



**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG**

Not reportable

Case No: 811/2023

In the matter between:

DAN SAN FARMING (PTY) LTD

PLAINTIFF

and

PIETER MAARTEN FEENSTRA

FIRST DEFENDANT

IWAMAZI GAME LODGE CC

SECOND DEFENDANT

Coram: Wessels AJ

Heard: 6 and 7 October 2025

Delivered: This judgment was handed down in open court and circulated electronically to the parties' representatives via email, uploaded to CaseLines, and released to SAFLII. The date and time for the handing down of the judgment are deemed to be 10h00 on 13 March 2026.

Summary: Practice — Absolution from the instance — Test for absolution — Whether evidence exists upon which a court, properly applying the law, could or might find for the plaintiff.

Contract — Oral agreement — Specific performance — Agreement allegedly concluded in 2006 or 2007 — Plaintiff company only incorporated in 2020 — A non-existent entity cannot contract or be represented — Failure to prove subsequent cession of rights or new undertaking — Claim legally unsustainable.

Delict — Damages — Causation — Malignant Catarrhal Fever (MCF/‘snotsiekte’) — Failure to establish chain of custody for laboratory samples — Crucial evidence from attending veterinarian and laboratory technician omitted — Reliance on inadmissible hearsay to link test results to plaintiff’s cattle.

Nuisance — Final interdict — Balancing of competing land uses between neighbours — Cattle farming versus game farming — Relevance of the "last to arrive" principle — Plaintiff commenced operations 13 years after defendants introduced wildebeest — Plaintiff’s knowledge of risk and elective grazing practices near common boundary — Failure to establish a clear right to the removal of animals

JUDGMENT

Wessels AJ

Introduction

[1] This is an application for absolution from the instance brought by the first and second defendants (the defendants). The plaintiff, a cattle farming operation, claims that the defendants' black wildebeest, kept on the adjacent farm, infected its cattle with Malignant Catarrhal Fever ('MCF'), commonly known as 'snotsiekte', a highly lethal disease to cattle.

[2] The plaintiff's claims are threefold. Claim 1 is for specific performance of an oral agreement allegedly made in 2006 or 2007, wherein the defendants undertook to pay for any such damages. Claim 2 is for delictual damages based on the defendants' alleged negligent breach of a legal duty, both statutory and common law, to prevent the spread of the disease. Claim 3 is for a final interdict compelling the defendants to remove their black wildebeest from the portion of their land adjacent to the plaintiff's property.

[3] At the onset of the trial, it was agreed in terms of Uniform Rule 33(4) that the issues appearing from paragraphs 1 to 20 (both included) and paragraph 24 and prayer 5 of the particulars of claim read with corresponding paragraphs of the defendant's plea and the corresponding paragraphs of the replication with concomitant costs, are separated for adjudication as presently set down. The remainder of the issues in the action are postponed *sine die*. This agreement was reduced to an order and thereafter guided the proceedings.

[4] The defendants now apply for absolution from the instance, contending that the plaintiff has failed to adduce sufficient evidence upon which this Court, properly applying the law, could reasonably find in its favour. I have carefully considered the evidence presented by the plaintiff, the

comprehensive arguments of counsel for the defendants in support of the application, and the arguments of counsel for the plaintiff in opposition.

Summary of the Plaintiff's Evidence

[5] The plaintiff called two witnesses: Mr Heinrich Schoenfeld, the director of the plaintiff company, and his wife, Mrs Anne-Maria Magdalena Schoenfeld, who manages the financial and administrative affairs of the farming operation. The evidence may be summarised as follows.

[6] Mr Schoenfeld testified that he commenced cattle farming in 2002, on portions 23, 29, and 30 of the farm Waterval 462 ('Groenfontein'), that belonged to his father-in-law, and which constitutes the area where the plaintiff currently farms.

[7] During 2006 or 2007, Mr Schoenfeld noticed that a game fence was being erected on the adjacent farm portion 41 of the farm Waterval ('Luckin'), which the second defendant managed. He approached Mr Stan Burger ('Mr Burger'), representing the defendants, and offered to contribute fifty per cent of the cost of erecting a normal cattle fence. According to Mr Schoenfeld, Mr Burger declined this offer, stating that he had a plan to introduce black wildebeest. Mr Schoenfeld warned Mr Burger about the dangers of MCF, to which Mr Burger allegedly responded that this was an old wives' tale. Critically, Mr Schoenfeld testified that Mr Burger gave an undertaking that, if Mr Schoenfeld's cattle became infected with MCF from the black wildebeest, the defendants would pay damages. This undertaking forms the basis of Claim 1.

[8] Black wildebeest were introduced onto the adjacent farm in 2008. Mr Schoenfeld acknowledged that he had been aware of the presence of blue wildebeest in the immediate area of Groenfontein since 2001 and of the risk of disease transmission. He testified that he managed his grazing in accordance with what he understood to be safe practice, keeping his cattle several hundred metres from the wildebeest. He also stated that he relied on Mr Burger's undertaking to pay for any losses, which gave him the confidence to continue farming adjacent to the wildebeest.

[9] In February and March 2022, Mr Schoenfeld's cattle began to die. He contacted Dr H.M. Olckers ('Dr Olckers'), the attending veterinarian, who examined the cattle, collected blood samples, and sent them to the ARC-Onderstepoort Veterinary Institute. Mr Schoenfeld testified that he was informed that the test results confirmed the presence of MCF. A total of 26 cattle died in 2022, and a further two died in 2023. He estimated the value of the losses at approximately R2.65 million, in addition to veterinary costs of some R61,000.

[10] Under cross-examination, Mr Schoenfeld made several significant concessions. He acknowledged that he had been aware of the presence of blue wildebeest in the immediate area of Groenfontein since 2001, some seven years before the black wildebeest were introduced. He admitted that he knew of the risk of MCF transmission from wildebeest to cattle, and that the generally accepted safe distance was approximately one kilometre.

[11] To put this evidence into context, the area on which Mr Schoenfeld farmed was not of sufficient size to allow a one-kilometre buffer zone and still use the remainder of the farm productively for purposes of cattle grazing. He conceded that his own farm management practices involved a balancing

of risks, and that he had on occasion chosen to graze his cattle close to the common fence with the adjacent farm despite the risk, because he needed to manage the occurrence of another illness, such as heartwater and because he had no other grazing available. Mr Schoenfeld testified, ‘I took the risk because he [Mr Burger] said it’s an old wives’ tale and he is going to pay me back my losses’.

[12] Crucially, what appears to be Mr Schoenfeld’s entire farming operation was transferred to the plaintiff in March 2021. Mr Schoenfeld conceded that when he transferred all his cattle to the plaintiff company in terms of s 42 of the Income Tax Act 58 of 1962, known as an asset for shares transfer, in February and March 2021, he did not inform Mr Burger of this transfer, nor did he seek a new undertaking from the defendants in favour of the plaintiff. He assumed that the 2006 agreement would automatically apply to the plaintiff, but he took no steps to secure it.

[13] Mrs Schoenfeld testified primarily about the financial and administrative aspects of the farming operation. She explained that invoices for veterinary expenses and cattle purchases were sometimes issued to Mr Schoenfeld personally rather than to the company, because payments were made from his personal account and, for administrative convenience, to comply with Value Added Tax and bookkeeping requirements. She confirmed that, to her knowledge, all cattle belonging to the family farming operation were owned by the plaintiff company.

The Legal Principles Governing Absolution from the Instance

[14] The test for absolution from the instance, as laid down in *Claude Neon Lights (SA) Ltd v Daniel*¹, is well-established in our law. The test is whether there is evidence upon which a court reasonably might, or could, find for the plaintiff. This is not a test of the merits in the sense of weighing the evidence; it is a threshold test to determine if the plaintiff has made out a prima facie case. If the plaintiff's evidence, taken in its most favourable light, is so unsatisfactory that no reasonable court could find in its favour, absolution must be granted. The court considering such an application must assume the truth of the plaintiff's evidence and accept as established all facts that such evidence tends to prove. However, this does not mean that the court is blind to inherent contradictions or fatal voids in such evidence. Where the plaintiff's evidence contains inherent contradictions or is so lacking in critical respects that it falls short of the legal threshold required to establish a cause of action, the application for absolution must succeed.

Evaluation of Claim 1: The Oral Agreement

[15] The plaintiff alleges that in 2006 or 2007, its director, Mr Schoenfeld, and a Mr Burger, representing the defendants, concluded an oral agreement. In terms of this agreement, the defendants undertook to pay the plaintiff for any damages that might result from the transfer of MCF from their black wildebeest to the plaintiff's cattle.

[16] The fatal flaw in this claim is one of law, not fact. It is common cause from the pleadings and the evidence that the plaintiff was only registered as

¹ *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A).

a company in 2020. It did not exist as a legal entity in 2006 or 2007. It is a trite principle of our law of contract that a party to an agreement must exist at the time of its conclusion. A non-existent entity cannot contract, nor can it be represented in the conclusion of a contract.

[17] The plaintiff led no evidence of a subsequent cession of rights from Mr Schoenfeld in his personal capacity to the plaintiff. In fact, the plaintiff's pleaded case is that it was an original party to the contract, which is a factual and legal impossibility. Mr Schoenfeld conceded under cross-examination that he did nothing to inform the defendants of the transfer of his cattle to the company, nor did he seek a new undertaking in favour of the company. He assumed that the 2006 agreement would automatically apply to the company. This assumption is legally flawed.

[18] Even taking the plaintiff's evidence in the most favourable light, as I am bound to do on an application for absolution, this claim is legally unsustainable. The evidence, when subjected to the most basic legal scrutiny, reveals that no reasonable court could find that a contract existed between the plaintiff and the defendants in 2006 or 2007. Accordingly, the defendants are entitled to absolution from the instance in respect of Claim 1.

Evaluation of Claim 2: Delictual Damages

[19] To succeed in a delictual claim for damages, the plaintiff must prove, on a balance of probabilities, a causal link between the wrongful or negligent act of the defendants and the harm suffered. In this case, the plaintiff must prove that its cattle died from the wildebeest-associated MCF and that they contracted it from the defendants' black wildebeest.

[20] The plaintiff sought to prove the cause of death of its cattle primarily through documentary evidence: a letter from Dr Olckers, the attending veterinarian, attached to the particulars of claim and laboratory reports from Dr M Romito ('Dr Romito'). Dr Romito is a Senior Research Veterinary Technical Manager: PCR-based Diagnostics, Diagnostic Services Programme at the Agricultural Research Council, Onderstepoort. Dr Olckers, who examined the cattle and took the blood samples, was not called to testify. Dr Romito, who performed the PCR tests, did not testify either, and his report was admitted as evidence. Dr Romito, who performed the PCR test, did not testify either, and his report was admitted as evidence by agreement between the parties.

[21] Of considerable importance is that Dr Romito's report was admitted into evidence after counsel for the defendants added the following rider.

'Anything except for quantum is hearsay in that report. And that witness is in any event not going to be called now, this is what my learned friend said. I'm just raising that caution. We are not going to suffer hearsay evidence being introduced to this report.'

[22] The defendants' argument focuses on what is commonly termed the 'chain of custody'. Dr Romito's evidence and report are clear: he received blood samples labelled with specific reference numbers and tested them. His report indicates that the 'sender' was Dr H.M. Olckers and the 'owner' was 'Mr H. Schonfeldt'. However, as Dr Romito rightly recorded in his report, '[t]he laboratory was not responsible for sampling'.

[23] The information regarding the 'sender' and 'owner' on the laboratory request form is hearsay. It is information provided by someone else, presumably Dr Olckers or his staff, to the laboratory. Dr Romito has no

personal knowledge of where the sample was taken, from which animal it was taken, or the circumstances of its collection. He cannot authenticate that the sample in fact came from a specific dead cow belonging to the plaintiff.

[24] The only person who could bridge this gap and establish the causal link between the laboratory results and the plaintiff's cattle was Dr Olckers. In the absence of his testimony, the chain of custody is irretrievably broken. The laboratory results, while reliable as to what was contained in the tube, cannot be definitively tied to the plaintiff's loss. Applying the test for absolution, this evidence is not evidence upon which a reasonable court could rely to find causation established. The plaintiff's case on causation rests on inadmissible hearsay evidence.

[25] Furthermore, even if causation were established, the plaintiff's evidence on the source of the infection is problematic. The defendants, in their plea, raised the presence of other wildebeest on another neighbouring farm as a possible alternative source. Mr Schoenfeld confirmed under cross-examination that yet another neighbour kept wildebeest in the vicinity of Groenfontein. While the defendants do not bear the onus of proof at this stage, the existence of this alternative hypothesis, which the plaintiff's evidence has not excluded, further undermines the proposition that a court could reasonably find for the plaintiff on the balance of probabilities.

[26] The plaintiff's counsel argued that the defendants' own expert report supported their case. That argument misses the point. The expert's opinion is based on the assumption that the cattle died from the defendants' wildebeest. That assumption is what the plaintiff has failed to prove through admissible evidence. An expert's opinion is only as good as the facts upon which it is

based. Here, the foundational fact, the link between the test results and the plaintiff's cattle, is absent.

[27] Resultantly, I find that the plaintiff has failed to adduce sufficient evidence upon which a court could reasonably find that the plaintiff's cattle died from MCF transmitted by the defendants' black wildebeest. Absolution from the instance must therefore be granted in respect of Claim 2.

Evaluation of Claim 3: Final Interdict

[28] A final interdict is a drastic remedy, and an applicant must establish a clear right. The inquiry into whether such a right exists in a dispute between neighbours requires a careful balancing of their competing interests in the use and enjoyment of their properties.

[29] The plaintiff argues that the defendants' continued keeping of black wildebeest constitutes a wrongful nuisance. The defendants counter that their use of the land is reasonable, especially given the chronology of the two farming operations. The evidence shows that the defendants introduced black wildebeest to the Luckin in 2008. The plaintiff only commenced its cattle farming operations on Groenfontein in 2021. The plaintiff's director, Mr Schoenfeld, had farmed the land personally since 2002 and was intimately aware of the presence of wildebeest on the adjacent farm since 2001 and the risks they posed. He candidly admitted that he 'took his chances' by grazing his cattle near the common fence, prioritising access to grazing over the risk of disease, and that he relied on Mr Burger's undertaking to pay for any losses.

[30] The following judgment of the Supreme Court of Appeal ('SCA') directly addresses the factual matrix of this case. In the matter of *PGB Boerdery Beleggings (Edms) Bpk and Another v Somerville 62 (Edms) Bpk and Another*², the SCA considered a dispute between a game farmer who wished to introduce wildebeest and an established cattle farmer. The court articulated the applicable legal principles as follows, quoting from the judgment of *Wright v Cockin*³ which dealt with the test for unlawfulness as follows:

'In my view, however, the issue is a straightforward one. This is not, in my view, dealing as we are with an alleged nuisance emanating from respondents' property, the type of case where the Court is required to render a value judgment as to what society's notion of justice demands. A landowner has an intrinsic right to the reasonable enjoyment of his land. If his neighbour through his positive actions unjustifiably interferes with that right thereby causing him physical or patrimonial harm then his actions are wrongful. In the present matter therefore if applicants can establish that they have a reasonable apprehension that the snotsiekte virus will be transmitted to their cattle by respondents' blue wildebeest running adjacent to their boundary then, in my view, they will have satisfied the first two requirements for the granting of a final interdict.'

[31] It was found in *PGB Boerdery* that the cattle farmer (appellant) was not entitled to the interdict. The court refused the interdict on the following grounds, which together form the ratio decidendi: the keeping of game on a neighbouring farm is not *per se* unlawful. The question is whether the use, given the circumstances, is unreasonable. This will not be the case, particularly where the risk of harm is low; where the plaintiff can almost eliminate the risk through reasonable measures (such as adjusting his own farming practices); where the defendant has offered to compensate for actual damages; and the requested

² *PGB Boerdery Beleggings (Edms) Bpk and Another v Somerville 62 (Edms) Bpk and Another* 2008 (2) SA 428 (SCA) para 7.

³ *Wright v Cockin* 2004 (4) SA 207 (E).

interdict is excessive. It would unreasonably limit the defendant's rights as the owner.

[32] This decision confirms that a balance must be struck between competing land uses and that the 'last to arrive' cannot simply prohibit the established use of a neighbour, provided that use is reasonable.

[33] While Mr Schoenfeld testified that the defendants dismissed the risk of MCF as an 'old wives' tale', this subjective belief does not, in itself, render the defendants' land use objectively unreasonable. In the context of a nuisance-based interdict, I must perform a value judgment based on objective facts rather than the personal opinions of the parties. The evidence confirms that the defendants had been farming with wildebeest for over a decade before the plaintiff commenced its own operations. Consequently, a defendant's dismissive attitude toward a known risk, while perhaps unwise, does not override the established legal principle that a 'last to arrive' cattle farmer in the person of the plaintiff must bear the consequences of the defendant's pre-existing and otherwise lawful land use, particularly when the plaintiff chose to prioritise grazing needs over a known buffer-zone safety margin.

[34] Thus, where a game farmer is first in time, a cattle farmer who subsequently brings his cattle into proximity with the known risk cannot simply demand the removal of the wildebeest. The 'last to arrive' must bear the consequences of the established use, provided that the use is not per se unreasonable.

[35] The evidence before me does not establish that the defendants' use of their land is per se unreasonable. The defendants have kept black wildebeest on their property since 2008, some 13 years before the plaintiff company

commenced operations, and there is no evidence before me that this use was unreasonable or caused harm to others during that period.

[36] The existence of the disputed 2006 or 2007 undertaking to pay damages, even if invalid as a contract, is a relevant factor in the overall conspectus of facts. It suggests an acknowledgement of risk and an attempt to regulate it through compensation, rather than through the absolute prohibition of the wildebeest.

[37] This is consistent with the notion that both parties are entitled to make reasonable use of their properties, and that the balancing of interests may, in appropriate circumstances, be achieved through compensation rather than prohibition.

[38] The plaintiff further relied on the provisions of the Animal Diseases Act⁴ and the Animal Health Act⁵ to support its claim of a clear right. However, a proper reading of these statutes reveals that they impose reciprocal duties on all owners of land and animals to take reasonable steps to prevent the infection and spread of animal diseases. Section 11 of the Animal Diseases Act, for instance, provides that:

‘(1) Any owner or manager of land on which there are animals, and any owner in respect of animals, shall, whether or not such owner or manager has obtained advice regarding the health, or any certificate of fitness or health of the animals in terms of section 13 (1) (c), from the director—

(a) take, with due observance of the provisions of this Act, all reasonable steps to prevent the infection of the animals with any animal disease or parasite and the spreading thereof

⁴ Animal Diseases Act 35 of 1984.

⁵ Animal Health Act 7 of 2002.

from the relevant land or animals, or which are necessary for the eradication of animal diseases and parasites on the land or in respect of the animals; and

(b) whenever such animals—

(i) have become or can reasonably be suspected of having become infected with any animal disease or parasite, apply in respect of such animals the prescribed treatment or any other treatment which may be deemed suitable and customary in the particular circumstances; and

(ii) have become or can reasonably be suspected of having become infected with any controlled animal disease, immediately report such incidence in the prescribed manner to the director.’

[39] The language of this section applies equally to the plaintiff and the defendants. It creates duties, but the content of those duties and whether they have been breached must be evaluated in the context of what is reasonable between neighbours.

[40] These statutes do not, without more, grant a cattle farmer a clear right to compel a game farmer to remove his animals. Given the chronology of the land use, game first and cattle company later, the plaintiff’s imputed knowledge of the risk through its director, and its own conduct in managing its grazing in a manner that prioritised other farming considerations over the avoidance of the disease, I am not persuaded that the plaintiff has established a clear right to the relief sought.

[41] The evidence is such that I could not reasonably find that the defendants’ use of their farm is so unreasonable as to warrant the drastic step

of a final interdict. For these reasons, the application for absolution must also succeed in respect of Claim 3.

Conclusion

[42] In applying the test for absolution, I have considered whether there is evidence upon which a reasonable court might find for the plaintiff. I have assumed the truth of that evidence and have drawn inferences in the plaintiff's favour wherever possible. However, even applying this generous test, the plaintiff's case falls short. Claim 1 fails on a point of law that no amount of factual evidence can cure. Claim 2 fails for want of admissible evidence establishing the causal link between the defendants' wildebeest and the death of the plaintiff's cattle. Claim 3 fails because the plaintiff has not established a clear right, given the chronology of the land uses and its own conduct in assuming the risk.

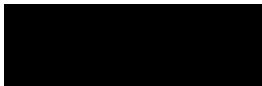
Costs

[43] The defendants have succeeded in their application and are entitled to their costs. I see no reason to depart from the general rule that costs follow the result. The plaintiff is accordingly ordered to pay the costs of the action to date, including the costs of this application. Such costs are to include counsel's costs on Scale C.

Order

[44] In the result, I make the following order:

1. The defendants' application for absolution from the instance is granted.
2. The plaintiff is ordered to pay the defendants' costs on Scale C.



M WESSELS
ACTING JUDGE OF THE HIGH COURT
NORTH WEST DIVISION, MAHIKENG

Appearances

For plaintiff(s)	:Adv Basson
Instructed by	:JJ Jacobs Attorneys
	:Pretoria
	:c/o Maree & Maree Attorneys
	:Mahikeng

For defendant(s)	:Adv Maritz SC
Instructed by	:Savage Jooste & Adams
	:Pretoria
	:c/o Nienaber Wissing
	:Mahikeng

