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**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MAKHANDA**

Appeal Case No: CA 56/2025

Court *a quo*: RC 96/2018

In the matter between:

ATTIE ODENDAAL

Appellant

(Defendant in the Court *a quo*)

and

HERMAN FANELEKILE MARWANQA

Respondent

(Plaintiff in the court *a quo*)

JUDGMENT

Appels AJ

Introduction

[1] This is an appeal against the judgment of the Magistrates' Court, dated 18 December 2024, in terms of which the respondent succeeded in a delictual claim for damages against the appellant, arising from the impoundment of nine cattle owned by the respondent ("the cattle").

[2] In the particulars of claim, the respondent alleged that the appellant falsely represented to the SPCA that the cattle had been trespassing on the appellant's property, whereas in truth, the cattle had been impounded from a communal grazing area. It was also pleaded that the misrepresentation was unlawful and fraudulent, and that as a consequence of such misrepresentation, the cattle were accepted by the SPCA in terms of Pound Ordinance No. 18 of 1938 ("the Ordinance") and thereafter sold. As a result of the sale, the respondent allegedly suffered damages in the amount of R399 000, being the value of the cattle that were impounded. In his plea, the appellant denied the aforesaid allegations. He pleaded that the cattle had in fact trespassed onto property under his care and custody ("the appellant's property").

The Evidence in the Magistrates' Court

[3] The respondent was the first witness to testify at the trial on his own behalf. He testified that on 7 August 2015, he took the cattle from his homestead in Tolofiyeni, King William's Town, to a grazing field situated on communal land of the Tolofiyeni Village. He tended to the cattle until 13h00, after which he went home to have lunch, leaving the cattle grazing in the field. At about 15h00, he returned to the grazing field to collect the cattle but found that they were no longer there.

[4] He was informed by a gentleman that the cattle had been driven to the appellant's property. Upon arriving at the appellant's property, another gentleman informed him that the cattle had been removed from the appellant's property and taken to the SPCA.

[5] The following morning, the respondent went to the SPCA where he was informed that he had to pay a fine in order to secure the release of the cattle. The respondent was distressed because he was not in a financial position to pay the fine.

He therefore left the SPCA and returned home. When he later returned to the SPCA, he was informed that the fine had been increased. He was also informed that the cattle arrived at the SPCA after having been transported there on a truck owned by the appellant.

[6] During the course of his evidence, the respondent read into the record an email authored by a representative of the SPCA. In the email, it was stated that the SPCA operates as a pound-holding facility appointed by the municipality. It was further recorded that the cattle were impounded by the owner of the property on which they were found trespassing, and that the owner of the property was legally authorised to impound the cattle if they are trespassing on his property.

[7] The respondent's legal representative requested the respondent to comment on the contents of the email. His response was as follows: *"I do not – this thing about this land and also the thing that you have mentioned, I do not know."*

[8] The respondent was unable to specify how long the cattle remained at the SPCA, but on returning at a later stage to inquire about them, he was informed that they had been taken to the abattoir.

[9] Under cross-examination, the respondent was forced to concede that on the day in question, he left the cattle unattended in the grazing field. He further conceded that he did not personally witness the cattle being driven away from where they were grazing. He also admitted that he did not know the precise location from which the cattle were impounded. When it was put to him that the cattle were found on the appellant's property, he could only respond that he did not leave the cattle on the appellant's property.

[10] The second witness to give evidence on behalf of the respondent, was Mr Melumzi Nqwala, a headman of the Tolofiyeni Administrative Area. He testified that the respondent is one of the community members of Tolofiyeni. Mr Nqwala further testified about a meeting which he attended on an unspecified date, with local farmers in the area.

[11] The chairman of the meeting enquired from him about the boundaries of Tolofiyeni village. He informed them in the meeting about the boundaries of Tolofiyeni as well as those of the appellant's property. He also stated that the appellant's property is separated from the communal land of Tolofiyeni by a fence. Mr Nqwala also testified that in his view, it would have been impossible for the cattle to enter the appellant's property as it was properly fenced in, with a strong wire fence. He further testified that there were dense trees at the back, sides and front of the property which would have prevented the cattle from gaining access to the appellant's property.

[12] It is important to note that Mr Nqwala was not present on the day when the respondent left the cattle unattended to graze and returned to his homestead. He did not witness where the cattle were grazing, nor did he witness where they were impounded.

[13] Under cross-examination, Mr Nqwala conceded that he has no direct or personal knowledge of where the cattle were grazing on the particular day when they were impounded. He was referred to a map and requested to focus his attention on Erf 5[...], indicated on the map. When asked to whom Erf 5[...] belonged, he stated that it was communal land. When asked whether, to his knowledge, the cattle were left to graze on Erf 5[...], he gave no response.

[14] When it was put to him that the appellant leases Erf 5[...] from its lawful owner, Mr Des Torr, he could not dispute this. Instead, he testified that the community of Tolofiyeni instituted a land claim in respect of the property in 2009 and that some members of the community received compensation,

[15] The appellant was the first witness to give evidence on his behalf. In his evidence, he stated that he found the cattle grazing on Erf 5[...], land which he leased from Mr Des Torr. Upon finding the cattle on Erf 5[...], he gathered them and drove them to his farm situated at Erf 2[...] and kept them in a kraal for a period of two days. On the third day, he loaded the cattle on his truck and transported them to the SPCA and left them in the care of the SPCA.

[16] Under cross-examination, the appellant testified that he informed the SPCA that the property on which the cattle had been grazing was under his care and custody. It was put to him that there was no lease agreement between him and the owner of Erf 5[...]. He disputed this and maintained that a lease agreement did exist, stating that it was an oral agreement between him and Mr Torr. It was further put to him that there was no written proof of such a lease agreement. He nevertheless persisted in his version that a valid oral lease agreement did exist. When it was put to him that there are no bank statements to prove that rental payments were made to Mr Torr, he stated that he paid the rental in cash.

[17] Pursuant to a report in respect of Deeds Office records pertaining to Erf 5[...], which the respondent accepted as correct in terms of a pre-trial minute dated 16 August 2024, it became common cause between the parties that the cattle were grazing on Erf 5[...], and that Erf 5[...] was indeed not communal land but was owned by the Des Torr Family Trust. In light of this, it was put to the appellant that, as Erf 5[...] is owned by a trust, the trust could not validly enter into a lease agreement without a resolution authorising the conclusion thereof.

[18] In this regard, the record reflects that the following was put to the appellant by the respondent's attorneys:

'MR MUSETEKA: ... Now, this land is owned by a trust, I think it is on record and we have agreed to that. Another thing that is consistent was the fact that there was no ...[indistinct] – there is no resolution by the trusts of this lease agreement, would you agree with me?'

[19] The appellant's attorney objected to this line of questioning and argued that it was inconsistent with the respondent's pleaded case. He submitted that the respondent's pleaded case was that the property on which the cattle were left to graze, was communal land. He argued that after it had become common cause that Erf 5[...] is not communal land, the respondent was effectively putting a different case to the appellant, namely that there was no resolution authorising the alleged lease agreement between the appellant and the owner of the land. The objection was upheld by the Magistrate.

[20] In this regard, the record reflects that the appellant's attorney submitted that:

'MR MCCUNE: Your Worship, I am not sure where we are going. This seems to be quite a fishing expedition. He would not know what resolution the trust would take. It is not necessary for him, if he is dealing with Des Torr who says he owns the land, it is a Des Torr's Family Trust, he is probably a trustee, but we are not realm on speculation here. He has set out their case – their case, the plaintiff's case is that it was communal land where the cattle was found and it is like a fishing expedition now to say there was no resolution, there was not this, there was not that. I think it is irrelevant to his case and I submit that it is not in line with his pleadings and it is not in line with their case.'

[21] The appellant also called Mr Brian Cowley to give evidence on his behalf. Mr Cowley, a business partner of the appellant, confirmed that a lease agreement existed in respect of Erf 5[...] between Mr Torr and the appellant. In this regard, he testified about arrangements he had made to pay rental to Mr Torr in respect of Erf 5[...]. Under cross-examination, Mr Cowley conceded that the WhatsApp arrangements he gave evidence about, were made several years after the incident in question. He nevertheless testified that he had been present on many occasions when Mr Torr collected rental payments from the appellant. He further stated that on certain occasions, when the appellant was not present, he personally handed the rental payments to Mr Torr.

Judgment of the court *a quo*

[22] The Magistrate identified the issues to be determined as: a) whether the land where the cattle were grazing formed part of the communal area or was under the care and custody of the appellant; and b) whether the impoundment of the cattle was lawful.

[23] In evaluating the evidence of the respondent and his witness, the Magistrate found that the respondent successfully established that the cattle were grazing in an area distant to the appellant's farm. The court found that Mr Nqwala's testimony was unchallenged that the area where the respondent's cattle grazed was communal land and that the cattle were impounded in this communal area. Relying on the evidence of Mr Nqwala, the Magistrate held that the evidence of both the respondent

and Mr Nqwala established that the appellant's farm was fenced and inaccessible and separate from the communal area. On this basis, she concluded that the cattle could not have accessed the appellant's farm. The Magistrate rejected the appellant's version that the cattle were impounded on land under his control. She further held that the evidence of his witness, Mr Cowley, could not take the case any further.

[24] In addition, the Magistrate found that the appellant's evidence regarding the lease agreement in respect of the property, was inconsistent with his pleaded case. She reasoned that the appellant's plea implied that he did not impound the cattle, whereas in his evidence he admitted that he had done so. She found that the appellant's contradictions in this regard undermined his credibility.

[25] The Magistrate also found that the Ordinance contained provisions which were unconstitutional. It was further found that the respondent's cattle were impounded without affording him an opportunity to be heard, which violated the rules of natural justice. The Magistrate accordingly found that the respondent ought to succeed in his claim, in that the appellant's actions in impounding the cattle and transporting them to the SPCA were unlawful and resulted in the respondent's loss.

Analysis

[26] The respondent's case rests on the contention that the appellant made a wrongful and fraudulent misrepresentation to the SPCA that the cattle were trespassing on his property, when in fact they were grazing on communal land, and that this misrepresentation induced the impoundment and subsequently sale of the cattle. For the respondent to succeed, he was required to establish, on a balance of probabilities, that: a) The appellant made representation to the SPCA that was false and misleading; b) that the false representation was made fraudulently with the intention to induce action by the SPCA; and c) that the false representation caused the loss or damages suffered by the respondent.¹

¹ *International Shipping Company (Pty) Ltd. v Bentley* 1990 (1) SA 680 (A) at 684H – J. See also: *mCubed International (Pty) Ltd and Another v Singer NO and Others* 2009 (4) SA 471 (SCA) at para 17.

[27] In the matter of *Mdodana v Premier of the Eastern Cape and Others*,² the constitutionality of the Ordinance came under scrutiny and certain of its provisions were declared inconsistent with the Constitution. It is however important to note that the issue before the Magistrate was not the constitutionality of the Ordinance nor the lawfulness of the impoundment.

[28] The issues before the Magistrate were whether the appellant had made a representation to the SPCA that was false, wrongful and fraudulent, and whether such representation caused the respondent to suffer damages.

[29] At the very least, evidence was required to show that a false statement was made by the appellant to the SPCA. Therefore, the respondent was required to adduce evidence establishing the location of the cattle at the time of the impoundment.

[30] It is significant that the respondent conceded under cross-examination that he left the cattle unattended and could not say where they were impounded from. His version as to where the cattle was impounded was therefore not based on his personal knowledge.

[31] The respondent's witness, Mr Nqwala conceded under cross examination that he had no direct knowledge of where the cattle were grazing on the day in question and that he did not witness the impoundment. In these circumstances, his evidence could not establish where the cattle were grazing and where they were impounded. Mr Nqwala further could not dispute that the cattle were grazing on Erf 5[...], that Erf 5[...] was not communal land, but in fact land which is leased by the appellant from the landowner.

[32] The Magistrate therefore erred in treating Mr Nqwala's evidence as "unchallenged" and reliable. Her reliance on his evidence as decisive was misplaced.

² *Mdodana v Premier of the Eastern Cape and Others* (1648/10) [2013] ZAECHGHC 66 (13 June 2013).

[33] The factual premise underlying the respondent's case fell away the moment it became common cause during the proceedings that the cattle were grazing on Erf 5[...] and that Erf 5[...] was not communal land, but private property owned by the Des Torr Family Trust. This concession was evident from the case which was put to the appellant during cross-examination when the respondent's attorney attempted to contest the existence of a valid lease agreement between the trust and the appellant.

[34] Once this concession was made, the foundation of the respondent's pleaded case, namely that the cattle were lawfully grazing on communal land, could no longer be sustained. The Magistrate, however, failed to have regard to the aforementioned concession.

[35] The appellant's evidence was that he found the cattle on Erf 5[...], land over which he exercised control by virtue of a lease agreement with the owner. That version was consistently maintained and was not shown to be false. Even if the validity of the lease agreement were to be questioned, it does not follow that the appellant's representation to the SPCA was fraudulent. At best for the respondent, such dispute would go to the appellant's legal authority to act, not to the truth or falsity of the factual representation he made to the SPCA as to where the cattle were found.

[36] On the appellant's uncontested evidence, he informed the SPCA that the cattle were grazing on land under his care and custody. That statement accords with the objective facts as they ultimately emerged at trial and it also accords with the appellant's pleaded case. In this regard, the appellant pleaded that the respondent's *"...cattle had trespassed on property under his care and custody..."*

[37] The Magistrate's finding that the appellant's case was inconsistent with his evidence is therefore not supported by either the pleadings or the evidence adduced at trial.

[38] Furthermore, the Magistrate rejected the evidence of the appellant's witness, Mr Cowley, without engaging with its true probative value. Mr Cowley's evidence

was not tendered to prove where the cattle were found. Its purpose was clearly to corroborate the appellant's version that Erf 5[...] was under his care and custody by virtue of a lease agreement. The Magistrate nevertheless concluded that Mr Cowley's evidence could not take the case any further, without explaining why corroborative evidence of the existence of a lease agreement was irrelevant. Once it became common cause that the cattle were grazing on Erf 5[...], Mr Cowley's evidence became significant in supporting the appellant's pleaded case that the cattle were found on property under his care and custody.

[39] The appellant's conduct, gathering the cattle, holding them for a period and thereafter delivering them to the SPCA, is consistent with the belief that he was acting lawfully in response to trespassing livestock. The absence of direct evidence of a false representation to the SPCA, is fatal to the appellant's claim which is based on a fraudulent misrepresentation.

[40] In these circumstances, the respondent failed to establish that the appellant made a false representation to the SPCA. The impoundment of the cattle cannot therefore be attributed to any actionable misrepresentation by the appellant. The respondent's delictual claim was accordingly not supported by the evidence.

[41] The Magistrate erred in pronouncing on the constitutionality of the Ordinance. The validity or constitutionality of the Ordinance was not an issue raised on the pleadings and a determination in respect thereof was not necessary for the determination of the dispute. By deciding a constitutional issue that did not arise from the parties' cases, the Magistrate exceeded the proper bounds of the inquiry. It is settled law that it is not appropriate for any court to pronounce on issues that were not raised by the parties and properly argued before the court.³

[42] The legality of the impoundment was similarly not an issue raised on the pleadings. Moreover, the respondent's case was founded on fraudulent misrepresentation, not administrative unlawfulness. Therefore, in finding that the

³ *Afriforum NPC v Nelson Mandela Foundation Trust* 2023 (4) SA 1 (SCA) at paras 70 - 71

cattle were impounded without lawful authority and in violation of natural justice, the Magistrate also decided a case which did not arise from the pleaded case.

Condonation

[43] At the hearing of the appeal, the appellant applied for condonation for the late filing of his notice of appeal. An affidavit was filed in support of the condonation application, in which the appellant set out the reasons for the delay. It was explained that upon receipt of the judgment he discussed a possible settlement with his attorneys. Following these settlement discussions, his attorneys, acting on his instructions, made a settlement proposal to the respondent's attorneys. The appellant's attorneys were initially informed that the proposal had been accepted and accordingly, a settlement agreement was drafted for signature by the respondent. The respondent's attorneys later informed the appellant's attorneys that they are unable to make contact with their client to obtain instructions from their client. Eventually, the respondent's attorneys informed the appellant's attorneys that the acceptance of the settlement proposal had been withdrawn. By that stage the time period for filing a notice of appeal had expired, necessitating an application for condonation.

[44] The explanation for the delay is reasonable, and it is apparent that the appellant enjoys good prospects of success on the merits and their appeal. Condonation for the late filing of the notice of appeal should accordingly be granted.

Conclusion

[45] On a proper evaluation of the evidence, the respondent failed to prove that the appellant made any false or fraudulent representation to the SPCA. The probabilities favour the appellant's version, which was consistent, corroborated and aligned with the objective facts.

[46] For these reasons, the appeal ought to be upheld.

Order

[47] Accordingly the following order issues:

1. The appeal is upheld with costs, taxed on scale C.
2. The order of the court *a quo* is set aside and replaced with the following order:

“The plaintiff’s claim is dismissed with costs.”

G APPELS
ACTING JUDGE OF THE HIGH
COURT

I agree:

M MAKAULA
JUDGE OF THE HIGH COURT

APPEARANCES:

For the Appellant:
Instructed by:

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Heard: 21 November 2025

Delivered: 31 March 2026