



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case number: A189/2023

Magistrate's Court case number: 3/2022

In the matter between:

ROWAN SMITH

Appellant

and

KLAWERVLEI SITRUS CC

Respondent

JUDGMENT DELIVERED ON 11 MARCH 2025

MANGCU-LOCKWOOD J et VAN ZYL AJ:

Introduction

1. The mere presence of a deceased animal on the road does not give rise to a presumption of negligence. This is the conclusion to which we come in this matter.
2. The appellant appeals against the judgment of the Clanwilliam Magistrates' Court handed down on 21 June 2023 in an action for delictual damages

instituted by the appellant, as plaintiff, against the respondent, as defendant. The magistrates' court granted absolution from the instance, with costs, after the close of the plaintiff's case.¹

3. Absolution from the instance is granted where there is, for present purposes at the close of the plaintiff's case, not sufficient evidence upon which a court might reasonably find for the plaintiff; in other words, where the plaintiff has failed to make out a *prima facie* case (in the sense that there is evidence as to all of the elements of the claim).² Absolution from the instance can only be granted where the onus rests upon the plaintiff.³
4. The central issues in the present matter are:
 - 4.1 whether the maxim *res ipsa loquitur*⁴ applies in the circumstances; and
 - 4.2 whether Regulation 313 of the regulations promulgated under the National Road Traffic Act 93 of 1996⁵ creates a statutory presumption of liability in civil cases. The appellant contends that the evidence presented by the driver of the plaintiff's vehicle presented a scenario which was prohibited by Regulation 313.
5. The appellant primarily relies on a judgment given on appeal from the magistrates' court by the Free State Division, namely *Mofokeng v Moloi*,⁶ in support of his contentions that the Regulation does create such a presumption, and that *res ipsa loquitur* in any event applies. The appellant thus argues that the magistrate was wrong in granting absolution. He seeks the remittal of the action to the magistrate's court to allow the respondent to

¹ The issues of merits and liability had been separated from the issue of *quantum* by prior agreement between the parties.

² *Gafoor v Unie Versekeringsadviseurs (Edms) Bpk* 1961 (1) SA 335 (A) at 340A-C.

³ *Schoeman v Moller* 1949 (3) SA 949 (O) at 957.

⁴ Loosely translated, this means that the facts speak for themselves, that is, an inference of negligence can be drawn from the occurrence itself.

⁵ National Road Traffic Regulations, 2000, published under GN R225 in *Government Gazette* 20963 of 17 March 2000.

⁶ 2014 JDR 1838 (FB).

give evidence in rebuttal of this presumption.

Condonation

6. At the outset, the appellant sought condonation under Rule 27(1) for his failure to prosecute the appeal within the prescribed time period as provided for in Rule 50(1).
7. In our view, the delay was satisfactorily explained. The application was unopposed, and condonation was duly granted.

The pleadings in the action

8. It is common cause that on 24 June 2021 a vehicle owned by the appellant and driven by Mr Elim Basson, collided with a cow owned by the respondent on the N7 national road. The cow was lying in the road, apparently already dead.
9. In his particulars of claim the appellant relied on two causes of action.
10. The main claim was formulated on the basis of the *actio de pauperie*.⁷ At the trial, the appellant's legal representative conceded (quite correctly, in our view)⁸ that this was not a sustainable cause of action in the circumstances of this matter. The appellant therefore abandoned this basis for his claim.
11. That left the alternative cause of action, namely an Aquilian action based on allegations of negligence against the respondent. The allegations were that the respondent was “*negligent in one or more or all of the following respects*”, in that he:

11.1 “*failed to ensure that the cattle was (sic) contained properly on the*

⁷ “*The Defendant’s cattle as aforementioned acted contrary to its nature of its class by leaving the Defendant’s premises and wandering onto the public road, on which the Plaintiff was travelling at the time*”.

⁸ See the discussion in *Jordaan v Krone Boers and others* [1999] 3 All SA 57 (C) at 62b-9.

property and out of the public road”;

11.2 *“failed to take reasonable steps to prevent and deter the cattle from breaking out of the premises and entering the public road along which the Plaintiff was travelling”;*

11.3 *“failed to ensure that at the relevant time the premises, which is adjacent to a public road, was properly secured”;* and

11.4 *“failed to ensure that the cattle did not constitute a hazard for road users”.*

12. The respondent, in its plea, denied the allegations of negligence, and pleaded that the appellant has failed to plead a legal duty in circumstances where he relied on an omission.

13. In the pre-trial minute filed by the appellant in the magistrates’ court, the appellant confirmed that negligence and liability remained in dispute, and accepted that the onus and duty to begin rested on him. At no point in the pleadings or pre-trial minute did the appellant indicate that he would rely on any legal presumption of negligence or a reversal of the onus.⁹

The evidence led at trial

14. The appellant did not rely on any factual misdirection on the magistrate’s part, but accepted that she correctly summarised the evidence in her judgment. The appellant’s issue is with the fact that the magistrate did not find that the evidence, as it was, had given rise to a presumption of negligence on the respondent’s part.

15. The only witness to testify regarding the circumstances of the collision was the driver of the appellant’s vehicle, Mr Elim Basson. Mr Basson testified that

⁹ Reliance on Regulation 313 was not pleaded.

it was pitch black on the N7 when he was momentarily blinded by the bright lights of an oncoming truck. He did not see the cow lying in the roadway, but drove over the animal and crashed into another vehicle.

16. When asked who was to blame for the accident, Mr Basson answered that he felt that the approaching truck had caused the accident by failing to dim its lights. The truck had given him insufficient warning and space to avoid the collision. He made no mention of the respondent, as owner of the cow, in his answer.
17. When asked specifically what the respondent could have done to ensure the accident had not occurred, Mr Basson answered that he knew the respondent's member, Mr Jannie Smith, to be a responsible person who would have done his best to avoid such an incident. He stated further that, if someone had opened a gate at midnight while Mr Smith was sleeping, there was not much that Mr Smith could have done.
18. The only evidence relating to fault in relation to the collision was in fact exculpatory of the respondent.
19. When questioned directly on factual issues related to negligence, Mr Basson testified that he had no idea how the cow got onto the roadway, but thought that someone must have opened a gate. He did not see any gate open or any break or gaps in the fence after the collision. He knew nothing about fencing and could not comment on the fences used by the respondent. He was unable to say how the cow had ended up in the road.
20. The magistrates' court pointed out that the appellant *"did not inspect the fence at any time after the collision, he did not take photographs of the fence or gates, he did not request the court to do an inspection in loco, he failed to call witnesses, including expert witnesses, to give evidence about the condition of the fence or gates. There is absolutely no evidence before this court which would point to negligence on the part of the defendant."*

21. On a consideration of the transcript of the hearing, this finding is unassailable. The question then is whether, in the absence of any evidence pointing to negligence, the appellant may nonetheless rely on a legal presumption of negligence derived from the mere fact that the respondent's cow was lying in the roadway.¹⁰
22. The appellant relies on two arguments for the contention that the mere presence of the respondent's cow on the roadway creates a *prima facie* case of negligence against the respondent.
- 22.1 First, the appellant relies on the notion of *res ipsa loquitur* to establish a *prima facie* case which the respondent must rebut. The appellant argues that such evidence as there is of itself presents a *prima facie* case.
- 22.2 Second, the appellant relies on Regulation 313 to argue that a statutory presumption of negligence - in a civil – context - arises in these circumstances.
23. We deal with these arguments in turn below

Res ipsa loquitur

24. The appellant argues in his heads of argument that “*res ipsa loquitur* is of application to the action before court, since a cow does not just end up on a road, something must have gone horribly wrong which led to this mistake and only the Respondent was in a position to shed light on this”.
25. We agree with the submission by the respondent's counsel that the appellant's reliance on the maxim *res ipsa loquitur* in the present matter is misplaced. Various cases, including a judgment of the Supreme Court of Appeal, have specifically excluded the operation of this maxim in

¹⁰ Essentially reversing the onus.

circumstances such as the present.

26. In *Swartz v Delport*¹¹ the Supreme Court of Appeal considered a case where a motor vehicle had collided with a bull that had strayed onto the roadway. The plaintiff in that case sought to argue that the mere fact that the bull was on a public roadway created an inference of negligence on the part of the bull's owner. The Supreme Court of Appeal rejected this argument, and held as follows:¹²

"Na my mening is die onderhawige nie 'n saak waar res ipsa loquitur toegepas kan word nie. Daar kan nie van die feit dat die bul deur die draad gekom het en op die pad beland het 'n afleiding van nalatigheid aan die kant van die respondent gemaak word nie. Die appellant sou verder moes gegaan het en, byvoorbeeld, bewys het dat die swak toestand van die heining redelikerwys waarneembaar was of dat die respondent se voorkomende instandhouding ontoereikend was. Sulke getuienis ontbreek."

[Our translation: In my opinion this is not a case where res ipsa loquitur can be applied. An inference of negligence on the part of the respondent cannot be made from the fact that the bull had come through the fence and ended up on the road. The appellant would have had to go further and, for example, should have proved that the bad condition of the fence was reasonably noticeable or that the respondent's preventative maintenance was insufficient. Such evidence is missing.]

27. A similar argument was raised in this Division in *Britz v Green and others*.¹³ It was argued that the maxim should be applied to assist a plaintiff who only established that the defendant's cow was on the public roadway. The court discussed the applicable principles and case law, including *Coreejes v Carnarvon Munisipaliteit*,¹⁴ *Jamneck v Wagener*,¹⁵ and *Jordaan v Krone*

¹¹ [2002] 2 All SA 309 (A).

¹² At para [16] of the unanimous judgment.

¹³ 2006 JDR 0998 (C).

¹⁴ 1964 (2) SA 454 (C).

¹⁵ 1993 (2) SA 54 (C).

*Broers and others*¹⁶ and, with reference to *Swartz v Delport*, held as follows:¹⁷

“Plaintiff produced no evidence to show from where the cow had escaped the farm in a journey across the R43. There was no evidence other than that to which I have made reference concerning the state of the fence. Unlike in Jordaan, supra, no expert evidence was led as to the effectiveness of defendant’s fence.”

28. It is clear from these judgments that some evidence pointing to negligence on the respondent’s part was indispensable for the creation of a rebuttal onus, for example, that there was a gap in the fence,¹⁸ or that the respondent’s fencing was inadequate.¹⁹ *Res ipsa loquitur* did not assist the plaintiffs in these matters.
29. In *Willemse and another v Whitney Farming Enterprises*²⁰ the court was faced with similar arguments seeking to apply the maxim despite a dearth of evidence from the plaintiff. The court referred with approval to the unreported decision in *Van Zyl v Conradie*²¹ in which the court had held that there is no presumption of negligence which arises from the mere fact that the defendant’s cattle were found to be in the road, and that there was no room for *res ipsa loquitur* to apply. The court in *Willemse* found, similarly, that the mere fact that the cattle were on the road did not give rise to any presumption or inference of negligence. More was needed from the plaintiff to establish a *prima facie* case:²²

¹⁶ [1999] 3 All SA 57 (C).

¹⁷ At p 9.

¹⁸ As was the case in *Coreejas supra* at 457A-G, and *Jamneck supra* at 61J-63I.

¹⁹ Which was clear from the evidence led in *Jordaan supra* at 63b-i.

²⁰ [2002] ZAECHC 4 (28 February 2002).

²¹ Eastern Cape Division case number 1536/88, 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.*”

²² Emphasis added. See also *Rocky Lodge (Pvt) Ltd v Livie* 1977 (3) SA 231 (RA) at 232E: “*The onus was on the plaintiff to establish positively that the presence of the cow on the road was due to some act or omission amounting to negligence on the part of the defendant. See the cases of Kruger v Coetzee, 1966 (2) SA 428 (AD), and Moubrey v Syfret, 1935 AD 199 ...*”

“ ... the plaintiffs [argued] that, in the light of the weerleggingslas referred to in Jamneck v Wagenaar supra, I should draw an adverse inference against the defendant. ... the plaintiffs have placed what information they can before the court. It cannot reasonably be expected that they would be able to prove where on the farm the heifers had been grazing and how they got out of their grazing camp and on to the road. On the other hand the defendant has always had the facts at its disposal. It is expected, in these circumstances, to explain the circumstances of the collision and, in particular, to explain that the collision is not attributable to fault on its part.

This argument is valid only if the plaintiffs are able to establish a prima facie case of negligence against the defendant in the first place. There can be no talk of a weerleggingslas if there is no prima facie case. There can be no talk of an adverse inference that the defendant was indeed negligent because it has failed to give an innocent explanation, in the absence of a prima facie inference of negligence being a likely explanation. To hold otherwise would be to place a real onus, and not merely a weerleggingslas or rebuttal onus, on the defendant. The authorities cited above are clear that it is not possible for me to conclude that there is a prima facie case of negligence from the mere fact that the defendant's heifers were on the national road at night. If I do not know how they got into the road, whether through a hole in the fence or through a gate which had been left open or in some other way from which an inference of fault might reasonably be drawn, I have to speculate about how they got on to the road and whether or not it was the defendant's fault. Speculation can never amount to proof on a balance of probabilities.”

30. The upshot of this is that the established test for negligence as set out in *Kruger v Coetzee*²³ continues to apply in matters such as the present, and the plaintiff must make out a *prima facie* case against the defendant to avoid

²³ 1966 (2) SA 428 (A) at 430E-G: “For the purposes of liability culpa arises if - (a) a diligens paterfamilias in the position of the defendant - (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and (ii) would take reasonable steps to guard against such occurrence; and (b) the defendant failed to take such steps”.

the grant of absolution from the instance.

31. Given this precedent one would have thought that that was the end of the matter. The appellant nevertheless relies on two cases to argue that the maxim should apply, namely the judgment of the Supreme Court of Appeal in *Enslin v Nhlapo*,²⁴ and the decision in *Mofokeng v Moloi*.²⁵

Enslin v Nhlapo

32. *Enslin* is not authority for the appellant's proposition. On the contrary, it establishes the opposite. In *Enslin* extensive evidence was led about how the defendant's bull had strayed onto the public roadway. It was accepted that two gates had been left open, allowing the bulls to wander out. The court accepted that the defendant had installed fencing and gates, but found on the evidence that the gates were used by various people for access, that the defendant had no control over these movements, and that the defendant's bulls had previously strayed on to the road. He had nevertheless not taken steps to lock the gates.
33. On these facts, the court found that the defendant knew about the risk that his cattle posed.²⁶ He knew the risks of the unregulated gate access, and ought to have taken the simple and inexpensive step of installing padlocks on the gates:²⁷

"[5] ... It was thus a reasonably foreseeable possibility that both gates might have been left open, particularly as the one was utilised by a neighbour and his visitors to gain access to the adjoining property. Moreover, on the defendant's own version, his cattle had strayed onto the public road on a prior occasion. In those circumstances, it seems to me, that a reasonable person would not have shrugged his/her shoulders in unconcern, as the defendant appears to have done, but would definitely have considered further

²⁴ 2008 (5) SA 146 (SCA).

²⁵ 2014 JDR 1838 (FB).

²⁶ *Enslin v Nhlapo* *supra* at para [4].

²⁷ At paras [5]-[7].

precautionary measures over and above those taken by the defendant in this case.

[6] ...

[7] 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. The defendant's objection to the use of a padlock was that the one gate was shared by his neighbour as well. The employment of a padlock, however, could quite easily have occurred in consultation with his neighbour who could have been furnished with a key. 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. The defendant's failure to take either precaution meant that he had been causally negligent in relation to such damage as may in due course be proved by the plaintiff."

34. The Supreme Court of Appeal did not apply any inference of negligence in *Enslin*. It considered the evidence of the plaintiff's witnesses and found that negligence had been established. *Enslin* is thus not authority for the appellant's contention in the present matter, and the Supreme Court of Appeal's judgment in *Swartz v Delport supra* remains binding authority on the point.

The judgment in Mofokeng v Moloi

35. The court in *Mofokeng v Moloi* also had occasion to consider a magistrates' court's order of absolution in an action where a collision with the respondent's cow on a public road had caused damage to the appellant's vehicle. The court held that the magistrates' court should have refused absolution because the appellant had adduced sufficient *prima facie* evidence to establish causal negligence on the part of the respondent and to place a duty of rebuttal upon

the respondent.²⁸

36. It appears that there was evidence in *Mofokeng* suggesting that the defendant (as owner of the cow) had in fact been on the scene when the accident occurred, but had left after the collision without offering assistance.²⁹ It is not clear to what extent that evidence impacted on the court's reasoning in *Mofokeng* concerning negligence. To the extent that it was relevant, the facts of the present case are distinguishable in that, as Mr Basson testified, the owner of the cow was in bed asleep, and there was little he could do if someone had let his cows out.
37. The parties are otherwise agreed that, on the law, *Mofokeng* is the only authority in support of the appellant's case and, as a result, it is necessary to consider that judgment in detail. Regrettably, we are unable to agree with it, for the reasons discussed below.
38. First, after setting out passages³⁰ from *Enslin v Nhlapo* and *Van Zyl v Conradie*, the court in *Mofokeng* found³¹ that the two decisions were "clearly not compatible". The passages were set out as follows:

"[24] In *Enselin 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

²⁸ *Mofokeng supra* at para [32].

²⁹ *Mofokeng supra* at para [12].

³⁰ *Mofokeng supra* at paras [24]–[25].

³¹ In para [26].

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."

39. It must be remembered that in *Enslin* the defendant, a farm owner, gave evidence in which he sought to exonerate himself from negligence, stating that he was not the owner of the bull in question. Once the Supreme Court of Appeal was satisfied that the defendant was the responsible person, and that he had taken certain steps, it turned to look at "*whether a reasonable person would have taken further precautions to prevent the cattle from straying onto the public road*".³² It was in that context that the Supreme Court of Appeal restated the standard of the reasonable person test at paragraph [4] of its judgment which is quoted in paragraph [24] of *Mofokeng*.
40. Far from exhibiting dissonance, the Supreme Court of Appeal was following the accepted position which is summarised in the quoted passage of *Van Zyl v Conradie*, to the effect that a plaintiff can only succeed if it establishes credible and acceptable evidence that the defendant was negligent. The two judgments are squarely compatible: both re-assert the well-established principle that the plaintiff must establish a *prima facie* case in evidence.

³² *Enslin* at para [5], and quoted in *Mofokeng* at para [24]. Emphasis added.

41. Accordingly, the finding in *Mofokeng* that the two judgments are incompatible seems to be based on a misreading of the judgment in *Enslin*. The approach in *Van Zyl v Conradie* has, moreover, now been approved by the Supreme Court of Appeal in *Swartz v Delport supra*, as set out in paragraph 26 above. Regrettably, the court in *Mofokeng* made no reference to *Swartz v Delport*, which remains the authority on the issue of *res ipsa loquitor* and the inference of negligence in this context.
42. Second, the court's approach in *Mofokeng* appears to have been largely influenced by its views on the applicability of Regulation 313. We are in respectful disagreement with this approach, and return to a discussion of the Regulation below.
43. Third, in reaching its conclusion the court in *Mofokeng*³³ (and consequently, the appellant in this case) relied on the decision of *Jamneck v Wagener supra* for the contention that the respondent has an onus of rebuttal. However, the judgment in *Jamneck* holds the opposite of what the appellant seeks to contend.
44. In *Jamneck*, the plaintiff's evidence established that the defendant's horse had escaped through a large hole in the fence adjacent to the roadway. The question arose whether the fence had been inspected regularly and how long the hole had been present. The court held³⁴ that the plaintiff had established a *prima facie* case by proving where and how the animals had come onto the road. For that reason, the defendant had to explain how often he had checked the fences, whether he knew of the hole in the fence, and whether he had sought to remedy the problem. It was not the mere presence of the horse on the road that gave rise to the rebuttal onus. *Jamneck* accordingly did not afford any authority for the court's conclusions in *Mofokeng*.
45. For these reasons, the appellant's reliance on *Enslin* and *Mofokeng* does not

³³ *Mofokeng supra* at para [27].

³⁴ *Jamneck v Wagener supra* at 65G-66H.

assist him. There is no room for the application of the maxim *res ipsa loquitur* in the context of the present matter.

Regulation 313

46. The appellant contends in his heads of argument that the “*contravention of Regulation 313 ... was common cause from the outset of the matter, since it was common cause that the cow was outside the border fence of the farm and in the road when the collision occurred.*”
47. The matter is not so simple. Apart from the fact that a contravention of the Regulation was never common cause, because the appellant had not pleaded reliance thereon but had referred to it for the first time in argument at the trial, the question arises whether the Regulation is of any assistance to the appellant at all.
48. Regulation 313 reads, in relevant part, as follows:

“313 Animal on public road

(1) ... 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 onto such section of a public road.

(2) ...

(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 enclosed along both sides even though there is an opening providing access to such road in the fence or other enclosure.”

49. Regulation 313(1) thus makes it a road traffic offence to leave or allow an

animal to be on a public road. Regulation 313(3) provides that in any prosecution for such a contravention, in the absence of evidence to the contrary, it shall be presumed that the animal was left or allowed to be on the road by the owner of the animal. This is the presumption which the appellant seeks to elevate to a civil presumption of negligence on the authority of *Mofokeng v Moloi supra*.

50. Whether this is permissible depends on the proper interpretation of the Regulation.³⁵ The well-known *dictum* in *Natal Joint Municipal Pension Fund v Endumeni Municipality*³⁶ represents the current state of the South African law regarding the interpretation of documents. In the more particularised context of statutory interpretation, the Constitutional Court in *Cool Ideas 1186 CC v Hubbard and another*³⁷ articulated these principles as follows:

“A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:

- (a) that statutory provisions should always be interpreted purposively;*
- (b) the relevant statutory provision must be properly contextualised; and*
- (c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a).”*

51. We are, on consideration of the issue, not in agreement with the appellant’s contention that the Regulation gives rise to a civil presumption of negligence.
52. First, and perhaps most obviously, on the plain wording of the Regulation it

³⁵ The Court in *Mofokeng* unfortunately did not set out the process of interpretative interpretation that it had followed in coming to its conclusion as regards the civil impact of the Regulation.

³⁶ 2012 (4) SA 593 (SCA) at para [18].

³⁷ 2014 (4) SA 474 (CC) at para [28].

operates in the context of a “prosecution”. There is no mention of negligence in the Regulation. The offence created by the Regulation does not require negligence to be present or proved. The Regulation imposes a road traffic obligation on the owners of animals, but does not imply negligence. A prosecution for a contravention does not require negligence to be established.

53. Secondly, the Regulation is of criminal or penal application, having been promulgated within the criminal sphere. The penalty for a contravention of the Regulation is a fine or imprisonment,³⁸ and thus distinctly criminal in nature. The establishment of a statutory offence does not give rise to concomitant delict at common law: “... a breach of a statutory duty created by legislation regulating road traffic cannot simply be equated to negligence ... The provisions of the road traffic legislation do not provide for a civil remedy and do not displace the common law test for negligence ...”³⁹
54. Numerous judgments have reiterated that the breach of a statutory provision does not equate to negligence in a civil setting. For example, in *S v Rohrmann*⁴⁰ it was stated that the fact of a traffic violation was no proof of negligence for the purposes outside of the violation itself. In *De Jongh v Industrial Merchandising*⁴¹ it was held that the mere breach of regulations controlling speed limits was not proof of negligence. Similar statements can be found in *Olivier v Rondalia Versekeringsmaatskappy van Suid-Afrika Bpk*⁴² and *Malherbe v Eskom*.⁴³ As pointed out in *South African Railways v Bardeleben*,⁴⁴ the failure to comply with a regulation does not establish negligence any more than compliance with a regulation neutralises an allegation of negligence.

³⁸ Under section 75(5) of the National Road Traffic Act.

³⁹ Klopper *The Law of Collisions in South Africa* (8ed) at pp 20-21. See also Cooper *Motor Law* (Vol. 2, 1987) at p 126: “The road traffic legislation does not purport to provide a civil remedy in the event of a breach of its provisions and the enactment of a legislative standard for conduct for road-users does not supplant the common-law test for the determination of negligence ...”

⁴⁰ 1967 (3) SA 411 (SWA) at 412G.

⁴¹ 1972 (4) SA (R) at 445B.

⁴² 1979 (3) SA 20 (A) at 30A.

⁴³ 2002 (4) SA 497 (O) at 505I.

⁴⁴ 1934 AD 473 at 481.

55. Third, the Court in *Mofokeng* appears to have relied on the judgment in *Klaas v Serfontein*⁴⁵ for the conclusion that Regulation 313 creates a statutory inference of negligence in the civil setting. The Court states that:

*“... the Road Traffic Regulation 313 of 1996 was clearly enacted to enhance public protection from the foreseeable danger posed by stray animals 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 140 CPD 616 at 621)”*⁴⁶

56. *Klaas v Serfontein* is, however, not authority for the proposition. In *Klaas*, the Court found that the plaintiff had not furnished sufficient evidence to establish negligence on the defendant’s part after the latter’s horse had strayed onto a divisional road. The Court expressly declined to find that a particular regulation (imposed by the Divisional Council) created “statutory negligence”, and left the point unresolved. Some reservations as to the proposition appear from the Court’s discussion in this respect:⁴⁷

“In the view which I take of the evidence it becomes unnecessary to decide how far such a regulation can be held binding upon a farmer ... through whose farms or camps a divisional road runs, and which the Council has taken no steps to fence on both sides; and, even if it were binding, whether a breach of such regulation constituted ... “statutory negligence”. There must be many farms of considerable size within Divisional Council areas upon which the owners ... graze stock, and through which unfenced divisional roads run. To hold such a regulation binding would be placing a serious limitation upon their rights as owners, for the effect might be either to prevent them from grazing at all, or to compel them to employ a gang of servants to keep their stock from straying across the road, or to compel them to fence the road on both sides. And if such a regulation were to be regarded as binding

⁴⁵ 1940 CPD 616 at 621.

⁴⁶ *Mofokeng* at para [26].

⁴⁷ At 621. Emphasis added.

the further question would arise as to whether the purpose of the regulation was to prevent a nuisance, or whether it was enacted for the purpose of protecting a particular class of persons against possible danger. In the latter alternative a breach of the regulation might constitute statutory negligence. These are difficult questions upon which I propose to offer no definite opinion. It must be observed, however, that in this case the area through which the road in question runs is private property and appears to form part of the ordinary grazing of the owner of the farm”.

57. It is clear that *Klaas* did not intend to, and does not, offer any authority for the notion that a regulation such as Regulation 313 was intended to operate in the civil sphere, effectively so as to reverse the onus in matters where a plaintiff is unable to furnish any evidence pointing to negligence on the part of a defendant.
58. It follows that the bases for the findings in *Mofokeng* upon which the appellant relies both in relation to its *res ipsa loquitur* argument and its reliance on Regulation 313, are unsustainable, and do not accord with the established state of the law. Insofar as *Mofokeng* holds that Regulation 313 creates statutory liability in civil cases, we respectfully do not agree, and we decline to follow it.

Failure to take *obiter* remarks into account

59. We need to refer to one further ground of appeal raised by the appellant. As a very last string to his bow the appellant contends that the magistrates’ court failed to take into account the *obiter* remarks in *Mofokeng v Moloji*⁴⁸ to the effect that the granting absolution from the instance in similar circumstances as those before her may open the floodgates for similar cases, and set a bad precedent:

“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”.

60. As a ground of appeal this contention has no merit. Insofar as the remarks in *Mofokeng* were *obiter* they were not binding on the magistrate.⁴⁹
61. Of itself, the remark in any event does not assist the appellant. It seems to us, rather, that the floodgates may be opened should absolution *not* be granted instances such as the present, and should a plaintiff be allowed to present no evidence suggesting negligence, but to rely on the defendant effectively to disprove negligence. This is simply not in accordance with our law as set out earlier in this judgment.

Conclusion

62. It follows that the magistrate’s court correctly found that insufficient evidence had been led to establish a *prima facie* case of negligence against the respondent. In the absence of such a *prima facie* case, no inference of negligence arises. Absolution from the instance was correctly granted.

Costs

63. The parties were agreed that the normal rule as to costs should be followed, namely that costs should follow the event.
64. Given the importance of this matter in confirming the position as regards civil liability in cases of animals on the road, at least as far as this Division is concerned, we are of the view that counsel’s fees should be taxed on Scale C as contemplated in Rule 67A of the Uniform Rules of Court.

⁴⁹ *The Director-General, Department of Agriculture, Forestry and Fisheries and another v Nanaga Property Trust* (case number 4689/2014, unreported judgment of the Eastern Cape Division, Grahamstown (per Hartle J) in an application for leave to appeal, delivered on 21 April 2016) at para [6], with reference to *Jajbhay v Cassim* 1940 TDP 182 at 185.

Order

65. In the premises, it is ordered as follows:

The appeal is dismissed, with costs, inclusive of counsel's fees taxed on Scale C.

N. MANGCU-LOCKWOOD
Judge of the High Court

P. S. VAN ZYL
Acting Judge of the High Court

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