



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case no: 4466/2023
In the matter between:

SCORPIO CARRIERS CC

Plaintiff

and

QUARRIEHOEK BOERDERY (PTY) LTD

First Defendant

JAN CAREL COETZEE

Second Defendant

SOUTH AFRICAN NATIONAL ROADS AGENCY SOC

Third Defendant

N3 TOLL CONCESSION (RF)(PTY)LTD

Fourth Defendant

CORAM: MB NEMAVHIDI AJ

HEARD ON: 18 APRIL 2024

DELIVERED ON: 31 MAY 2024

***JUDGMENT BY:** MB NEMAVHIDI AJ

Introduction

[1] The plaintiff, Scorpio Carriers CC, was involved in a collision when its truck struck two cows on the N3 highway on 19 October 2019 at approximately 23h45 whilst traveling in a northerly direction, about 4,5 kilometers from Warden, Free State. Total damages amounted to R1 402 100.00. Mr MS Mafahle was the driver. The cattle strayed from the farm operated by

the first defendant, Quarriehoek Boerdery (Pty) Ltd) and managed by the second defendant, Jan Carel Coetzee on day-to-day basis.

[2] The farm borders the N3 highway which runs along the boundary of the farm. The farm is fenced off with a wire boundary fence erected and held in an upright position by droppers, poles and straining posts. The first and second defendants owned, controlled, possessed and exercised control over the farm as well as the fence separating the farm and the N3 highway.

[3] The highway and its road reserve and immediate environs fall under jurisdiction and authority of the third and fourth defendants, respectively being the South African National Roads Agency SOC and the N3 Toll Concession (RF) (Pty) Ltd.

[4] The third and fourth defendants are, in terms of the South African National Roads Agency Limited and National Roads Act 7 of 1998 (the Act), mandated to finance, improve, develop, manage, rehabilitate, repair and maintain the highway. They are to take reasonable steps to protect and ensure the safety and unhindered flow of the vehicular traffic using the N3 highway.

[5] The delictual claim against first and second defendants is based upon the following:

- (a) Failing to keep the cattle within the boundaries of the farm.
- (b) Allowing the cattle to stray onto the N3 highway.
- (c) Failing to maintain the fence in such a condition that it could keep the cattle within the perimeter of the farm.
- (d) Omitting to inspect the fence timeously, regularly, thoroughly and to repair the broken fence, and not allow the fence to fall into a state of disrepair.
- (e) Omitting to request third and fourth defendants to erect a suitable fence, repair, inspect or monitor the fence regularly.
- (f) The third and fourth defendants failed to install, erect, improve, upgrade, maintain, repair, inspect and monitor the fence timeously.
- (g) Failed to erect warning signs for the vehicles and traffic using the N3 highway in

the vicinity of the farm that there may be stray animals on the road.

[5] The fourth defendant excepted to the plaintiff's summons and plea on the basis that they do not contain averments necessary to disclose a cause of action or are vague and embarrassing. The plaintiff's claim against the fourth defendant is premised on a breach of legal duty to erect and maintain a fence to prevent cattle or animals from straying from the farm into the N3 highway. As such, the plaintiff contends that the source of the alleged duty is found in statute or contract. However, the plaintiff failed to identify which statute or contract gives rise to the alleged duty and which provisions of the statute and contract were allegedly breached by the fourth defendant.

General Principle

[6] A court hearing an application for an amendment has wide powers to allow a change to pleadings at any stage, even after argument and before judgment.¹ Whether or not to grant the amendment is a matter for the discretion of the court, which discretion is to be judicially exercised.² As one of the primary functions of pleadings is to tell the other side what case it is that it has to meet,³ clarity in pleading is essential. If the opponent is fairly-able to say at the trial that they did not know that this was the case that they had to meet, then that evidence cannot be led at the trial. A postponement and a subsequent amendment can cure this shortcoming. In other words, the pleading can be 'fixed' (amended): the opponent is brought up to speed about the matter and the trial can resume with everyone fully aware of the content of the matter, and each party is afforded a fair opportunity to prepare (such as calling of witnesses, discovery etc.) with regards to the pleaded case.

[7] The aim of the court is to do justice between the parties. In the context of amendments, mistake or neglect on the part of one of the parties ought not to stand in the way of ventilating and deciding the real issues between the parties,⁴ necessity for the amendment having arisen through some reasonable cause.⁵ Nevertheless, all amendments must be *bona fide*,⁶ and the court will always, as a further essential consideration in the exercise of its discretion, examine any prejudice or injustice that the other party may suffer if the amendment is granted, especially

¹ *Morgan & Ramsay v Cornelius & Hollis* (1910) 31 NPD 262 at 264.

² *Erasmus Superior Court Practice* (RS6-2018, D1-331): Commentary on rule 28(4) and authorities cited at note 15.

³ *Minister of Safety and Security v Slabbert* [2009] ZASCA 163; [2010] 2 All SA 474 SCA para 11.

⁴ *Trans-Drakensberg Bank Ltd (Under Judicial Management) v Combined Engineering (Pty) Ltd and Another* 1967 (3) SA 632 (D) at 640F (*Trans-Drakensberg Bank Ltd*); *Kasper v André Kemp Boerdery* CC 2012 (3) SA 20 (WCC) para 70.

⁵ *Zarug v Parvathie, N.O* 1962 (3) SA 872 (D) at 876.

⁶ *President Versekeringsmaatskappy v Moodley* 1964 (4) SA 109 (T); Schwikkard et al *Principles of Evidence* 3ed at 471-472.

where such prejudice cannot be compensated for by a suitable order as to costs or, if appropriate, a postponement.⁷ An applicant seeking an amendment of its pleadings bears the onus of proving that the amendment is *bona fide*, and that the other party will not suffer prejudice as a result. Doubt as to whether the other party might suffer prejudice will result in the refusal of the application.⁸

[8] Furthermore, it must be shown that the amendment has something deserving of consideration to wit a triable issue.⁹ The amendment will not be granted if it renders the pleadings excipiable.¹⁰

[9] In our law, the position has always been clear: if a pleading is bad in law, the answer is to except.¹¹ The reason is because the main purpose of an exception, on the basis that a pleading does not disclose a cause of action, is to avoid the leading of unnecessary evidence at trial.¹²

[10] In considering an exception, no additional facts may be adduced by either party and the court must assume that the facts alleged in the particular of claim are correct.¹³ In this regard, the court has wide powers to allow a change to pleadings at any stage, even after argument and before judgment.¹⁴

[11] In the proposed amendment notice set out in the plaintiff's heads of argument, it is stated that the consequences of and terms of the concession agreement between the third and fourth defendants comprises of the requisite *facta probantia* since it constitutes evidence to be led which would confirm that the concession agreement created a legal duty on the fourth defendant.

[12] However, it appears that the concession contract did not extend to maintenance of the fence. The privity of the contract doctrine entails that anyone who is not a party to the contract

⁷ *Trans-Drakensberg Bank* at 638A; *Bulktrans (Pty) Ltd v Power Plus Performance (Pty) Ltd* [2003] JOL 11706 (ELC).

⁸ *Tengwa v Metrorail* 2002 (1) SA 739 (C) at 744; *Kali v Incorporated General Insurance* 1976 (2) SA 179 (D) at 182A-C.

⁹ *Commercial Union Assurance Co Ltd v Waymark NO* 1995(3) SA 73 Tk at 77F-I.

¹⁰ See in this regard *Associated Paint & Chemical Industries (Pty) Ltd t/a Albestra Paint and Lacquers v Smit* 2000 (2) SA 789 SCA at 794C-A.

¹¹ *MN v AJ* [2011] ZAWCHC 5; 2013 (3) SA 26 WCC para 38.

¹² *Dharumpal Transport (Pty) Ltd v Dharumpal* 1956 (1) SA 700 A at 706E.

¹³ *Steward and Another v Botha and Another* [2008] ZASCA 84; 2008 (6) SA 310 (SCA) para 4.

¹⁴ Footnote 4.

*Carnavon Munisipaliteit en 'n Ander*²² it was held that where the owner of a farm erected a fence alongside a public road, the duty rested on the owner to ensure the effectiveness of the fence, insofar as this could be achieved reasonably.

[15] In *White v Kheis! Municipality*²³ the court determined the following:

(a) The responsibilities if pertaining to the planning, design, construction, operation management, control, maintenance and rehabilitation of national roads are main functions of the third defendant. Those responsibilities were transferred to the fourth defendant in terms of the contract.²⁴

(b) The Act does not place a duty on the third defendant to maintain a fence on a National Road.²⁵

(c) At Common Law the duty to maintain a fence lies with the owner of property if he allows animals to be kept on his farm, he has a duty to ensure that the fence is in such a condition to safeguard road users from the presence of animals on the road.²⁶

[16] Ultimately, where a defendant was or ought to have been aware that if the cattle on his farm were to stray into the adjoining the road and they could endanger the lives of road users, he owed a duty of care to take steps preventing his animals from straying onto a public road.²⁷ Contrary to the contentions raised by the plaintiff, and in light of the aforementioned, it is abundantly clear that there rested no duty on the fourth defendant to maintain the fence on the National Road.

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

1. The plaintiff application for leave to amend its particulars of claim is dismissed with costs awarded on Rule 67A scale.
2. The exception by the fourth defendant is upheld.

²² *Coreejes v Carnavon Munisipaliteit en 'n Ander* 1964 (2) SA 454 at 457A-C.

²³ *White v Kheis! Municipality* [2015] ZANHC 41.

²⁴ *Ibid* para 12.

²⁵ *Ibid* para 16.

²⁶ *Ibid* para 39.

²⁷ *Enslin v Nhlapo* [2008] ZASCA 75; 2008 (5) SA 146 (SCA) para 4.