



IN THE HIGH COURT OF SOUTH AFRICA
(Gauteng Local Division, Johannesburg)

Case no: 2023-071396

Heard on: 21 November 2023

Judgment handed down: 21 February 2024

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED.
-

In the matter between:

SIZWE SENZO

FIRST APPLICANT

MARIA SUSANNA VAN ROOYEN

SECOND APPLICANT

FRANS FREDERICK ALLERS

THIRD APPLICANT

AND

RHYS DUDLEY JAMES GRIFFITHS

FIRST RESPONDENT

MERLOT CREEK FARMS CC

SECOND RESPONDENT

(2007/131669/23

DNR FARMING CC

THIRD RESPONDENT

(200407134023)

RICHARD GRIFFITHS

FOURTH RESPONDENT

JUDGMENT

STRIJDOM, J

1. The applicants effectively seek the following relief:
 - 1.1 Interdictory relief to remove the source of dangerous disease for their livestock that would, if granted, require the respondents within 10 (ten) days to remove the forty (40) black wildebeest upon their farm properties (more particularly) the farms Driekop number 387, portion 9 and Waaikraal 385 JT portion 5 in the area of the Emakhazeni or Highlands Local Municipality (also known as the Belfast district) in the Mpumalanga Province;
 - 1.2 Enforcing compliance by the respondents with Section 11 of the Animal Diseases Act 35 of 1984;
 - 1.3 That the respondents be ordered, jointly and severally, to pay the costs of the applicants on the scale as between attorney and his own client;
 - 1.4 Further and/or alternative relief.

2. First applicant, Sizwe Senzo Khoza, is a farmer resident on the farm Leeukloof in the area of the Emakhazeni or Highlands Local Municipality in the Mpumalanga Province.

3. Second applicant, Maria Susanna Van Rooyen is a farmer resident on the farm Waaikraal no 385 JT in the area of the Emakhazeni Municipality.

4. Third applicant, Frans Frederick Allers is a full-time commercial farmer on remaining extent of portion 2 of the farm Waaikraal no 385 JT, portion 14 (portion of portion 2) of the farm Waaikraal no 385 JT and portion 1 of the farm Driekop no 387 JT.
5. The first respondent is Rhys Dudley James Griffiths, a businessman who runs and owns a game farm and hunting lodge on the properties of the second and third respondents, Waaikraal 365 JT portion 5 and portion 9 of the farm Driekop number 387. The first respondent resides in Mozambique.
6. The fourth respondent is Richardt Griffiths, a farmer and a son of the first respondent. The fourth respondent occasionally resides on the said farms of the respondents and appears to supervise the day-to-day activities on the farms. He resides in Centurion, Gauteng.
7. At the outset of this application, leave was granted to the fourth respondent¹ to file a supplementary affidavit and a confirmatory affidavit of Simon John Shabangu.²
8. There are four principal defences raised in respondents' heads of argument, namely:

¹ Caseline: Section 03 p7 to 15

² Caseline: Section 03 p17 to 20

- 8.1 The black wildebeest arrived first (in 2004);
 - 8.2 The Waaikraal area (where the parties farm) falls within the natural distribution range for black and blue wildebeest; and there are in fact 'free ranging blue wildebeest' in the area, which also carry the MCF virus;
 - 8.3 Respondents deny that the black wildebeest on their farms 'carry the disease' saying 'no proof has been provided.'
 - 8.4 Respondents claim that the black wildebeest 'are kept as part of a commercial enterprise generating substantial income.'
9. The respondents raised the point for the first time during final address that the expert opinion of Prof Van Vuuren was merely annexed to his founding affidavit and is therefore inadmissible. Counsel for respondents relied on a decision, in the Land Claims Court where the court remarked as follows: 'They cannot merely attach the opinion, refer in general terms to its content or parts of the opinion, and then fairly expect the respondents to seek to discern from it whether or not there is any sound basis suggested to ground a potential review.'³
10. It is trite that it is not open to an applicant or a respondent to merely annex to its affidavit documentation and to 'request the Court to have regard to it.'¹⁴

³ *Pro-Active Landowner Association and Others*, case no LCC 173/2011 C para 22 dated 6 Nov 2023.

⁴ *Swissborough Diamond Mines v Government of the RSA 1999 (2) SA 279 TPD*.

11. Prof van Vuuren deposed to an affidavit in which he states that he is the author of the report, annexed to his affidavit marked 'MV2' and confirmed the content to be true and correct.⁵
12. The respondents in their answering affidavit never disputed the admissibility of the report. They disputed the correctness and conclusions of Prof van Vuuren's report. In para 51.2 of their answering affidavit the respondents remarked as follows: 'It appears that this deponent was not alerted to the presence of the roaming blue wildebeest in the area. This must certainly have had a material impact on his report.'⁶
13. Prof van Vuuren's report was not annexed to any of the applicant's founding affidavits. The facts in this matter are clearly distinguishable from the case referred to by the respondents.
14. In my view there is proper identification of the contents of the report on which the applicants rely and the case which is sought to be made out on the strength of the report. The respondents were properly informed what case must be met.
15. The following facts are undisputed, namely:

⁵ Caseline: Section 01 p43-44

⁶ Caseline: Section 01 p 79 para 51 AA

15.1 The parties are neighbouring farmers in the relevant area, whose farms are identified on the aerial photograph “Annexure “X1” to the founding affidavit of the first applicant.⁷

15.2 The respondents are engaged in a game hunting business on the farms for which purpose they keep seven (7) species of game, including a herd of about forty (40) black wildebeest.

15.3 Despite several requests by the applicants over the last four years for the respondents to remove the danger and source of fatal contamination of their cattle (namely the herd of black wildebeest they keep on their properties), these requests were ignored.

16. It will be convenient at this stage to deal with the evidence relating to this disease. Malignant catarrhal fever (MCF) is a sporadic, invariable fatal, multisystemic viral disease of cattle, African buffaloes, and a wide range of antelope species, the latter only when kept in captivity, but never under free-ranging conditions. Two forms of the disease namely wildebeest associated (MCF) and sheep – associated MCF have been recognised in Africa but are predominantly found where cattle are in close contact with the blue wildebeest (*Connochaetes taurinus*) or the black wildebeest (*Connochaetes gnou*). The MCF viruses of blue and black wildebeest are identical.⁸

⁷ Caseline: Section 01 p 19

⁸ Caseline: Section 01-50 Annexure ‘MV2’

17. According to Prof M van Vuuren, laboratory tests are not able to distinguish the viruses of blue and black wildebeest from each other and no other wild antelope species have been documented to be able to infect cattle with the causative virus.
18. The virus is transmitted via aerosol from the nasal mucus of wildebeest or sheep during periods when the virus is shed. No other mode of transmission has been proven or documented. All reports consistently indicate that spread does not occur from cattle suffering from the disease.
19. According to Prof van Vuuren the transmission of A1HV-1 is very efficient among wildebeest. All calves become infected during birth or in the first few weeks of life. All or most of the adult blue and black wildebeest in herds are regarded as persistently infected. The usual source of A1HV-1 in outbreaks of malignant catarrhal fever are wildebeest calves during the first 3-4 months following birth, and less commonly older wildebeest.⁹
20. The classic presentation of snotsiekte is characterized by fever, complete loss of appetite and inflammation of the mucous membranes of the mouth, nose and eyes. Cattle suffering from snotsiekte deteriorate rapidly and die from secondary bacterial pneumonia or meningoencephalitis (inflammation of the brain.)

⁹ Caseline: Section 01-50: Annexure 'MV2'

21. Prof van Vuuren opine that the control of the disease is very difficult and there is no possibility of eradicating the disease. The only reliable preventative measure is to keep cattle separated from potential reservoir species such as wildebeest. Separation of wildebeest and cattle by several hundred meters is regarded as necessary to prevent infection in cattle.

22. Prof van Vuuren concluded that: 'In his opinion the cattle of the complainants which died as a result of MCF became infected with the virus following transmission from the wildebeest that were grazing on the adjacent farms owned by the companies controlled by the first respondent. He arrived at this conclusion for the following reasons:

22.1 According to verbal and printed situational and spatial information provided by the applicants.

22.2 According to the necropsy report and laboratory tests results made available to him by the applicants which confirmed that the tested animals died of wildebeest derived and not sheep derived snotsiekte;

22.3 Wildebeest are known to be the only reservoir hosts capable of infecting cattle with alcelaphine herpesvirus type 1 (wildebeest – derived snotsiekte virus);

22.4 According to evidence provided by Mr Allers and Mrs van Rooyen that the wildebeest owned by the neighbour Mr Rhys Griffiths live in close proximity to their cattle.

The Salient Facts

23. The first applicant states that he is farming with a herd of cattle consisting of 89 cows, 4 bulls, 20 calves and 20 heifers. It is his sole source of income and livelihood on which he depends.¹⁰

24. In his founding affidavit the first applicant avers that during April/May 2020, he detected a disease in one of his cows that showed clinical signs similar to that of rooiwater/tick fever, watery mouth and nose, very high fever, breathing problems and she didn't eat. He treated her for rooiwater/tick fever but without success. He noticed mucus in her nose and upper lip. He phoned the second applicant (his neighbour) who visited and explained to him that it was snotsiekte and that no medication will resolve or improve her condition. The cow died after 4 to 5 days.

25. The first applicant further states that during May/June 2022 a pregnant cow showed the same signs that he experienced the previous year. Again, he tried Berenil,

¹⁰ Caseline: Section 01-15 para 18.1 FA

Nufior and Predef but she also passed away after 4 to 5 days. She also showed signs of blindness, mucus in and around the nose and suffocation.

26. At the end of April 2023 another cow of the first applicant showed signs similar to the previous two which died of what he believed was snotsiekte. The cow also died after 4 to 5 days. No treatment for this cow helped.

27. Second applicant states that he is a full-time farmer since 2006 on section 10 of the farm Waaikraal no 385 JT in extent 333 hectares.¹¹

28. In 2016, she noticed that there was a game fence being erected by first respondent on the boundary between section 10 (which is her section), and section 5, the section which the first respondent acquired and what he calls 'Merlot Creek', where the game camp has since been established.

29. Second applicant states that first respondent also owns section 9 of the farm Driekop no 387 JT, market C on the aerial photograph, which is called DNR farming. Currently, the wildebeest run on farm 'B' and a part of 'C' on the aerial photographs.

¹¹ Caseline: Section 01 page 23 para 6. FA

30. During 2016/2017 the second applicant noticed that there are quite a few types of game on the farm and, among other things, black wildebeest arriving on section 'B'.
31. In September 2017 the second applicant suffered the first cow with snotsiekte signs. Her first signs were watery eyes, watery and wet mouth, fever and no appetite. Later she had a snotty discharge from her nose and mucus threads and foam of the mouth. Her eyes became dull and eventually she suffered blindness. She died after five to six days. Second applicant spoke with the first respondent at the time and he told her that his cattle and calves had also died of similar signs and that he had sold his whole herd of cattle as a result thereof.
32. Second applicant states that over time more of her cows fell ill and died showing similar signs. She followed the same treatment as in the case of the first cow, but no treatment improved their condition.
33. On 23 April 2023, one of the second applicant's Simmentaler cows fell ill. The initial signs of illness were lethargy, fever and a wet nose and mouth. Her condition deteriorated and she died on 3 May 2023. A photo of the cow marked 'MVR1'¹² attached to the founding affidavit was taken by second applicant. A blood sample was taken from the cow and the second applicant took it to Dr Marietjie Malan (a veterinarian) in Lydenburg. Organs were also taken of the dead

¹² Caseline: Section 01-33

cow and handed over to Dr Malan for a post-mortem examination. Second applicant was later informed by Dr Malan that the blood test was positive for wildebeest related snotsiekte. The report by Dr Malan, together with the blood test are attached to the second applicants founding affidavit, marked 'MVR3'¹³

34. Second applicant further states that on 8 May 2023 she informed the first respondent by Whatsapp about the results that confirmed snotsiekte. She also attached the video clip of the suffering cow and a map to indicate the proximity of the wildebeest on the farms to her farm. Two days later the first respondent replied saying that he would 'investigate'.

35. Second applicant states that 'replacing a lost cow is a highly expensive process, and you lose not only the cow you handpicked but all her future breeding value and carefully selected qualities.'

36. Third applicant is a full-time commercial farmer on the farm Waaikraal and Driekop. The farm mainly consists of a Bonsmara stud cattle herd. His farms are identified as 'D', 'E' and 'F' on the aerial photograph attached to first applicant's affidavit.

37. Third applicant states that he occupied the farms since November 2013, and during 2016/2017, the first respondent introduced several species of game on the

¹³ Caseline: Section 01-35

neighbouring farm consisting of zebras, waterbuck, elk, gemsbuck, blesbuck as well as black wildebeest.

38. He states that on 8 March 2019, he noticed that his large Beefmaster bull was showing signs of lethargy, swollen eyes and watery nose. On 10 March 2019, he was notified that his Brangus bull also showed the same signs as the Beefmaster bull. He decided to call Dr Trumpelman in Lydenburg. As requested by Dr Trumpelman he took the carcass of the Brangus bull and the head of the Beefmaster to Dr Trumpelman in order to obtain tissue samples.

39. On 13 March 2019 third applicant called the first respondent and informed him that he had sent two bull carcasses for tests for snotsiekte. On 15 March 2019 he received written confirmation of the positive result for snotsiekte based on the *post mortem* report received from the Onderstepoort Veterinary Institute. A copy of the report is attached to his founding affidavit as 'FA3'¹⁴. On the same day the third applicant sent the result via WhatsApp to the first respondent by saying that he would speak to his son (fourth respondent) and suggested that he would reduce the price per wildebeest (which they charged hunters) in order to reduce the number of the black wildebeest. The first respondent further disclosed to the third applicant that he shot his own cattle which had contracted snotsiekte, using his pistol.

¹⁴ Caseline: Section 06 p 10

40. On 20 March 2019 at 09:30 the third applicant informed the first respondent that another cow of him is showing signs of snotsiekte. At 10;30 third applicant sent a further WhatsApp to inform first respondent that another cow is showing the same signs. Both cows were slaughtered.

41. On 4 April 2019 third applicant sent a WhatsApp to first respondent that another bull is showing snotsiekte signs and explained to him that the damage is becoming unbearable. The first respondent responded by saying that his cattle also died of snotsiekte and that he sold the remaining cattle to one Louw Van der Merwe from Bethal. The third applicant tracked down Mr Van der Merwe who confirmed that he purchased cattle from the first respondent.

42. The fourth respondent is a businessman and farmer and was authorised to oppose the proceedings on behalf of the respondents.

43. The fourth respondent states that the area where the relevant farmland is situated falls within the natural distribution range of both blue and back wildebeest. There are according to him a number of free roaming blue wildebeest in the area including on the farms of the applicants.

44. The fourth respondent annexed a photograph of the blue wildebeest that he shot in the area and on the farm of Ms Makuwa and marked same as annexure 'AA5'. He shot the wildebeest on 11 August 2022. He later deposed of a supplementary affidavit stating that he shot the animal on 18 February 2023.¹⁵

45. The fourth respondent states that the black wildebeest were lawfully introduced onto the respondent's land as far back as 2004. The population currently found there derives from the original population as was introduced in 2004.

46. The fourth respondent further states that the applicants have no right to curtail the lawful business of the respondents in the game farming industry. It is further denied that any of the respondent's animals are the carriers of the disease in question. The fourth respondent annexed a copy of a certificate allowing the respondents to keep black wildebeest as annexure 'AA1'.¹⁶

47. Any breach of Section 11 of the Animal Diseases Act, 35 of 1984 is specifically denied by the respondents.

48. The fourth respondent states that 'it does not appear that the expert, utilised by the applicants was informed of the presence of free roaming blue wildebeest in the area. This invalidates his opinion. If the applicants imposed any buffer zone

¹⁵ Caseline: Section 3 p 10 para 5

¹⁶ Caseline: Section 01 p 88

to do so at their own election. A buffer zone would be an effective response and should take away any problems, if there were any (which is denied).¹⁷

49. The fourth respondent states that no official tests were conducted on the applicants animals and denied that they had the disease complained of. The result of all tests is denied and the applicants put to the prove thereof.

50. In his confirmatory affidavit of the fourth respondent's supplementary answering affidavit, Simon John Shabangu states that he is employed by the first respondent from 2004 to date. He states that black wildebeest were introduced to the respondents farms in 2004 and that he have seen free-roaming blue wildebeest in the area from time to time.¹⁸

THE FACTUAL DISPUTES

51. The respondents argued that there are factual disputes in this matter and that the case should be decided on the version of the respondents. *In casu* this would entail that the court has to decide the matter on the following facts:

51.1 The first to third respondents brought the Black Wildebeest to the area in 2004. This predates the cattle farming operations of any of the applicants;

¹⁷ Caseline: Section 01 p 70 para 26.1 AA

¹⁸ Caseline: Section 03 p 18

51.2 The area concerned falls within the natural distribution range of Black Wildebeest and Blue Wildebeest;

51.3 There are free-roaming Blue Wildebeest in the area, along with other managed populations.

51.4 It would accordingly not assist if the operations of the respondents in relation to Black Wildebeest is halted;

51.5 The respondents deny that their animals are infected or that they have caused any infection to any cattle or resulted in damages;

51.6 The Black Wildebeest are kept as part of a commercial enterprise generating substantial income.

52. The respondents state that 'The black wildebeest were lawfully introduced onto the Respondent's land as far back as 2004. The population currently found there derives from the original population as was introduced in 2004, no new animals were introduced over time.'¹⁹

53. The year, 2004 is when the third respondent was incorporated and in which third respondent acquired farm C on the diagram 'X1'. At the time when the respondents still farmed cattle, there weren't any wildebeest on the farms.

¹⁹ Caseline: Section 01-p64 AA para 11

54. The fourth respondent and main deponent for the respondents states the following in response to the evidence of a telephonic discussion on 15 March 2019 between the first respondent and him related by the third applicant: 'Mr Rhys Griffiths did not disclose to anyone that he shot cattle because of snotsiekte. He is also not qualified to diagnose any animal. In any event, at the time when the Respondent still farmed cattle, there weren't any wildebeest on the farm'²⁰

55. This version conflicts with the version by the respondents that black wildebeest having been introduced on the farms since 2004.

56. The version of the fourth respondent as to when the alleged 'free roaming' blue wildebeest was shot is not convincing. In his answering affidavit the fourth respondent states that he shot a blue wildebeest on 11 August 2022. He annexed a photograph 'AA5' to his answering affidavit of the blue wildebeest, that he shot.²¹ His version as to when the blue wildebeest was shot, was retracted in respondent's Rule 35(12) reply.²² The retraction was made in the face of evidence that fourth respondent lied on the basis of his own exhibit 'AA5' (which showed lush green grass, an impossibility on the dry highveld of winter in August 2022.)

²⁰ Caseline: Section 01 – page 77-78 para 47 AA

²¹ Caseline: Section 01 page 63 AA para 8 and Section 01-86 (Photograph).

²² Caseline: Section 02 page 8 RA para 4.3.

57. There are also the following material flaws in the respondent's version:

- 57.1 The lie about the existence of a 'profitable business plan' (for game farming of black wildebeest.)²³ This was exposed when respondents were forced to admit that none exists.²⁴
- 57.2 The misrepresentation of the relevant parts of Stuart's Field Guide²⁵ which is not addressed in the respondent's heads of argument.
- 57.3 The misrepresentation of the remit of the (hunting) permits held by respondents. The fourth respondent states that a certificate annexed to his answering affidavit marked 'AA7' allow them to keep black wildebeest on the relevant land.²⁶ On closer inspection 'AA7' is an 'Exemption To Hunt, Capture And Sell Game In An Approved Fenced Area Contemplated In Section 37' issued in terms of the provisions of the Nature Conservation Act 10 of 1998.

58. In the case of *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*²⁷ Murray, them AJP, said: 'A bare denial of applicant's material averments cannot be regarded as sufficient to defeat applicant's right to secure relief by motion proceedings in appropriate cases. Enough must be stated by respondent to enable the Court to conduct a preliminary investigation ... and to ascertain

²³ Caseline: Section 01 page 63 AA para 10.

²⁴ Caseline: Section 02 page 7 para 1.

²⁵ Caseline: Section 01 - p106 to 107 RA

²⁶ Caseline: Section 01 - p66 para 18 AA

²⁷ 1949 (3) SA 1155 (T) at 1165

whether the denials are not fictitious intended merely to delay the hearing. The respondent's affidavit must at least disclose that there are material issues in which there is a *bona fide* dispute of fact capable of being decided only after *viva voce* evidence has been heard.'

59.If by a mere denial in general terms a respondent can defeat or delay an applicant who comes to Court on motion, then motion proceedings are worthless, for a respondent can always defeat or delay a petitioner by such a defence. ²⁸

60.It is necessary to make a robust, common sense approach to a dispute on motion as otherwise the effective functioning of the Court can be hamstrung and circumvented by the most simple and blatant stratagem. The court must not hesitate to decide an issue of fact on affidavit merely because it would be difficult to do so. I am satisfied that the alleged disputes of fact raised by the respondents are not material to the issue to be decided. I am satisfied that the matter is capable of determination on the papers.

61.The following facts stated by the applicants are baldly denied by the respondents and accordingly capable of determination on papers:

²⁸ See also *Prinsloo v Shaw*, 1938 AD 570.

- 61.1 Black wildebeest (like blue wildebeest) are carriers of the bovine malignant catarrhal fever (MCF) also known as the “snotsiekte” virus, a highly contagious and deadly animal disease;
- 61.2 MCF (or “snotsiekte”) causes 100% certain death of cattle infected by the disease – the veterinary details are fully explained in the report of Prof van Vuuren. The van Vuuren Report, is baldly, disputed by the fourth respondent who is not qualified as an expert – the respondents have not presented any credible countervailing expert evidence to contradict or gainsay the Van Vuuren Report;
- 61.3 All the applicants have already suffered substantial losses due to several livestock deaths caused by MCF since 2016 (when the black wildebeest were introduced onto the farms by the respondents);
- 61.4 Prof van Vuuren has found that the likely cause of these deaths is MCF emanating from the respondent’s herd of black wildebeest;
- 61.5 Not only have these losses caused substantial financial harm to the applicants, but the forty (40) MCF infected wildebeest which respondents continue to keep also drastically infringe on the applicant’s property rights.
- 61.6 The second and third applicants are forced to forego the full use and benefit of their farms in an attempt to protect their cattle from the deadly infection.

61.7 Prof van Vuuren has found that a buffer zone of at least 1 km (one kilometre) wide is required to be maintained between cattle and the black wildebeest. The fourth respondent in his answering affidavit conceded that 'a buffer zone would be an effective response and should take away any problems, if there were any.'²⁹

61.8 Wildebeest (of both the black and blue variety) do not naturally occur in the relevant area as alleged by the respondents. The black wildebeest were introduced to the relevant area by the respondents in 2016.

THE ANIMAL DISEASES ACT

62. The applicants rely, as one of their main causes of action, on breach by the respondents of the duties (imposed upon them under Section 11(1)(a) of the Animal Diseases Act 35 of 1984 ('the Act').

63. Section 11(1)(a) of the Act reads as follows: 'Duties of owners and managers regarding health of animals:

(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 had 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-

²⁹ Caseline: Section 01 – page 70 AA para 26.1

- (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 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.'

64. The following definitions in the Act are relevant:

'1. Definitions

'animal' means any mammal, bird, fish, reptile or amphibian which is a member of the phylum vertebrates, including the carcass of any such animal;

'animal disease' means a disease to which animals are liable and whereby the normal functions of any organ or the body of an animal is impaired or disturbed by any protozoon, bacterium, virus, fungus, parasite, other organism or agent.'

65. The respondent's answer to paragraph 16 of the founding affidavit is in paragraph 25.2 of his answering affidavit namely:

'25.2 Any breach of Section 11 of the Animal Diseases Act, 35 of 1984, is specifically denied. The highlighted part of the Act in the Founding Affidavit is specifically noted. To the best of my knowledge the disease in question does not spread through parasites and this is actually irrelevant. Parasite control is, however, imposed. The First, Second and Fourth Respondents also have

various measures in place, such as keeping proper fences and constantly patrolling them and checking if any animals possibly escape. To date no black wildebeest have ever escaped from the camps.³⁰

66. Prof van Vuuren explains in his Report:

66.1 how the transmission of MCF occurs, namely 'via aerosol from the mucus of wildebeest ... during periods when the virus is spread ... No other mode of transmission has been proven or documented.'³¹

66.2 'that all or most of the adult blue and black wildebeest in herds are regarded as persistently infected'(with MCF/snotsiekte).³²

67. Prof van Vuuren also refer in his Report to The Animal Diseases Act and remarked as follows:

'The Animal Diseases Act 35 of 1984 under the heading "Duties of owners and managers regarding the health of animals, states in Article 11(1)(a) and 11(1)(b) (i) that they should take all reasonable steps to prevent the spread of any animal disease from their properties. Mr Allers farm is adjacent to the farm of Mr Rhys Griffiths that has resulted in economic losses as a result of the hostage situation that he find himself in.'³³

FINAL INTERDICT

³⁰ Caseline: Section 01 p 69 para 25.2 AA.

³¹ Caseline: Section 01-51

³² Caseline: Section 01-51

³³ Caseline: Section 01-54/55

68. This application is concerned with the granting of a final interdict. It is trite that such an interdict can only be granted if applicants can show on a balance of probability, that:

- (a) they have a clear right;
- (b) an injury has actually been committed or is reasonably apprehended;
- (c) no other satisfactory remedy is available to them.

A CLEAR RIGHT

69. The respondents argued that the applicants do not make clear what their clear right would entail, but it appears that they rely on their right to farm on their property as they please.

70. In this regard it was submitted that property rights are not absolute and are subject to various restrictions.³⁴

71. In *Regal v African Superstate (Pty) Ltd* Steyn CJ stated as follows at 106 H-107A:

“As algemene beginsel kan iedereen met sy eiendom doen wat hy wil al strek dit tot nadeel of misnoeë van ‘n ander, maar by aangrensende vasgoed spreek dit

³⁴ See *Daniels v Scribante and Another*, 2017 (4) SA 341 (CC) and *PGB Boerdery Beleggings (Edms) Bpk and Another v Summerville 62 (Edms) Bpk and Another*, 2008 (2) SA 438 (SCA) 1963 (1) SA 102 A

haas vanself dat daar minder ruimte is vir onbeperkte regsuitoefening. Die reg moet 'n reeling voorsien vir die botsende eiendoms en genotsbelange van bure, en hy doen dit deur eiendomsregte te beperk en aan die eienaars teenoor mekaar verpligtins op te lê.”

72. In *East London Western Districts Farmers' Association and Others v Minister of Education and Development Aid and Others*³⁵ Hoexter JA stated as follows at 661:

‘Our law recognises as one of the intrinsic rights of a landowner or lawful occupier of land his right to the reasonable enjoyment of such land; and it provides him with a remedy against those who unjustifiably interfere with that right’

73. The facts in the matter of *Wright and Another v Cockin and Others*³⁶ are on all fours with the facts before me. The court held at page 215A, ‘that this matter falls to be determined in accordance with the principles relating to the law of nuisance. At page 215 G-H, the Court concluded as follows on the applicable legal principles:

‘Bearing the above-mentioned authorities in mind the issue in my view, in the present matter, is whether the respondent’s activities on their land with regard to the introduction of and the running of blue wildebeest adjacent to the boundary of

³⁵ 1989 (2) SA 63 (A)

³⁶ 2004 (4) SA 207 (E) [04-34]

applicants' property constitutes an unreasonable interference with the applicant's use of their land to farm cattle.'

74. Having regard to the circumstances of this matter I am satisfied that the applicants have established a clear right.

WHETHER AN INJURY HAS ACTUALLY BEEN COMMITTED OR IS REASONABLY APPREHENDED.

75. In the present matter the applicants have established that they have a reasonable apprehension that the snotsiekte virus will be transmitted to their cattle by respondent's black wildebeest running adjacent to their boundary. In coming to this conclusion I bear in mind the fact that as Prof van Vuuren stated, that black and blue wildebeest carry the snotsiekte virus which they readily shed.

76. The respondents argued that an alleged 'solitary blue wildebeest' might have caused MCF infection of applicants' herd of cattle. A similar issue was raised in the *Wright* case. Having considered the 'solitary blue wildebeest' issue, the court said the following at page 216 D-E, which applies also to the 'free roaming wildebeest' in respondent's papers:

'... it is in the view that I take of the matter, not necessarily to determine this issue. The solitary blue wildebeest has, in my view, assumed the mantle of a red herring. Even accepting that a solitary blue wildebeest which might itself transmit

the virus to applicants' cows has been running loose on applicant's property since March 2000 the question still remains as to whether or not applicants have a reasonable apprehension that the presence of respondent's blue wildebeest adjacent to their property will also causes them harm by causing their cattle to become infected with snotsiekte.'

77. I am of the view that the 'free roaming wildebeest' relied on by the respondents in this matter is, for the same reason, a red herring which does not take the case further.

78. It is clear from the Report of Prof van Vuuren that outbreaks of the disease will inevitably occur from time to time in cattle kept adjacent to black or blue wildebeest. The applicants are faced with a continuous situation. One cannot adopt the stance that applicants should content themselves with a claim for damages every time a cow or bull is infected. There is no knowing what the scale of their loss might be if the mischief is not removed. In my view, there is no alternative remedy.

79. I am persuaded that the applicants have satisfied all the requirements for a final interdict.

80. On a conspectus of all the evidence before me I concluded that:

- 80.1 The respondents' activities on their land with regard to the introduction of and the running of black wildebeest adjacent to the boundary of applicant's property constitutes an unreasonable interference with the applicants use of their land to farm cattle;
- 80.2 It is unreasonable that applicants, if they wish to avoid the risk of infection to their cattle caused by the introduction of non-endemic game into the area, should effectively have to abandon stock farming within 1000 metres of their common boundary with the respondents property.
- 80.3 The respondents failed to take reasonable steps to comply with the Animal Diseased Act ('The Act');
- 80.4 The only reasonable steps to comply with the Act is to remove the black wildebeest from the area alternatively to create a buffer zone of at least 1km (one kilometre) wide between cattle and the black wildebeest.

ALTERNATIVE RELIEF

81. The applicants effectively seek relief to this effect that the respondents should remove the black wildebeest from their farms and or alternative relief.

82. A prayer for further or alternative relief can be invoked to justify or entitle a party to an order in terms other than that set out in the notice of motion where that

order is clearly indicated in the founding (and other) affidavits (or in the pleadings) and is established by satisfactory evidence on the papers.

83. 'Relief under this prayer cannot be granted which is substantially different to that specifically claimed unless the basis therefore has been fully canvassed, viz the party against whom such relief is to be granted has been fully apprised that relief in this particular form is being sought and has had the fullest opportunity of dealing with the claim for relief being pressed under the head of 'further and/or alternative relief.'³⁷

84. In this matter I have invited counsel for the parties to address me on whether this court can make an order that the respondents must create a buffer zone of 1km (one kilometre) wide between the applicant's cattle and the black wildebeest, under the prayer for further or alternative relief.

85. Relief under this prayer is not substantially different from the relief sought by the applicants in the notice of motion.

86. The basis for this relief has been fully canvassed by the expert Report of Prof van Vuuren. He concluded that:

³⁷ *Port Nolloth Municipality v Xhalisa; Luwala v Port Nolloth Municipality* 1991 (3) SA 98 (C) at 112 D-G; *Herbert Porter and Co Ltd and Another v Johannesburg Stock Exchange* 0 1974 (4) SA 781 (W).

'the only reliable preventative measure is to keep cattle separated from potential reservoir species such as wildebeest. Separation of wildebeest and cattle by several hundred meters is regarded as necessary to prevent infection in cattle'. He found that a buffer zone of at least 1 km (one kilometre) wide is required.

87. The fourth respondent in his answering affidavit states that 'a buffer zone would be an effective response and should take away any problems if there were any.'³⁸

88. The prayer under alternative relief comes to a variation in form rather than of the substance of the relief claimed, without travelling, outside the facts contained in the papers, and it resolves the very dispute which the applicants have submitted to the Court.

89. In my view it would be unreasonable to expect the respondents to remove the black wildebeest from their farms and to stop farming with black wildebeest.

90. In balancing the respective interest of the parties it must be recognised that both have the right to the reasonable use of their properties. The respondent's' conduct in keeping black wildebeest on their property is not per se unreasonable.

³⁸ Caseline: Section 01-p70 AA para 26.1

91. I am satisfied that it would not be unreasonable under the circumstance to order that the respondents must move all black wildebeest to an area beyond 1000 meters of the applicants' farms.

92. I am of the view that in all the circumstances that applicants are entitled to the further or alternative relief.

93. Accordingly, the application succeeds. The following order is granted:

1. The respondents are directed jointly and severally within 60 (sixty days) of the issue of this order to comply with their legal duties under Section 11 of The Animal Diseases Act 35 of 1984 to remove all black wildebeest upon their farm properties (more particularly) the farms – Driekop, number 387, Portion 9 and Waaikraal 385 JT, Portion 5 in the area of the Emakhazeni or Highlands Local Municipality in the Mpumalanga Province, to an area beyond 1000 meters of the applicants' farms.
2. That the respondents, jointly and severally, the one paying the other to be absolved, pay the costs of the application on the scale as between party and party and which costs shall include the qualifying fees of Prof van Vuuren and senior counsel.

JJ STRIJDOM

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances:

For the applicants: Adv CHJ Badenhorst SC

Instructed by: Mr Ian Small-Smith

For the respondents: Adv JGC Hamman

Instructed by: Van Dyk Theron Inc Attorneys