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**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

Case No: CA & R 12/2021

Court *a quo* case no: 313/2018

Date Heard: 12 June 2023

Date Delivered: 9 February 2024

Reportable: YES / NO

Circulate to Judges: YES / NO

Circulate to Regional Magistrates: YES / NO

Circulate to Magistrates: YES / NO

In the matter between:

HANS VAN WYK

APPELLANT

and

JAN STEPHANUS LAMBRECHTS

RESPONDENT

Coram: Nxumalo J *et* Tyuthuza AJ

JUDGMENT

***Per* Tyuthuza AJ**

INTRODUCTION

1. This is an appeal by Mr Hans Van Wyk, the appellant, against the judgment and order dated 13 January 2021, by Mr P. Mulder, the Magistrate of Postmasburg, in which he upheld the respondent's claim on the merits.
2. The respondent herein instituted an action against the appellant, in which he claimed an amount of R164,991.66; together with interest and costs, arising out of damages which the respondent had suffered for reasonable costs for repairs, towing services and storage costs of his vehicle.
3. It is common cause that:
 - 3.1. On or about 3 December 2017 at about 20:15 on the R385 road outside Postmasburg, a collision occurred between the appellant's cow and the respondent's vehicle.
 - 3.2. The respondent is the owner of the Toyota Hilux vehicle with registration number C[...] 0[...] N[...] and at the time of the collision the respondent had been the driver of the vehicle.
 - 3.3. As a result of the collision the respondent's vehicle was damaged.
 - 3.4. The camp where the cattle are kept belongs to the appellant.

TRIAL

4. Despite the appellant having denied that the accident occurred as pleaded by the respondent in his particulars of claim, this denial was withdrawn and the only issues for determination at trial related to the ownership of the vehicle and the appellant's negligence.
5. The respondent's main contention is that the collision occurred as a result of the sole negligence of the appellant, in that: - the appellant failed to take any reasonable steps to prevent his cow from wandering onto the road; failed to warn road users of the cattle walking on the road and failed to take any reasonable steps to prevent the accident.

6. The appellant disputed the negligence as well as the quantum of damages claimed.

MR VAN WYK

7. The appellant testified that he is renting the farm from the Tsantsabane Municipality, whereon he is keeping his livestock in a camp. The camp belongs to him, is well-fenced with jackal proof wire and that he is responsible for the maintenance of the gate and fencing. He testified that the cattle could not escape through the jackal proof wire.
8. The appellant further testified that there is one gate which grants access to the camp, the gate has an iron frame and a padlock. He stated that only he and two other persons have the keys to the gate.
9. Despite having initially testified in chief that he did not employ anyone to look after the cattle by virtue of the fact that the cattle were in a camp and the fence is such that the cattle could not escape, the camp, upon questioning by the learned Magistrate, he testified that his employee, who lives on the plot, is responsible for closing the gate to the camp. He testified that the employee did not have a key to the main gate.
10. He testified that he was at the farm on 2 December 2017. When questioned about the condition of the fence and the gate on the day, he replied "*Die omheining was reg en die hek was toegesluit gewees.*" He testified that he locked the gate when he left the farm on 2 December 2017. When asked if the cattle have previously escaped the camp, he replied, "*Nee, geensins want daar is genoeg water. Ek het 'n windpomp daar. Ek het n solar pomp, so daar is nie 'n manier dat hulle kan uit kom nie.*" He testified that there is no way that the cattle could escape the camp in that the cattle had enough water.
11. Under cross-examination, he testified that he was responsible for the maintenance of the fence and the gate. He further testified that he is

employed 70km from Postmasburg and works 12 hour shifts and is not at the farm every day.

12. He testified that upon arriving at the camp on the night of the accident, the fence was still in order and that he did not check to see if there were any openings in the fence.
13. He testified that he took reasonable steps to ensure that the cattle would not leave the camp, and that on 2 December 2017, when he left the camp, the fence and the gate were in good condition.

MR LAMBRECHTS

14. The respondent testified that the collision had occurred as a result of him being blinded by the headlights of an oncoming vehicle and, as a result, he was forced to dim his headlights, which prevented him from seeing the cow which was now only five to six metres away. He testified that he tried to apply his brakes but his vehicle hit the cow.
15. He testified that he had no time to swerve. He testified that he was driving between 60 km and 70 km per hour, that the weather conditions were fine and that the area had a speed limit of 80 km per hour.
16. He stated that at the time of the collision, he did not know whom the cow belonged to but was later informed that the cow belonged to the appellant.
17. He testified that there were no warning signs to indicate that there are animals along the road, that the area is urban and not a farming area and that livestock was not supposed to be roaming around.
18. He testified that the cattle were roaming around unattended.
19. He testified that the collision caused damages to the front on his vehicle.

THE MAGISTRATE'S FINDINGS

20. The Magistrate was of the view that someone must have opened the gate to the farm and because they had failed to shut it, the cattle left the kraal.
21. The Magistrate stated that the question the Court had to answer was *"If Mr Van Wyk acted like the reasonable man would have acted in the circumstances to prevent the cattle from causing harm to the property of other people?"*
22. The Magistrate was of the view that it is unclear whether the cattle were let out of the gate or the cattle had left the kraal by themselves, and it is unknown to the Court what happened.
23. He stated that Mr Van Wyk, the Appellant, did not reside on the farm and was not on the farm every day. He mentioned that in a situation where you have a farm with so much cattle thereon, there was a greater duty on the farmer to ensure that the cattle remain within the camp and that there should be someone on the farm who inspects his farm fences and gates every day.
24. The Magistrate was of the view that Mr Van Wyk should have done more to ensure that his cattle are kept safe or do not stray.
25. Despite the evidence led by the appellant regarding the entrance gate and the fact that Messrs. Coetzee and Hael drove through his camp to exit their farms, the veracity of the evidence is unknown or uncertain as Coetzee and Hael were not called to testify to confirm the state of the camp.
26. That it is so in our law that someone in the position of Mr Van Wyk, must take steps to ensure that the cattle do not leave the camp.¹ The easiest and most cost-effective manner to ensure that the cattle do not leave camp is to install a cattle grid.

¹ Kruger v Coetzee [1966] 2 All SA 490 (A).

27. The Magistrate commented that Mr Van Wyk should have installed a fence around his camp to separate same so that Coetzee and Hael need not drive through his land. He stated that that would have been the easiest and most cost-effective measure which a reasonable man would have taken.
28. A reasonable man would have insisted on these measures in view of other people having access to his land and having keys to the gates. The appellant failed to take these measures.
29. The Magistrate was of the view that the appellant had failed to put enough measures in place to ensure to keep the cattle inside the camp.
30. The Magistrate found that the appellant was negligent in this respect.
31. The Court *a quo* found that the respondent's claim succeeded on the merits and costs to stand over.

ISSUE FOR CONSIDERATION IN THIS APPEAL

32. Despite the plethora of grounds of appeal raised by the appellant, the key issue for consideration in this appeal is whether the collision was caused by the negligence of the appellant.
33. In essence, the question to be determined is "*whether a reasonable person would have taken further precautions to prevent his/her cattle from straying onto the public road.*"²
34. The plaintiff carries the *onus* to prove on a balance of probabilities that the damages he suffered were as a result of the defendant's negligent conduct.
35. The farm whereon the appellant's camp is located borders a national road. In the circumstances, I am of the view that the appellant had a legal duty to

² Mkhwanazi v Van Der Walt 1995 (4) SA 589 (A) at t 593F.

ensure that the fence is in a good state of repair so that his cattle do not end up on the road and to ensure that the gate is kept locked at all times.³

36. It is undisputed that the appellant had such a legal duty. This legal duty included an obligation to regularly inspect both the fence and the gates, more especially because of the position of the farm in relation to the national road.⁴
37. On the appellant's version, he was not the only person with the keys to the gate as Messrs Coetzee and Hael were also in possession of keys to the main gate. He testified that he did not enquire from either of them whether they had left the gate unlocked. In the circumstances, it remains unclear why he could be so certain that the gate had remained locked after he left the farm.
38. The appellant confirmed that the enclosed camp belonged to him and that the farm was well-fenced. However, and despite having pictures of the camp and the gate which would have verified the appellant's version, these pictures were not presented as evidence.
39. He testified in chief that he did not have a herdsman looking after the cattle and that the fence is such that the cattle could not escape from it. This version later changed when he testified that he had someone in his employ to look after his cattle. This person was also not called to testify.
40. He testified that preceding the accident, he attended to the farm on the morning of 2 December 2017, and that the fence was in good condition and further that he had locked the main gate.

³ Jordaan v Krone Broers and Others 1999 (3) All SA 57 (C).

⁴ Swartz v Delport [2002] 2 All SA 309 (A) at para 12; see also Coreejes v Carnarvon Municipality and Another [1964] 2 All SA 527 (C)

41. Under cross-examination, he testified that he was responsible for the maintenance of the fence and the gate. He testified that the fence is in good condition and that the gate is always locked.
42. He further testified that he is employed 70km away from Postmasburg, works 12 hour shifts and is not at the farm every day.
43. He testified that he was not aware that the cattle had escaped from his camp and only became aware thereof when informed by the Police the evening of the accident. He testified that upon arriving at the camp on the night of the accident, the fence was still in good order and that he did not check to see if there were any openings in the fence.
44. He denied being negligent in that he left the cattle in the camp, and testified that he had taken reasonable steps to ensure that the cattle would not leave the camp and that the fence and the gate were 100% secure.

WHETHER OR NOT THE APPELLANT WAS NEGLIGENT

45. In the matter of *Enslin v Nhlapo* 2008 (5) SA 146 (SCA), the Court of appeal had to determine the same question before this court namely: Whether a reasonable person would have taken further precautions to prevent cattle from straying onto the public road. Ponnann JA, found that it was a reasonably foreseeable possibility that the gates might have been left open and that in the circumstances, a reasonable person would definitely have considered further precautionary measures over and above those which the defendant took. At paragraph 7, the learned Judge stated as follows:

“The use of a padlock to secure the steel gate or the installation of a cattle grid on the access road shortly before it joined the public road would have been easy, inexpensive and effective measures to prevent the cattle from straying onto the public road. ... Considering the respective interests of the defendant on the one hand and the road users of the public road on the other, the use of a padlock or a cattle grid as precautions were so easy and

relatively inexpensive to take, that a reasonable person would have taken at least one if not both of them”.

46. Mr Kruger, for the appellant, submitted that the respondent failed to discharge the *onus* which rested on him to prove negligence on the part of the appellant. He also submitted that there was no evidence before the Court *a quo* that proved negligence on the part of the appellant. He however conceded that the appellant is an absent farmer and was not on the farm at all material times.
47. It was not disputed that the appellant had a legal duty to take reasonable steps to ensure that the fence of his farm is in good state of repair, and that the gates are locked, so that his cattle do not stray onto the public road. The appellant had the duty to ensure that he regularly inspected the gate and fence, and he alleged to have done so. A reasonable person in the position of the appellant would thus have taken steps to prevent the cattle from straying onto the public road, particularly at night.
48. It was submitted that the appellant conducted reasonable regular inspections and that the measures taken by the appellant in installing a jackal-proof wire and a fenced iron gate were effective measures.
49. On the appellant's version, he locked the gates on 2 December 2017, upon leaving the farm, but it is common cause that the Appellant was not the only person with keys to the gate. Thus the fact that the appellant closed the gate does not necessarily mean that the gates remained locked. The two persons with keys to the gate were not called as witnesses, even more peculiar is the fact that the appellant did not call them subsequent to the accident to enquire if either of them had left the gate open.
50. It is common cause that the appellant was not at the farm at all material times. The appellant had in his employ a herdsman, whose responsibility it was to lock the gates. The herdsman, however, was not called to testify. On the appellant's own version, the herdsman did not have keys to the gate.

51. No evidence was led as to how the gates came to be opened and the appellant failed to call as witnesses the other two persons who exercised control over the gate. The appellant in exercising control over the gate, owed a duty to road users to ensure that the gate was closed to prevent the animals from straying onto the road. Despite stating that he closed the gate when leaving the farm, the Appellant has adduced no evidence to show that the gates remained closed after he had left the farm on 2 December 2017.
52. He failed to call witnesses who also exercised control over the gate or his employee who was employed to look after his cattle, and in the absence of such evidence, an inference can be drawn that the appellant could and should have reasonably ensured that the cattle were properly retained in the camp and prevented from straying onto the road and that the Appellant failed in his duty to do so and was thus negligent, which negligence was a direct cause of the collision.⁵
53. For what it is worth, the Respondent could, in my view, have based his claim in law on the *Actio de pauperie*. This action makes an owner of a domesticated animal liable for damage caused by that animal, without requiring negligence.⁶ In order to succeed with this action, the Plaintiff would have to allege and prove the following: (a) the ownership of the animal vested in the defendant at the time of the infliction of the damage; (b) the animal was a domesticated animal; (c) the animal acted contrary to the nature of domesticated animals generally (*contra naturam sui generis*) in causing damage to the plaintiff; (d) causation – in other words, that the conduct of the animal caused the plaintiff's damage.⁷
54. When put to Mr Kruger for the Appellant, he conceded that the requirements for the *actio de pauperie* were present and that the appellant could be liable based on the principle. Despite the presence of the requirements of the

⁵ *Jamneck v Wagener* 1993 (2) SA 54 (C)

⁶ *O'Callaghan NO v Chaplin* 1927 AD 310

⁷ Amler's Precedents of Pleadings, Animals: *Actio de pauperie*, 2018 - Ninth Edition.

actio de pauperie, the respondent has based his claim on negligence and this Court is required to make a determination based on the pleadings before it.⁸

55. What the Court has before it is evidence that the cow belonged to the appellant, that the appellant was the owner of the camp, that the appellant was not the only person with control over the gate, that the appellant was not on the farm at all material times, that the appellant had installed a jackal-proof wire on the fence and the gate, and further that the appellant's cow caused damage to the respondent's vehicle.
56. The *onus* lay on the respondent to prove that the appellant as the cattle owner was negligent in allowing the cattle to be on the road. The appellant admitted that he owed a duty of care to prevent his cattle from escaping onto the public road and that he was responsible for taking reasonable steps to prevent his cattle from escaping their camp.
57. The probabilities also point to the gate having been negligently left open and the cattle having escaped through it. On the Appellant's own version, he did not enquire from Messrs. Coetzee or Hael if they had locked the gate, neither has he led evidence from the herdsman who allegedly was employed to take care of the cattle. I am of the view, therefore, that the gate was negligently left open by one of the persons in charge of the gate and in the absence of a cattle grid, the cattle were able to escape.
58. Neither Messrs. Coetzee, Hael or the herdsman were called to testify that they had indeed closed the gate at all material times hereto. The appellant was last on the farm on the morning of 2 December 2017, a day preceding the accident, and thus in these circumstances, he is in no position to testify that the gate was indeed locked on the evening of 3 December 2017.

⁸ *Biyela v Minister of Police* 2023 (1) SACR 235 (SCA), at para 8

59. The appellant testified that he took reasonable steps and effective measures, by installing a jackal proof, padlocking the gate and employing a herdsman. No pictures were however presented in the court *a quo* evidencing same. In any event, I am of the view that the installation of a cattle grid would have been an effective measure to prevent the appellant's cattle from escaping, the installation of the jackal proof was not sufficient.
60. The cattle found at the scene belonged to the Appellant, thus it is clear that for the cattle to have escaped, the gate should have been left open, despite the evidence of the Appellant that the cattle could never escape the camp. I find that the probabilities point to the gate having been negligently left open and the cattle escaping.
61. Numerous case law dealing with similar matters have shown that livestock owners owe a duty of care to the public and should take additional precautionary measures to ensure that their animals are kept in a secure space if these additional measures can be achieved easily and inexpensively. 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.
62. A reasonable part-time farmer who does not live on the farm and who has given some persons access to the gate keys, should have foreseen the possibility of the gates being left open and of cattle straying onto the road. The appellant should have taken extra precaution in installing a cattle grid at the entrance to the camp.—The appellant's failure to take further precautions meant that he had been causally negligent in relation to such damages as may in due course be proved by the plaintiff.
63. In the result, the following order is made:
- a) The appeal is dismissed with costs.

T TYUTHUZA
ACTING JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION

I concur.

APS NXUMALO
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION

APPEARANCES:

On behalf of the Appellant:

Adv R.L Kruger

On the instruction of:

Andre De Beer Attorneys Inc.

On behalf of the Respondent:

Adv A. Stanton

On the instruction of:

DGF Attorneys Inc.