REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable
Case Number : 553 / 07

In the matter between

HERMANUS FRANCOIS ENSLIN **APPELLANT**

and

NGKAKA JACOB NHLAPO **RESPONDENT**

Coram : FARLAM, PONNAN JJA et SNYDERS AJA

Date of hearing : 22 MAY 2008

Date of delivery : 30 MAY 2008

SUMMARY

Liability of property owner – cattle straying onto a public road – legal duty - negligence.

Neutral citation: This judgment may be referred to as :
Enslin v Nhlapo
(553/2007) [2008] ZASCA 75 (30 May 2008)

J U D G M E N T

PONNAN JA

[1] At approximately 7pm on 9 February 2002, the present respondent ('the plaintiff') was driving his Toyota Venture, when he came upon a small herd of cattle alongside the farm Holfontein on the R26, the main tarred road between Petrus Steyn and Heilbron. He was unable to avoid them and collided into one, a young Brahman bull. The plaintiff sued the present appellant, the owner of the farm ('the defendant') for the damages he sustained in consequence of the collision. He averred that the cattle belonged to the defendant, alternatively, that the cattle were under the latter's control. The alleged grounds of negligence were that the defendant had failed to: ensure that the cattle were properly fenced in; prevent the cattle from straying onto a public road; and warn approaching motorists of the presence of the cattle on the public road although he could have done so. The plea denied ownership or control of the cattle, as also negligence. At the conclusion of the case, the issue of liability having been separated from that of quantum and the trial proceeding solely on the former, the plaintiff's claim was dismissed with costs by the Petrus Steyn Magistrate's Court.

[2] On appeal, the Bloemfontein High Court (per Ebrahim J, Molamela AJ concurring) reversed the decision of the trial court and altered the order to one of judgment in favour of the plaintiff for such damages as may be proved with costs. Persuaded that there were prospects that another court might well come to a different conclusion in the matter, the high court, on application to it, granted leave to appeal to the full court (three judges) of that division. The appeal succeeded before the full court. In terms of the Supreme Court Act, however, such further appeal on a judgment or order given on appeal to it lay to this court and not to the full court. (See LTC Harms *Civil Procedure in the Superior Courts* para C1.23; *S v McMillan* 2001 (1) SACR 148 (W); *Derby-Lewis v Chairman, Amnesty Committee of the TRC* 2002 (3) SA 485 (C).) That part of the order of the high court referring the matter to the full

court was therefore a nullity as was the order of the full court, which had no jurisdiction to hear the appeal.

[3] The defendant testified that the Brahman bull with which the plaintiff collided belonged to Mr Rondekop Mkwanazi. In that, there was corroboration in the evidence of his erstwhile employee, Mr Sahela Moloi. It follows that the conclusion by the trial court that the bull in question did not belong to the defendant can hardly be faulted. Although the defendant initially suggested in his evidence that Mr Mkwanazi had hired the camp in which his cattle had been grazing and whence they had strayed onto the public road, he later clarified: 'Dit is nou nie dat hy 'n kamp huur en die kamp kaal eet vir jaar in en jaar uit nie. Ek meen dit is my eiendom, ek bestuur die plek, maar vir daardie tyd het hulle in die kamp geloop. …' The bull was, thus, on the defendant's farm with the knowledge and consent of the latter. It was the defendant who decided where on the farm the cattle would graze and, for the right to graze his cattle on the defendant's farm, Mr Mkwanazi paid the defendant R15 per head per month. On his own version therefore it would appear that the defendant exercised a measure of control over the bull. But it may well be unnecessary to go that far, for he clearly exercised control over the grazing camp in which the bull had been allowed to roam freely unsupervised. (See *Jamneck v Wagener* 1993 (2) SA 55 (C).)

[4] It must be accepted, it seems to me, that the defendant had to have been aware of the fact that, if the cattle on his farm were to stray onto the adjoining public road, they could endanger the lives of road users. A reasonable person in the position of the defendant would thus have taken steps to prevent the cattle from straying onto the public road particularly at night. It is common cause that the defendant had indeed taken certain steps. The grazing camp was separated by a fence from an access road that ran from the public road to a neighbouring property. Two gates had been installed. The first, a wire gate, led from the camp to the access road. The second, a steel gate, led from the access road to the public road. For the cattle to have strayed onto the public road both gates had therefore of necessity to have been open. According to the defendant he had instructed his employees to keep both gates closed. That, Mr Moloi testified, he had done on the evening in

question. The gates had probably been opened thereafter - by whom and in what circumstances, does not emerge on the evidence.

[5] The real question in this case is whether a reasonable person would have taken further precautions to prevent the cattle from straying onto the public road. It is unfortunately a fact of life that, even though most people act with reasonable care most of the time, a normal degree of negligence is an everyday occurrence (see *Mkwanazi v Van der Walt* 1995 (4) SA 589 (A) at 594A-B). The leaving open of one or more farm gates falls into that category of negligence. Indeed, when it was suggested to the defendant that there was a real likelihood of visitors leaving the gate open, he replied:

'Dit is dan so, dit is dan so, maar dit is nie die plaasboer se moeilikheid om agter elke kuiermens, veral na 'n buurman toe se gat af te ry en te kyk, ekskuus die woord, agter hulle te gaan kyk dat hulle die hek toemaak nie'.

Of his arrangement with his neighbour in respect of the shared steel gate, the defendant stated:

'Omdat die buurman … het reg om die grond te gebruik deur na sy eiendom toe, en as daar geen vee links en regs is nie, het hy die reg om die hek oop te los. Soos ek met hom ooreengekom het, want hy het die draad voorsien om die gang te span juis vir daardie rede. Vroeëre jare was daar nie 'n gang gewees nie, dit was 'n enkeldraad gewees toe moes hy elke keer die hek oop en toe maak'.

It was thus a reasonably foreseeable possibility that both gates might have been left open, particularly as the one was utilised by a neighbour and his visitors to gain access to the adjoining property. Moreover, on the defendant's own version, his cattle had strayed onto the public road on a prior occasion. In those circumstances, it seems to me, that a reasonable person would not have shrugged his/her shoulders in unconcern, as the defendant appears to have done, but would definitely have considered further precautionary measures over and above those taken by the defendant in this case.

[6] In response to the suggestion that a cattle grid could have been installed or a padlock utilised, the defendant stated:

'Daar is geen wet wat 'n grondeienaar verplig om 'n slot of 'n motorhek te sit nie, en ek kan u net sê ter inligting by my plot het ek 'n motorhek gehad, die vorige eienaar en, sy perd het sy bene gebreek in die motor hek, so 'n motorhek keer ook nie vee nie. . . .

. . . So moenie vir my kom sê ek moet ‘n motorhek en slotte aansit as anders dit, mense wat ook vee eienaar is, se beeste loop waar hulle wil, wanneer hulle wil by enige Vrystaatse dorpie.

U kan nou saam met my ry, ek belowe vir u ek gaan beeste vir u … wys wat loop waar daar nie ‘n draad is nie. So moenie vir my sê ek moet motorhekke insit, ek het gedoen wat van my verwag is en geen eienaar van ‘n bees of geen eienaar nie, as ek my buurman se bees kry, hoeveel keer het ek al in die nag gery om my buurman se bees uit die pad uitgejaag.’

[7] The use of a padlock to secure the steel gate or the installation of a cattle grid on the access road shortly before it joined the public road would have been easy, inexpensive and effective measures to prevent the cattle straying onto the public road. The defendant’s objection to the use of a padlock was that the one gate was shared by his neighbour as well. The employment of a padlock however, could quite easily have occurred in consultation with his neighbour who could have been furnished with a key. Considering the respective interests of the defendant on the one hand and the road users of the public road on the other, the use of a padlock or a cattle grid as precautions were so easy and relatively inexpensive to take, that a reasonable person would have taken at least one if not both of them. The defendant’s failure to take either precaution meant that he had been causally negligent in relation to such damage as may in due course be proved by the plaintiff.

[8] There remains the question of the wasted costs incurred in respect of the full bench appeal. Plainly the legal representatives on both sides, who ought to have known that a further appeal to the full court was incompetent, should be disentitled to recover those costs from their clients. It follows that no legal fees may be debited against either party by their legal representatives in respect of those proceedings and such fees as may have been debited must be refunded.

[9] In the result the appeal is dismissed with costs.

V M PONNAN
JUDGE OF APPEAL

CONCUR:

FARLAM JA

SNYDERS AJA