


**IN THE LAND CLAIMS COURT OF SOUTH AFRICA
HELD AT RANDBURG**

CASE NUMBER: LCC143/2015

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO	
(2) OF INTEREST TO OTHER JUDGES: YES / NO	
(3) REVISED: YES / NO	
31/1/2022	
DATE	SIGNATURE

In the matter between:

MARKOS SIBANYONI

Applicant

and

MICHAEL HARTMAN HOLTZHAUZEN

First Respondent

CORNELIA ARNOLDIA HOLTZHAUZEN

Second Respondent

CARL JACOBS

Third Respondent

(This judgment is handed down electronically by circulation to the parties' legal representatives by email. The date for hand-down is deemed to be December 2021.)

JUDGMENT

MIA J

INTRODUCTION

- [1] This matter follows from an application by the applicant, an occupier on the farm Degoedehoop 362JT, Portion 3(the farm), for the restoration of grazing rights in terms of the Extension of Security and Tenure Act 62 of 1997 (ESTA) and the return of cattle that were illegally impounded by the respondents. The matter came before Ngcukaitobi AJ on 9 May 2015 when judgment was granted in favour of the applicant on the merits. The court declared that the impounding of the six cattle by the respondents in their capacities as persons in charge of the farm was non-compliant with s 7 of ESTA. The court further declared that the applicant is entitled to just and equitable compensation which must take account of the value of the cattle at the time of the impoundment in November 2014. The matter was postponed *sine die* to determine just and equitable compensation in respect of the loss of the cattle.

ISSUES FOR DETERMINATION

- [2] A pretrial meeting was conducted before Cowen J. The issue for determination was set out as:
- 2.1 the sum of equitable compensation to be received by the applicant for the six cattle impounded by the respondents must take into account the value of the cattle at the time of impoundment in November 2014 and any other relevant factors.
 - 2.2 after the applicant's expert witness had testified and been cross-examined, the respondent filed a supplementary report. The applicant objected thereto. The court was required to determine whether the respondent's supplementary report which was filed after the applicant's evidence was led, was admissible.

ADMISSION OF THE RESPONDENT'S SUPPLEMENTARY REPORT

- [3] Ms Mashaba objected to the respondent's submission of the supplementary report after the applicant's expert witness had testified. The first basis of the objection was that there was non-compliance with the time frame for filing the supplementary report. A further basis was that the respondent's report was

amended to align it's with the evidence tendered by the applicant's expert witness and the evidence was not put to the applicant's expert witness. The purpose of the postponement after the applicant's witness was due to time constraints, in that the respondent did not have time to lead their witness' evidence in chief, it was not to afford the respondent an opportunity to supplement its report after hearing the evidence of the applicant's expert witness.

[4] Ms Oschman replied that the report did not amount to an elaboration but served merely to bring the report in line with the requirement for an expert report. She submitted that she was unable to respond to the objection as there was no substantive objection. She elaborated on her submission and pointed out each paragraph and submitted that there were no differences in the content and to the extent, there was a difference that it did not hold any prejudice for the applicant and thus held no merit. The value was not in the initial report but was common cause and was evidence before the court and was discovered by the respondents and is in the third paragraph on page 156. Ms Mashaba's reply was that if the respondent were permitted to reply the applicant should be permitted to reply.

[5] In *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft Fur Schadlingsbekampfung* 1976 (3) SA 352 (A) the Court stated 371C-F

In deciding whether there has been due compliance with sub-rule (9) (b), it is, in my opinion, relevant to have regard to the main purpose thereof, which is to require the party intending to call a witness to give expert evidence to give the other party such information about his evidence as will remove the element of surprise, which in earlier times (regarded as an element affording a tactical advantage) frequently caused delays in the conduct of trials. Indeed, all the sub-rules of Rule 36 were formulated with that purpose in mind. Consequently, when summarising the facts or data on which the expert witness premises his opinions, the draughtsman should ensure that no information is omitted, where the omission thereof might lead to the other side being taken by surprise when in due course such information is adduced in cross-examination or evidence. Furthermore, proper compliance with the sub-rule may enable experts to exchange views before giving evidence and thus to reach agreement on at least some of the issues, thereby saving costs and the time of the court.

(See *Klue and Another v Provincial Administration, Cape. 1966 (2) SA 561 (E)* at p. 563).”

[6] I considered the submissions of both counsel. The report did not comply with the rule and time frames and there was no application for condonation of its late filing by the respondent. The applicant is justifiably taken by surprise. The applicant objected that the late filing was prejudicial in that it was filed after the applicant's expert was cross-examined and the remand requested was due to time constraints and not to enable the respondent to file a report. I accept the submission that the late filing continued to be prejudicial to the applicant having been filed after the applicant led its expert witness and Mr Xaba was cross-examined. Whilst Ms Oschman submitted that the supplementary report merely brought the report in line with the formalities required of an expert report, it is inescapable that report addresses issues that were not present in the initial report and responds to the evidence on record so as to cure omissions in their own report.

[7] There is no reasonable explanation why the respondent did not file a report as required given that the respondent was legally represented and the qualification that the expert placed on record. The experts are not similarly qualified. If indeed the report according to Ms Oschman was in substance the same as the previous report, then the respondent would not be prejudiced by relying on the same report. The short notice, the lateness and non-compliance with the rules were reasons for upholding the applicant's objection to the respondent's reliance and use of the supplementary report.

THE DISPUTE

[8] The issue that was not in dispute was that there were six cattle impounded and taken to the local pound where the cattle were sold after being kept at the pound for a month. There was a dispute as to whether the cattle were of the Drakensberger breed or a different breed. The applicant sought the amount of R816 666.67 as compensation as determined by Mr Xaba for the loss suffered.

APPLICANTS EXPERT

- [9] The applicant's witness, Mr George Orbit Xaba, testified that his experience relating to agriculture and livestock production commenced from his primary schooling. He was a herd boy as a young child and studied agriculture at primary and secondary school. Once he completed school he worked as a teaching assistant and taught agriculture and Afrikaans. Thereafter he attended the University of Fort Hare where he studied agriculture. His curriculum covered forty per cent livestock production, forty per cent crops and twenty per cent agricultural extension. Once he completed his studies, he commenced working as an agricultural advisor in the Department of Agriculture(the Department). He moved up through the ranks to become a senior agricultural advisor, an assistant director, a deputy director, a college principal and eventually he was appointed to the level of a director. He also served as the chief director for the district in the same department. At the time of his evidence, he had just been promoted to the position of Acting Chief Director for the entire province in the Department of Agriculture in Mpumalanga Province. He also served as a lecturer at the Lowveld College for Agriculture for six years and served as the Principal of the College. He was required to write reports to the board for part of the twenty-five years of his appointment in the Department.
- [10] He testified that in his experience there had been various diseases affecting the cattle in the country, namely Foot and Mouth Disease which affected cattle in the Limpopo province and Avian flu fever. There were no diseases affecting large livestock, except for African Swine Fever affecting pigs and Avian flu affecting birds. The Foot and Mouth Disease despite being limited to Limpopo province prevented the export of large livestock. His duties included advising farmers on livestock production and crop production. He worked with key stock holders and commodity production stakeholders. His work in communities entailed inviting farmers to participate in programmes and included interested persons entering the field. His function was managerial in nature. He explained that he is not a farmer himself however his father is a registered Nguni and Brahmin breeder. He actively advises his father on farming.

- [11] During cross-examination, he agreed that evidence must be based on facts. His evidence was based on information from the instructing attorney that the cattle were Drakensberger cattle. He based his opinion on the information presented to him. When Ms Oschman suggested that it was hearsay information, he responded that his experience and expertise applied to the information furnished indicated that the cattle were Drakensberger cattle. He testified that his expertise in agriculture allowed him to respond to the clients' needs. He agreed that if the source of his information was fallible it could impact his opinion. He confirmed that Foot and Mouth Disease in cattle and Avian and African Swine fever were present but no large livestock was affected in the Mpumalanga region to his knowledge.
- [12] Mr Xaba explained that cattle were sold at slaughter sales which occurred in Belfast where they were placed in various categories namely pedigree sales, stock sales and commercial sales and sometimes for reproductions purposes. They were also sold for stud purposes when they were registered with a breeding society. He explained further that commercial sales were lower than sales for stud purposes. Mr Xaba indicated he attended auctions with his father as his father sold his livestock at Badenhorst Auctioneers. He was aware of other auctioneers namely: BKB and Vleis Sentraal. The auctions taken to Badenhorst Auctioneers were taken for slaughter or culling purposes in his experience. When an auction occurred for production purposes the auction was held at the farm or a specialized place. They were then sold based on their pedigree.
- [13] Mr Xaba explained that it was his instructions from the applicant's attorneys, the applicant kept the animals to produce more livestock. If the applicant took them for slaughter purposes they would be taken to either Badenhorst, VleisSentraal or BKB. The animals were however still at the property reproducing. If the animals were sold it would be for commercial purposes. He classified them for commercial purposes and not for stud or breeding purposes. He proposed three scenarios. For slaughter purposes, they would be weighed and the approximate estimated values were as follows:
- 13.1 The first scenario was as follows if presented for slaughter sales:

YEAR	SEX	ESTIMATED WEIGHT (KG)	PRICE
2014	BULL	750	@11/KG+8.250
	BULL CALF	235	@20KG=4.700
	3XCOWS	480	@11/KG=15,840
	HEIFER	220	@20KG=4.400
TOTAL			R33.190

13.2 The second scenario also reflected slaughter sales but reflected prices as at 2020:

YEAR	SEX	ESTIMATED WEIGHT (KG)	PRICE
2020	BULL	750	@17/KG=12.750
	BULL CALF	235	@29.50/KG=6.933
	3XCOWS	480	@17/KG=22.950
	HEIFER	220	@29.50/KG=6.490
TOTAL			R49,123

13.3 If the animals were presented for production sales as commercial

YEAR	SEX	OPEN	PRICE	PREGNANT	PRICE
2014	BULL	NA	25, 000	NA	25,000
	BULL CALF	NA	12, 000	NA	12,000
	3XCOWS	YES	@ 12,000 EA	YES	@18,000
	HEIFER	YES	12,000		20,000
TOTAL			85,000		111,000

13.4 If the animals were presented for commercial sale in 2020

YEAR	SEX	OPEN	PRICE	PREGNANT	PRICE
2020	BULL	NA	40,000	NA	40,000
	BULL CALF	NA	24, 000	NA	25,000

	3XCOWS	YES	@ 20,000 EA	YES	@28,000
	HEIFER	YES	15,000	YES	25,000
TOTAL			140,000		174,000

[14] Mr Xaba also opined that the cows would have reproduced each year. This would have produced six calves from 2014 to 2020. The heifer would have grown and would have calved at least four times from 2014 to 2020. This would bring the total increase of the livestock to thirty-five animals in total. He testified during cross-examination that the Drakensberger trait dominated in these animals. He also indicated that age played a role in slaughter sales. He testified that the young bullock and heifer were the offspring of the cows and bull indicating that the bull and cows were of breeding age.

[15] Mr. Xaba testified that he did not apply contingencies as diseases were not applicable in that particular area. Where he opined that the cattle would increase from six to thirty- five, he took into account there were no diseases affecting cattle in the area where the cattle were placed. He testified that diarrhoea and calf mortality rate and death due to age were not applicable as they were not relevant. On the availability of grazing fields, the cattle had access to grazing. His view was that under normal conditions the animals would have increased to thirty-five. He also added that if the laws applicable were applied then the applicant would have access to grazing land. Ms. Oschman put to Mr. Xaba that the total actual weight was 1995kg and there was a difference of 500kg compared to Mr. Xaba's estimate. Mr Xaba conceded this but noted that the difference was marginal given he had not had sight of the animals.

[16] He agreed that there were black cattle in the breed in Angus Dexter and Drakensberger but they differ in shape. He pointed out there is also a recent black breed that joined however the shape, length, breadth and height indicate the breed. This applies to other breeds as well. The Brahman is bigger than Boran although the colour is the same. The six cattle impounded were not only black, they included a red-brown cow. Mr Xaba testified that it could be classified

as the same as a Drakensberger type which was established by a certain Mr Uys from the Drakensberg mountain, where the cattle derived their name. They were previously called Uys cattle. He cross-bred an Afrikaner type which is red with a Drakensberger which is black. This accounted for the reason why some Drakensberger cattle were red in the offspring. These were Drakensberger type animals not purebred. This also accounts for the weight differentials.

- [17] Mr Xaba's evidence was that the bull calf would be ready to commence breeding from two and half years to three years and the same applied to the heifer under normal circumstances. The bull was mature from three years upwards and ready to breed. An old bull between eight to ten years was less able to maintain itself. He formed an opinion that the bull in question was a mature bull, able to mate but not mature to the point it could not reproduce. He agreed there was no reproduction history as in the report but he pointed out that there were cows and a bull and heifers and a bullock. These he testified were indicative of reproduction taking place among the animals. He was informed that the bullock and heifer were birthed from the cows and the bull.
- [18] Furthermore, he testified that if impounded in November and sold in December they would lose weight. In his opinion they lost half a kilogram for every 5 kilometres travelled on the road. Mr Xaba could not indicate what the distance was between the farm and the pound, however, he reiterated that they would have lost weight at the pound as they were not in a familiar environment which would have caused stress to the animals. His opinion was that they would be affected in the first month mostly and adjust to a new environment after approximately three months.
- [19] Mr Xaba indicated in his report that the value of the cattle could be determined by factors such as birth date, birth weight, sire and breeding values. Ms Oschman put it to him that his opinion was based on the weight, the colour and the gender of the cattle. Mr Xaba deduced the number of cattle could have grown to thirty-five cattle over a period of five to six years. Ms Oschman suggested that from 2009 to 2014 there had been no increase in the five years. However, Mr Xaba indicated there may have been factors that influenced the number. He also

suggested the birth of the bullock and the heifer who were younger than five years indicated recent births resulting from reproduction. Mr Xaba was resolute in his view that there was reproduction. He explained that the animals were fertile as demonstrated by the birth of the young heifer and bullock.

[20] After Mr Xaba furnished the value in 2014, he was shown the tax invoice of the sale in 2015. The tax invoice reflected the gender, the number of cattle and the weight and colour of the cattle sold. Ms Oschman compared the weight of the bull and indicated that Mr Xaba's estimation was incorrect. Mr Xaba indicated that factors influencing the lower weight included the impoundment which caused a loss of weight as did the carriage of animals which affected their normal weight. Furthermore, he expressed that his responses were based on his knowledge of such instances. In his experience animals arrived from the Thursday before the Wednesday auction were affected by travelling and impoundment factors which caused their weight to be lower than what they normally weighed.

[21] Ms Oschman suggested to Mr Xaba that he did not consider that no provision was made for contingencies such as whether the applicants had sufficient grazing in the area. Nor did he provide contingencies for diseases. Mr Xaba testified that tick fever (rooi water) was not applicable to the area. He did not make provision for contingency for any other illness as it was not applicable to the area. In response to the question of whether there was any provision for decreases, Mr Xaba testified that he considered this where diseases broke out and whether these particular cattle were affected by any disease. He conceded he did not make provision for natural calf mortality rate or natural death of cattle due to age. To his knowledge, the cattle had access to grazing and were taken away from the owner. Mr Xaba stressed that the increased number was based on normal conditions. He was satisfied that the animals had access to grazing based equitable application of the laws of the country.

RESPONDENTS EXPERT

[22] The respondent called Mr PJ Badenhorst, who testified that he was a qualified attorney. He however runs an auctioneering business. He has been involved in

auctioneering assisting his father and his grandfather. He took over the business from his father in 1997. In 2004 he formed a company called PJ Badenhorst Auctioneers (Pty) Ltd. He is not only the owner of the business PJ Badenhorst Auctioneers (Pty) Ltd, but he conducted the auctions himself every Wednesday since 1997 to date. He has continuously conducted weekly Wednesday livestock auctions which have become an institution in the area. The farmers in the area know there is a livestock auction in Belfast on Wednesday which include goats, sheep and cattle. These take place in Ermelo on Thursday, and in Standerton on Friday. They sell approximately three hundred cattle every Wednesday. He indicated that another auctioneer known as Vleissentraal conducts an auction on the same day. This has created a marketplace without the need for advertising. It attracts buyers and sellers to compete for the best prices.

[19] In addition to these auctions, there are advertised auctions relating to sales of farms which include the livestock and farming implements on Fridays. The auction relating to the cattle in the present matter occurred at a regular Wednesday auction. The Wednesday auction is popular for buying and selling livestock including cattle.

[20] Mr Badenhorst explained the auction process as follows. A batch of cattle enter the ring and step onto a scale. Their value is then determined by ascertaining the price of cattle sold the previous week. This is where the bidding commences. The previous week's market price is always used as a base value. The bidding commences from what was obtained per kilogram from the previous week. He testified that the value of a cow would not differ materially within a week. It only would only change if there was knowledge of foot and mouth disease and there were sellers from the area where the disease is prevalent. This would cause the price of cattle to decrease and decrease the sale value in the market as some buyers would not bid. This may influence the price in a week. A difference in price would be evident when prices were compared annually.

[21] He testified further that gender and age also played a role in the price. Bull calves grew faster than a heifer calf so a buyer would pay more for a bull calf. A full-grown calf would also achieve a higher price than a younger calf. Farmers

who wanted to reproduce were willing to pay more for a cow than they were for a bull. They would also pay less for a bull as the meat was less tender. In addition, he testified that certain breeds gained weight faster. Bonsmara were more in demand as they gained weight faster than the Drakensberger type and thus achieved more at auction sales. A further determining factor was the increase in maize price which caused a decrease in the price of weaners. Conversely, if the price of maize dropped buyers would be willing to pay more for weaners.

[22] He confirmed that on 10 December 2014, six cattle impounded by Goue Akke Skut were brought to him to be auctioned. The tax invoice reflecting the sale indicated the cattle were sold for R29 950.00 in 2014. His commission was R2902.16 and cost of transporting the animals to the pound was R500. This was deducted from the above amount leaving the amount of R26 547.84. He testified that the cattle were sold on the same basis cattle auctions were usually conducted. The sale of the bull at R8 900 was based on the highest bid. The same applied to all six cattle. To adapt these values for the purposes¹ of compensation these were calculated to the 2021 dates and adjusted having regard to the 2021 vendu roll, which lists the owner, description of cattle, the weight, gender and the price obtained for the animal. He was able to go through the vendu rolls and determine the current market value. He estimated the current value in 2021 to be R58 220.00. This was based on his sales tax certificate viewed for the recent months. His computer programme noted the different breeds and the average weight per kilogram. He estimated the value of a bull at R15 per kg in 2014 and checked the price which was R23 per kg in January, February, March 2021. He commenced the starting bid prices in June 2021 after he consulted the prices from the previous week. Mr Badenhorst furnished the price per kilogram and the total weight only despite the available information available on his programme relating to the weight of each animal.

¹ See page 157 of the respondents report.

RECALCULATED FROM ITEMISED TAX INVOICE 10 DECEMBER 2014

YEAR	SEX	ESTIMATED WEIGHT (KG)	PRICE
2021	BLACK BULL	23 PER KG	R13 570
	BULL CALF		R 7600
	2 RED XCOWS @R7750		R15 500
	1 BLACK COW		R7750
	1 BLACK COW		R6650
	HEIFER		R7150
TOTAL			58 220

[23] Mr Badenhorst then referred to a sale that he conducted on 21 April 2021 which comprised high-quality Drakensberger cattle. He testified that the breeding cows in the offer weighed between 475kg and 490kg. The cattle they sold on the 21 April 2021 he regarded as high-quality Drakensberger and quality prized breeding bulls and cows. He knew the owner personally and the cattle sold realized a price of between R8 950.00 and R9 350.00. He explained he usually used a three-month average to determine the price. However, the cattle he sold on 21 April 2021 were high-end breeding cattle that would not usually be destined for slaughter. In contrast to the previous instances where he used the three months' average to determine the price in the present instance, the cattle were high-quality breeding cows and heifers whilst the cattle he auctioned in 2014, belonging to the applicant were not. The high-quality breeding animals were sold at a value of R37 per kg. He testified that the value was not overvalued or undervalued. In his view, it was unlikely that the cattle sold in 2014 would obtain better prices in 2021 than the high-value cattle. His reasons for this were that they were too small and their frames were too small. He did not take into account that the bull would have aged. He did this for all the cattle.

[24] Mr Badenhorst compared slaughter sales versus production sales. Slaughter sales sold for R22 per kilogram while production sales sold for R28 per kilogram.

He testified that not every auctioneer distinguished between slaughter and production sales, he could distinguish between such sales as his computer printout provided for this difference. Production cattle were young calves ready for mating of good breed. They were born of mothers that were fertile and who had enough milk and produced heifers that were about 250 kg when weaned. Stud cattle were registered as such. They produced high-quality cattle because they were registered as breeders with stud cattle who were certified as being of good quality. There was a slight difference. The only difference indicated was in the price namely in the prices of the cows who were ready to reproduce and bulls ready to inseminate cows. The 200 kg black weaner calf was not suitable for production or slaughter purposes. The heifer at 260 kg was too young to be mated with a bull and not suitable for production or slaughter purposes. If the heifer was 350 kg she would have obtained a slightly higher value.

[25] He testified further if the indicator on the vendu roll was that it was an adult cow and it weighed only 260 kg it suggested that it would not have been in a very good condition. In contrast, if it was a black heifer then it suggested that it was in good condition. The description together with the weight was a good starting point to determine value.

[26] In response to Mr Xaba's report, he confirmed the difference between slaughter sales and product sales. He agreed with Mr Xaba that weight played a role including the factors he mentioned. According to Mr Badenhorst, the black bull weighed 590 kg and the production sale was R15 per kg in 2014. The value was estimated at R8 250.00. In paragraph 2.5 Mr Xaba's report indicated a production price for the same bull at R25 000. This evidenced a big difference of R20 per kilogram rather than his experience which indicated three rands more per kilogram between the slaughter and production rate which Mr Badenhorst testified was unlikely. Mr Badenhorst testified that the most expensive bull he sold on that day was sold at R11 400.00 but he could not say whether it was for slaughter or production purposes. In his experience, the prices estimated by Mr. Xaba could not be realized in 2014 for high-quality production cattle. In his view none of the cattle owned by the applicant were stud cattle as they were not branded or tattooed to indicate they were stud cattle. The vendu roll did not say

what type of cattle it was that were sold but indicated the colour of the cattle not the breed. Mr Badenhorst testified that he auctioned off the cattle. Furthermore, he testified that Drakensberger type cattle were mostly black but that occasionally in one hundred or two hundred they would produce a red calf. He confirmed that the red cow could be a Drakensberger as well, this was a common assumption in his view.

[27] He confirmed his qualifications under cross-examination. He completed a Bachelor of Commerce and a Bachelor of Laws degree. He went to the army in 1991 and commenced his articles in 1992. He began his legal practice in Belfast in 1994, under the name Badenhorst attorneys. He joined his father in 1997. In 2004 his father handed the auctioneering business over to him. He did not attend any classes related to agriculture or auctioneering. He however sits on the Agriculture and Produce Council (APAC) on the subcommittee for livestock agents. He indicated that in his view, the fact that he sold sixteen thousand cattle per year qualified him as an expert to comment on the matter. He explained further that as an auctioneer he did not need a qualification to sell cattle.

[28] Mr Badenhorst expressed the view that despite being involved in the sale of the impounded cattle he felt that he could express an impartial view and give evidence in the matter. He could not recall specifically what occurred on the day. He estimated the values by utilizing the vendu roll. He obtained his facts as they appeared in black and white on the vendu roll. He did not present the vendu roll for the particular day reflecting either the weight of the different cattle and the prices obtained. He did not consult with the applicant either, he only had sight of the sales invoice. He testified further he was not aware for what purpose the cattle were kept for as they was brought by the pound master. He testified that the buyers bought the cattle and determined what they could be used for. It was his view that the bull be sold for slaughter purposes, the three cows for production purposes. The heifer would be sold for feedlot purposes and the calf for commercial feedlots neither commercial nor slaughter but to be fed for slaughter later. He explained that his instructions were not to consider that the cattle would have increased in number but to calculate the value of the six cattle to the present day.

- [29] Ms Mashaba during cross-examination enquired from Mr Badenhorst what the highest price obtained was based on the vendu roll given his evidence that a number of cattle entered the ring. He testified that the price reflected on the list indicated was the highest price obtained. He also testified that when they did sales on farms namely, production sales they sold the livestock according to their age groups. He testified furthermore, that if the applicant sold the cattle as production cattle the price achieved would have been slightly higher which would have been two rands per kilogramme more for the female cattle pegging the price at R25 per/ kg instead of 23 per/kg which was the price obtained. He pointed out that they did not check to see if the cattle were pregnant but buyers would see if the cattle were pregnant.
- [30] Mr Badenhorst testified that in contrast to the applicant's cattle which he auctioned, stud breeders obtain a record over years and their cattle obtain a reputation over years when they register their animals as stud animals. Under those circumstances, he testified that the buyer would pay R20 000 for heifer which would normally go for R12 000 because they would have been selected over a long time for top quality cattle in terms of fertility and milk production. He testified that having regard to the invoice it was possible that the three cows would have produced seven calves each and the heifer would have produced five cows yielding a total of twenty-six animals by 2021. The applicant could thus have owned a total number of thirty two cattle by the year 2021.
- [31] During re-examination it was put to Mr Badenhorst that the applicant placed on record that they had six cattle in 2009 when his mother passed away. He testified that it was unlikely that the heifer was the same heifer and would not have maintained the same weight of 250 kg from 2009 until 2014. He testified furthermore that the reproduction statistics which were applicable and affected cattle related to parasites, disease and lightning strikes. Despite referring to these aspects he testified that he had no knowledge of the applicant's cattle farming or his purpose thereof. He testified that buyers decided what they wish to pay for cattle and it is possible to see what buyers were willing to pay for cattle over a period of time.

[32] Ms Mashaba submitted that there was a possible conflict of interest in that Mr Badenhorst was the auctioneer who conducted the sale of the impounded cattle. As a valuator selling cattle for eleven years, he had no experience to be qualified as an expert. Moreover, she submitted, he raised livestock within his family and his evidence could not be regarded as wholly impartial as his submissions were not independent. She submitted that he omitted to consider material facts which detracted from his concluded opinion and assumed the role of an advocate for the respondent's case. She pointed out that he conceded during cross-examination that the applicant's livestock would have increased to approximately 29 in number. She concluded that the applicant would thus have owned 31 to 34 cattle in 2021. This finding was similar to the applicant's expert, Mr Xaba's finding.

[33] She relied on a decisions emanating from the Supreme Court of Appeal where principles emanated in a number of reported decisions permitting a creditor to claim interest. She did not cite the authorities she relied on but referred to the general principles that:

- A debtor who is late with payment of money under a contract is entitled to claim mora interest on the outstanding debt due to the debtor's failure to make payment on the due date;
- The creditor is entitled to claim this interest without a specific contractual provision to pay interest.
- If the contract fixes the time for payment, no demand is necessary to place the debtor in default and interest is payable from the date on which payment was due.

In view of the above she submitted that the amount due to the applicant was the amount of R736 800.00 taking into account a ten percent contingency deduction.

[34] Ms Oschman submitted that both expert's evidence must not be elevated to heights so that the court's responsibilities in drawing conclusions from the evidence is lost. I accept her submission regarding the irrelevance of Mr Xabá's

evidence regarding stud cattle. There was no evidence that the cattle were stud cattle. The evidence of the applicant was not led to support a version that the cattle were stud cattle. However, the respondent's expert testified that he as an auctioneer did not examine the cattle himself either for pregnancy and the vendu roll did not indicate any tattoos or branding or their weight. He indicated that whilst he did not examine the cattle himself, the buyers present at the auction examined the cattle before a purchase. I have taken into account that his invoice and report as the auctioneer was submitted as the expert report but did not reflect any weight despite his evidence that the animals were weighed when they entered the ring.

[35] In *Cooper* above the Court stated that:

“In the ultimate result, it is the court's duty to construe the specification and on the merits to draw inferences from the facts established by the evidence. See *Gentiruco's* case, *supra* at pp. 616D - 618G. There are, however, cases where the court is, by reason of a lack of special knowledge and skill, not sufficiently informed to enable it to undertake the task of drawing properly reasoned inferences from the facts established by the evidence. In such cases, subject to the observations in the *Gentiruco* case, *loc. cit.*, the evidence of expert witnesses may be received because, by reason of their special knowledge and skill, they are better qualified to draw inferences than the trier of fact. There are some subjects upon which the court is usually quite incapable of forming an opinion unassisted, and others upon which it could come to some sort of independent conclusion, but the help of an expert would be useful (see, Hoffman, *S.A. Law of Evidence*, 2nd ed., p. 78).”

[36] Having regard to the evidence it is undisputed that there were six cattle impounded and sold by Mr Badenhorst which comprised one bull, three cows, a heifer and a calf. Both Mr Xaba and Mr Badenhorst's evidence indicate they both have experience with cattle with Mr Xaba's experience being academically superior in that he has more extensive practical and academic knowledge in the field of cattle farming and advising cattle farmers, while Mr Badenhorst's knowledge was attributed to auctioneering and cattle farming in recent years. Both Mr Xaba and Mr Badenhorst agreed that the cattle were Drakensberger type cattle. They also agreed that the appearance of red offspring occasionally

was due to a genetic trait which skipped generations. They agreed furthermore that the calf and heifer were an indication that the cows and the bull were reproducing. Both Mr Xaba and Mr Badenhorst testified that the cows would have produced at least six more cattle between 2014 and 2021. They agreed that the heifer and calf would have increased in mass and would not have remained the same weight. There appeared to be consensus that the number of cattle would have increased to at least twenty-one excluding the six cattle which were impounded. Mr Badenhorst did not dispute the evidence of Mr Xaba that the area was not affected or impacted by disease for the period in question. Mr Xaba's evidence was that he advised small farmers in the area. The only contingency affecting reduction was possible lightning strikes. No statistics were given on the impact in the area.

[37] The difference in the experts' evidence was in the value to be attributed to the cattle. Mr Badenhorst attributed an increase from R17/kg in 2014 to R23/kg in 2021 referring to his vendu roll. Whilst he referred to this vendu roll it was never handed in as an exhibit. Mr Badenhorst's evidence was that the heifer was too young at 260 kg to be mated with a bull and would have fetched a higher price at 350 kg. There was no evidence led to rebut Mr Xaba's evidence that cattle including the heifer lost weight during the transportation of the cattle to the pound.

[38] Both experts agreed that the cattle would have reproduced between 2014 and 2021. Mr Badenhorst's evidence was that the cattle would not have realized more than R37/kg. On the evidence presented, I am unable to find that the cattle were registered as stud cattle however given the passage of time and the evidence that the cattle were producing offspring it is evident that they were raised for production purposes. On this basis the scenario envisaged by Mr Xaba in paragraph 13.4 above provides for the production sale of the cattle as well as the taking into account the production of the births agreed upon by both Mr Badenhorst and Mr Xaba. The sum reflected is the amount of R174 000.

COSTS

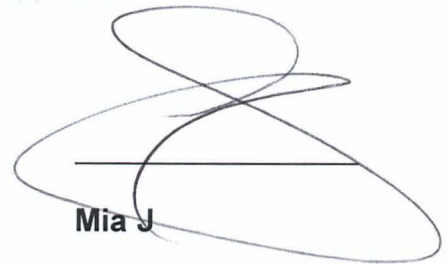
[39] The usual order of this court is not to make an award of costs except in exceptional circumstances. In my view exceptional circumstances are present.

The applicant was compelled to incur costs to bring the application and to bear the costs in the initial and subsequent application to ensure his rights were protected. His animals were not saved from the pound master. The circumstances of the present matter do constitute such exceptional circumstances which warrant the grant of a costs order. It is necessary that the costs order follow the relief that the applicants have been granted.

ORDER

[40] For the reasons above I order as follows:

1. The respondents are to compensate the applicant for the loss of cattle in the amount of R 174 000.00
2. The respondent shall pay the costs of the application.

A handwritten signature in black ink, appearing to be 'Mia J', written over a horizontal line. The signature is stylized with loops and a long horizontal stroke.

Mia J

Acting Judge

Land Claims Court

Appearances:

For the Appellants: Adv Mashaba

Instructed by Attorneys

For the Respondents: Adv Oschman

Instructed by Attorney

Hearing 19 May 2021, 8, 21 June 2021
Judgment 31 January 2022