrangement with Kheswa in terms of which Kheswa undertook responsibility to ensure that the steel gate was shut all times.

[9] Kheswa was not called as a witness to testify and the existence of this agreement was not specifically pleaded as a defence nor was the further submission in oral argument

by Mr. Van Rooyen who appeared on behalf of the respondent pleaded as a defence, namely that Mr. Kheswa had been given a servitude in respect of the access road on the respondent's property. Whether or not such an agreement existed and whether or not Mr. Kheswa was given a servitude by the respondent is in my view of no moment in light of the approach I have adopted in this judgement but for the purposes of the judgement I have assumed in the respondent's favour that there was such an agreement.

- [10] The fact is that the open steel gate giving access to the public road was not the sole and only reason why the cattle were able to escape onto the public road and cause the collision. The collision was caused as a result of both gates being open. The wire gate enclosing the grazing encampment in which the cattle were kept as well as the steel gate giving access to the public road had been left open. Moreover, it is clear from the sketch plan attached to the appeal record that the proximity of the wire gate to the

steel gate was such as to make it reasonably foreseeable that if the wire gate was left open cattle would stray onto the public road if the steel gate was also left open. There is no evidence whatsoever as to how these two gates came to be opened. The respondent in exercising control over the wire gate to the grazing encampment owed a duty to road users to ensure that that gate, had been closed such that it prevented the animals from reaching the road through the second steel gate used by Kheswa, see **JAMNECK v WAGNER** 1993 (2) SA 54 (C).

- [11] There is also an onus of rebuttal on the respondent to lead evidence regarding the manner in which he complied with this duty to control the wire gate. Other than the evidence of Molooi that both the wire gate as well as the steel gate were shut that Saturday morning when he left the location there is no evidence whatsoever on record of what control was exercised over the wire gate from the time Molooi left on Saturday morning to the time of the collision that Saturday evening. In the respondent's evidence it was

apparent that there was no lock on the wire gate to the encampment. In the absence of such evidence the inference is justified that the respondent could and should have reasonably ensured that the cattle in the encampment were properly retained within the grazing camp and prevented from straying onto the road, (see **JAMNECK'S** case *supra*). That the respondent failed in his duty to do so, amounts to negligence on his part, which negligence was a direct cause of the collision.

[12] In the result the following order is made:

1. The appeal is upheld with costs.
2. The judgement of the magistrate at Petrus Steyn is set aside and substituted with the following:
 - 2.1 Judgment is granted in favour of the plaintiff for such damages as plaintiff may prove to have suffered at the trial in relation to the quantum.
 - 2.2 The defendant is ordered to pay the costs of the trial on the merits.

S. EBRAHIM, J

I agree.

M. MOLEMELA, AJ

On behalf of appellant: Adv. M.W. Verster
Instructed by:
Rossouws Attorneys
BLOEMFONTEIN

On behalf of respondent: Adv. P.C.F. van Rooyen
Instructed by:
Naudes
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