IN THE GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.

(3) REVISED.

10/6/2014 R Keightley

DATE **SIGNATURE**

10/6/2014

Case No.: A7/14
530/2011

In the matter between:

NICO OOSTHUIZEN Appellant

and

SCHALK VAN HEERDEN t/a BUSH AFRICA SAFARIS Respondent

JUDGMENT

KEIGHTLEY, AJ

INTRODUCTION AND COMMON CASE FACTS

[1] It is the misfortune of cattle to be vulnerable to a disease which, in English is rather euphemistically called "bovine malignant catarrhal fever". The Afrikaans name for the disease is far more descriptive, it is known simply as "snotsiekte". By all accounts the disease is nasty and usually results in the infected cattle dying a painful death after a number of days of suffering. In this judgment, I will refer to the disease by its more common, and more descriptive, Afrikaans name.

[2] It is well established in scientific circles that wildebeest, and particularly blue wildebeest, are carriers of snotsiekte, although they do not suffer from the disease.

[3] The appellant, who was the plaintiff in the court *a quo*, claims that he lost six cattle to snotsiekte over a period of some weeks from mid-October 2010. He instituted a delictual action in the Magistrate's court of Ellisras against the respondent for damages, on the basis that the source of the snotsiekte infection was the blue wildebeest kept by the respondent on the respondent's property. The appellant sought recompense for the value of the cattle he lost to the disease. The appellant's claim was dismissed in the magistrate's court and he appeals against this dismissal.

[4] There are many facts in this case that are common cause. The appellant is a cattle farmer and he is the lessee of a farm known as Goa. He commenced leasing the farm in February 2009. The farm is divided into two sections,

known as Goa West and Goa East. A gravel road separates the two sections of the farm. The facilities for managing and treating the cattle, such as kraals, dipping, loading and watering stations, are all situated on Goa West, with Goa East being used primarily for grazing.

[5] To the north of Goa lies the southern border of the farm Samaria. It is also divided by the gravel road into Samaria West and Samaria East. The respondent is the lessee of Samaria West. For ease of reference, I will simply refer to the respondent's farm as "Samaria", although strictly speaking it is only on Samaria West that the respondent conducts game farming operations. Samaria East is for all intents and purposes not relevant to the issue in dispute in this matter.In addition to the farm Samaria, the respondent also farms on the properties Mariqua and Altefraai, which adjoin Samaria to the west.

[6] The respondent is primarily a game farmer, who runs hunting safaris on the farms that he leases. He has removed the fences between the Western Portion Samaria, Mariqua and Altefraai with the effect that he has a large area available to him on which to conduct his business. It is common cause that the respondent has blue wildebeest on these properties. It is further common cause that the respondent has been farming with blue wildebeest on his properties since 2002, and that he has all the necessary permits for such farming.

[7] Samaria and Goa West share a common border, this is the northern border of Goa West, and the southern border of Samaria. The border is 2,4km long. There is no common border between Goa East and the portion of Samaria under the respondent' control, save for one junction point between the north-west corner of Goa East and the south-east corner of Samaria. The distance between the properties at this point is 27 m, with the gravel road referred to earlier separating the farms at this junction.

[8] In addition to Samaria, there are other farms that border on the appellant's farm, Goa. The one that is relevant for purposes of this appeal is the farm Wellust, which is run by one Mr van Vuuren. Wellust borders Goa West on the latter's western boundary. The length of this border is 3.3km. The distance from the gravel road dividing Goa West from Goa East to the border with Wellust is, at the closest point, 1.320km. Mr van Vuuren has blue wildebeest on the farm Wellust, as well as on anther adjoining farm that he operates, Stilstroom. The evidence indicates that in July 2010, he imported a number of blue wildebeest onto Wellust, including some that he bought from the respondent on his farm, Samaria.

[9] The appellant does not dispute that he was aware of the existence of blue wildebeest on the respondent's farm Samaria when the appellant first moved his cattle on to Goa. It is common cause that he did not request the respondent to take any precautionary measures or to put safeguards in place to deal with the risk of infection from the respondent's blue wildebeest. It is also common cause that the appellant himself took no precautionary

measures. In the appellant's words: " ... *ek sien vandag nog nie die punt hoekom moet ek my beeste weghou van die blouwildebeeste of om dit te bestuur nie, want indien my beeste snotsiekte sou kry sou ek mos vergoed word.*" The appellant's attitude towards the risk of infection, therefore, was that all of the risk lay at the door of the respondent, and the appellant was not required to put any safeguards in place. I will have more to say about this attitude later in my judgment.

[10] It is not disputed that six of the appellant's cattle died over a period of some weeks from approximately 15 October 2010. The appellant claims that all of these cattle died of snotsiekte. It is common cause that two of the cattle were tested positive for the disease. No tests were conducted on the other cattle: the appellant bases his case on what he says were the similarities in the symptoms displayed by all six cattle, and his knowledge of snotsiekte as a cattle farmer of many years standing. For reasons that will become apparent later, nothing material turns on this issue.

THE APPELLANT'S CLAIM IN THE COURT *A QUO*

[11] The appellant based his claim on the following facts:

[11.1] On about 14 October 2010 he noticed that one of his cattle was sick.

[11.2] He left the cow to die and once it was dead he was sure it was snotsiekte that had killed her. He had seen snotsiekte before and he recognised the symptoms.

[11.3] He contacted the respondent and told him that he had better get his insurance in order because he was going to claim damages from him for the cow that had died of snotsiekte.

[11.4] The appellant visited Mr van Vuuren, on Wellust, and issued a similar warning.

[11.5] Two weeks later, a second cow became ill. This time, the appellant requested Dr Wiese, a vet who is also an expert on snotsiekte, to examine the animal. Dr Wiese confirmed it was snotsiekte that the cow had contracted.

[11.6] The following day, another cow became ill. The appellant killed both animals and sent specimens to Dr Wiese for testing. These tests later came back as positive for snotsiekte.

[11.7] Dr Wiese advised the appellant that the likely infection date of the disease in his cattle was 15 September 2010.

[11.8] He also advised the appellant that in terms of how the virus causing the disease spreads, it cannot be transmitted beyond a distance of 1 km.

[11.9] The appellant testified that during the likely period of infection his cattle were kept solely on Goa East. The last time that they were on Goa West was at the end of July 2010, when he had weaned the last calves, and dipped the cattle. Thereafter, he had moved all the cattle onto Goa East for the winter, as he had no need to use the facilities on Goa West to dip his cattle or for any other purpose. The appellant claimed that his cattle did not go on to Goa West at all from the end of July to November 2010,

[11.10] The distance between the farm Wellust and Goa East is approximately 1.3 km at the closest point. On Dr Wiese's advice that the virus could not travel a distance of over 1km, the appellant concluded that he would have no claim against Mr van Vuuren on the farm Wellust, as the distance was too great for Mr van Vuuren's wildebeest to have been the source of the infection.

[11.11] The appellant's case is that this left the blue wildebeest on respondent's farm as the only possible source of the infection, because, as I have indicated earlier, there is a common point of contact between Goa East, where the appellant claims his cattle were at the relevant time, and the south east corner of Samaria, separated by 27m.

[11.12] It was on this basis that the applicant instituted his delictual action against the respondent to recover his loss arising from the death of his cattle.

[12] The legal basis for the appellant's claim is described in his particulars of claim as follows:

"*3. Die Eiser se eis teen die Verweerder is op grond daarvan dat die Verweerder die eienaar van blouwildebeeste op die PLAAS MARIKWA en/of die PLAAS ALTEFRAAI en/of die PLAAS SAMARIA wat gesamentlik bedryf word en bekend staan as Bush Africa Safaris en aanspreeklik is in een of meer van die volgende opsigte, naamlik:*

3.1 Nalatig was deur blouwildebeeste aan te hou wat snotskiektedraend is welwetended dat dit skade kan veroorsaak aan beeste;

3.2 Blouwildebeeste aan te hou naby of teen die eiendom van die Eiser en nie die nodige voorsorgmaatreels te tref ten einde bees vrekte to voorkom;

3.3 Die Wet op Diere Gesondheid se bepalings nie nate kom nie deur diere aan to hou wat skadelik is;

3.4 Deur sy blouwildebeeste op so manier to bestuur dat dit 'n verhoogde risiko inhou vir die Eister."

[13] In other words, the appellant averred that the respondent's alleged wrongful conduct was demonstrated by his negligence in keeping blue wildebeest, which are known to be carriers of snotsiekte and which can result in harm to cattle, on his properties; by his keeping blouwildebeeste close to the property of the appellant without taking the necessary precautions to prevent harm to the appellant's cattle; by the respondent managing his blouwildebeeste in such a manner as to create an enhanced risk for the appellant; and by the respondent's failure to comply with the necessary statutory obligations pertaining to keeping dangerous animals. I point out that not much appears to have been made at the trial of this latter aspect.

[14] Appellant also averred that this aforementioned wrongful conduct by the respondent led to the deaths of his cattle in that these deaths:

> *"is veroorsaak deur snotsiekte en die snotsiekte was te alle relevant tye hiervan afkomstig van die Eiser se blouwildebeeste."*

[15] The respondent denied delictual liability for the loss of the appellant's cattle. In his plea the respondent placed all the substantial averments in dispute. In addition he claimed that in the event that the court found that the respondent was indeed negligent, he pleaded contributory negligence on the part of the appellant on the basis that the appellant had brought cattle onto his farm well knowing of the existence of blouwildebeeste on the respondents property, and by failing to take the necessary precautions to protect his own cattle from any inherent risk of snotsiekte.

[16] The court *a quo* dismissed the appellant's claim on two grounds; the first being in respect of the element of causation and the second being in respect of the element of proof of damages.

[17] In the first place, the court found that the appellant had failed to establish that it was the respondent's blue wildebeest that were the cause of the snotsiekte in the appellant's cattle. In evaluating the evidence, the court *a quo* rejected the appellant's version that the cattle had not been onto Goa West from the end of July to mid-November 2010. The court found that this did not make sense, given that all the facilities for managing and treating the cattle were on Goa West, and given the fact that in the region where the farms are situated, it is no longer winter from September onwards. The court *a quo* also pointed to the evidence advanced by various witnesses on behalf of the respondent to the effect that the appellant's cattle were seen moving between the two portions of the farm during the months in question.

[18] As regards the issue of damages, the court *a quo* found that the appellant had failed to prove his damages. The appellant's expert witness in this regard, Mr Vermaak, was the auctioneer who had originally sold a number of cattle including, the appellant claimed, 5 of the 6 that had died of snotsiekte, to the appellant some eighteen months before. At that stage, the cows were with calf Mr Vermaak based his valuation on the condition of the cattle at the time they were originally sold to the appellant. He confirmed that he had not seen them again before they died. It was also common cause that the sixth cow that died had not been purchased from Mr Vermaak, and was of a

different breed from the rest. These factors persuaded the court *a quo* to conclude that the appellant had failed to prove his damages.

[19] In view of the fact that the court *a quo* found the element of causation lacking, it did not consider the question of whether the appellant had satisfied the other elements of the *actio legis aquiliae* (save for, as I have indicated, the issue of damages), nor was it necessary for the court *a quo* to consider the issue of contributory negligence.

IS THERE MERIT IN THE APPEAL?

[20] The appellant bases his appeal against the court *a quo*'s judgment on five grounds, only three of which are of any real import. He contends that the court *a quo* erred in finding:

[20.1] that the appellant's cattle were on Goa West during September up to November 2010 (i.e. during the relevant period of likely infection);

[20.2] by implication, that if the appellant's cattle were indeed on Goa West during this period, there was insufficient time, during the cattles' presence on Goa West, for them to become infected with snotsiekte, bearing in mind the expert witness, Dr Wiese's evidence that the likely infection date was around 15 September 2010; and

[20.3] that the appellant had not proved his damages, and by failing to take into account the fact that the appellant had placed before the court *a quo* the best evidence of his damages.

[21] The crux of the appeal is clearly the question of factual causation, more specifically, did the appellant satisfy the onus resting on him to establish that the respondent's blue wildebeest, and only the respondent's blue wildebeest, were the probable cause of the infection of the appellant's cattle with snotsiekte?

[22] In turn, this raises the critical question of whether the court *a quo* erred in rejecting appellant's version to the effect that his cattle did not venture onto Goa West during the period when they were susceptible to infection. This question was crucial to the appellant's case before the court *a quo*, and it remains crucial to this appeal. The reason for this is that unless the appellant's version is accepted, (i.e. unless it is accepted that the appellant's cattle were, as he claims, exclusively on Goa East, and never on Goa West, from July to November 2010) then it cannot be ruled out as a possibility that his cattle were infected by Mr van Vuuren's blue wildebeest on the farm Wellust. This is because Goa West and Wellust have a common border and snotsiekte is therefore transmissible between the two properties. On this basis, if the probabilities lie with the appellant's cattle moving between the two portions of Goa during the months in question, as the respondent claims, then the possibility must exist that the infection came from Wellust and not from Samaria.

[23] The evidence led at the trial by the appellant and his witnesses on the one hand, and the respondent and his witnesses on the other, gave rise to mutually destructive versions of events. On the one hand the appellant vehemently asserted that his cattle never went on to Goa West during the winter months when the risk of infection was highest. He claimed that he treated his cattle prior to winter in order to ensure that he did not have to dip them during the winter months. He further claimed that he had no other cause to take his cattle across to Goa West in order to use the facilities that were only available on that portion of the farm. On the appellant's version, he did not take his cattle onto Goa West for a period of four months.

[24] On the other hand, according to the testimony of the respondent and his witnesses, the appellant continued to move his cattle between Goa East and Goa West throughout this period, although it was not seriously disputed that they were primarily kept on Goa East at this time.

[25] The respondent testified that he recalled noticing that the appellant continued to move his cattle between the two portions of the farm between the months of July to October 2010. The respondent drove daily to the nearby shop, which he ran during this period, and remembered noticing the movement of respondent's cattle between Goa East and Goa West.

[26] In addition the respondent testified that it was impossible for a cattle farmer like the appellant to have no need of the facilities that only existed Goa West for between 4 to 6 months. He pointed out that, among other things, it would

be necessary to dip the cattle every 2 to 3 weeks to deal with ticks, particularly once the rains came. He rejected the appellant's evidence that the use of the product "Deadline" would be sufficient to avoid having to use the dipping facilities on Goa West.

[27] It is relevant to point out at this stage that the uncontested evidence of the respondent was that he comes from cattle farming stock in the area, and in fact had grown up on the farm Goa (the farm now leased by the appellant), where his father had farmed cattle. For this reason, in my view, his evidence in this regard carries considerable weight.

[28] The respondent could not recall how often the cattle moved across to Goa West, but he testified that this would have been at least once a month. He also testified that sometimes the appellant's cattle stayed overnight on Goa West, before moving back to Goa East.

[29] A further witness for the respondent, Mr Pieterse also testified that during the period August to November 2010 he had driven daily on the road through Goa and had witnessed the appellant moving cattle between the two portions of the farm. This happened sometimes weekly or fortnightly.

[30] Mr van Vuuren, who farms on Wellust, testified to similar effect.

[31] Where a court is faced with mutually destructive or irreconcilable versions on the part of the plaintiff and the defendant, it must proceed as follows. It must first determine whether the matter may be resolved on the probabilities. This

involves considering the credibility of the witnesses, their reliability and, finally, determining on the probabilities whether the party with the onus has succeeded in discharging it. See in this regard Stellenbosch Farmers Winery Group Ltd v Martell et Cie 2003 (1) SA 11 (SCA) at 14H-15E; National Employers' General Insurance Co Ltd v Jagers 1984 (4) SA 437 (ECD) at 440D/E – F.

[32] If there are no probabilities upon which to assess the irreconcilable versions, then the court must apply the approach set out in the often cited dictum of Wessels JA in National Employers' Mutual General Insurance Association v Gany 1931 AD 187:

> "Where there are two stories mutually destructive, before the onus is discharged the court must be satisfied that the story of the litigant upon whom the onus rests is true and the other false. It is not enough to say that the story told by Clarke is not satisfactory in every respect, it must be clear to the court of first instance that the version of the litigant upon whom the onus rests is the true version ... "

[33] See also African Eagle Life Assurance Co Ltd v Cainer 1980 (2) SA 234 (WLD) at 237.

[34] In the present case, it seems to me that the dispute over whether the appellant's cattle were exclusively on Goa East over the months in question can be resolved on the probabilities. Moreover, it seems to me that, having

regard to all of the evidence presented, the probabilities do not favour the appellant. This is demonstrated by the following:

[34.1] When one has regard to the nature of the appellant's farming enterprise and the facilities available on the farm it is improbable that he never allowed his cattle to cross over onto Goa West throughout the period from July to November 2010. I have already referred to the respondent's evidence to the effect that a cattle farmer on Goa would not be able to avoid having to use the facilities on Goa West for a period of four months. When weighed against this evidence, the appellant's denial that he ever took his cattle onto Goa West during those four months is improbable.

[34.2] There is then also the fact that it was not only the respondent, but two other witnesses who also testified to the fact that there was movement of appellant's cattle between the two portions of his farm over the months in question. Like the respondent, both Mr Pieterse and Mr van Vuuren had ample opportunity to see cattle on Goa West. Mr Pieterse testified that he traveled twice daily on the gravel road at this time, and Mr van Vuuren's eastern boundary borders on Goa West's western boundary. He testified that he had the opportunity to view Goa West whenever he checked his boundary fences on the eastern section of his farm, and that he had done so after July 2010, when he had seen the appellant's cattle on Goa West.

[34.3] The appellant points to some inconsistencies in Mr Pieterse's testimony, and suggests that he may have had a motive to testify in support of the respondent. Be that as it may, that still leaves the evidence of the respondent and Mr van Vuuren. As far as the latter is concerned, it is difficult to understand why he would have testified that he had seen the appellant's cattle on Goa West in the months after July 2010 unless he had seen them.

[34.4] The appellant also points to the fact that the respondent does not pinpoint the dates, times and duration of when the appellant's cattle allegedly were seen on Goa West. Counsel for the appellant submitted that the appellant had established a *prima facie* case of infection from Samaria. He submitted that as a result of these shortcomings in the respondent's evidence, the respondent was unable to rebut the appellant's *prima facie* case, and hence the court *a quo* ought properly to have decided the matter in the appellant's favour.

[34.5] These submissions have no merit. They ignore the fact that it is the appellant who bore the overall onus of satisfying the trial court that respondent's blue wildebeest on Samaria were the source of the snotsiekte infection. The appellant's case, on which he led evidence, was that his cattle were <u>never</u> on Goa West from the end of July 2010 to November 2010. As part of his overall onus, he assumed the evidentiary burden of establishing this. No

evidentiary burden rested on the respondent to establish when, where or for how long, the appellant's cattle were on Goa West. It was sufficient for them to present evidence to rebut the appellant's case to the effect that his cattle were never on Goa West during the relevant period. In my view, the respondent's evidence to the effect that the cattle were in fact on Goa West during the period, without the necessity to specify dates, times and duration, was entirely sufficient to meet the case made out by the appellant.

[35] For all of these reasons, I am of the view that the magistrate was correct in accepting the respondent's version as the more probable. It follows that the court *a quo* was correct in concluding that the appellant had not satisfied the onus resting on him to establish that it was the respondent's blue wildebeest, and no others, that infected his cattle with snotsiekte.

[36] Moreover, even if it were to be assumed, in favour of the appellant, and contrary to my finding above, that the court *a quo* erred in the conclusion it reached in respect of the element of causation, I am not persuaded that the appellant would have succeeded in establishing delictual liability on the part of respondent in any event.

[37] In the first place, I cannot accept as correct the appellant's averment that the respondent was negligent in keeping blue wildebeest while knowing that, as carriers of snotsiekte, they can cause harm to cattle.

[38] It cannot, *per se*, be negligent for game farmers to keep blue wildebeest. It is well established that they carry a virus that can be transmitted to cattle and that can cause snotsiekte. Notwithstanding this, the law permits farming with game, including blue wildebeest, and does not outlaw such farming in the proximity of cattle farming. As I have indicated, it is common cause that the respondent obtained all the necessary permits for keeping blue wildebeest many years before the appellant commenced cattle farming on Goa. In order for the appellant to succeed in establishing the necessary element of negligence, in order to impose delictual liability on the respondent, something more would be required than this.

[39] The test for negligence requires that the *diligens paterfamilias* in the position of the respondent would have forseen the reasonable possibility of his conduct injuring another and would have taken reasonable steps to guard against such harm occurring (Kruger v Coetzee 1966 (2) SA 428 (A)). While it cannot be gainsaid that it is well known that blue wildebeest carry the snotsiekte virus, this in itself is insufficient to establish negligence on the part of the respondent. He testified that he had farmed for many years with both cattle and blue wildebeest in proximity to each other with no problems. In fact, the appellant himself testified that he viewed the risk of his cattle contracting snotsiekte from the respondent's blue wildebeest as very low. He said the following in this regard:

> "... *ek boer al 30 vir jaar langs blou wildebeeste, waar my beeste op die plaas Sara Bel het hulle gegrens aan die plaas Merino Vlakte en*

daarna het ek die plaas San Katrina gehad waar hulle gegrens het aan die plaas Merino Vlakte wat sedert 1980 boer ek langs blou wildebeest het ek nog nie skade gehad nie ... . Mnr van Heerden weet sy blou wildebeest is honderd persent draers van snotsiekte, hy weet dit is 'n feit. Die persentasie wat my beeste gaan snotsiekte kry, is bitter, is bitter min." (emphasis added)

[40] On the appellant's own testimony, therefore, the risk of infection from respondent's animals was very low. The respondent testified to the fact that it would not be economically viable for him to fence off a 1km stretch of his game farm in order to prevent the possible spread of infection to the appellant's cattle. He pointed to the fact that it is far more difficult to contain game in confined areas than cattle, and to the excessive cost of game fencing material for the area that would have to be covered. He also testified to the effect that this would have on his business.

[41] Given the low risk of infection, and the cost of erecting a game fence, it is hardly credible to suggest that the respondent was negligent in failing to do so in this case.

[42] There may well be cases where a game farmer can be held to have acted wrongfully and unlawfully by farming with blue wildebeest in the proximity of cattle farming. The law reports contain examples of cases in which the courts have considered claims by cattle farmers against game farmers over the risk of snotsiekte. I refer, for example, to Wright v Cockin 2004 (4) SA

207 (E), and PGB Boerdery Beleggings (Edms) Bpk v Somerville 62 (Edms Bpk 2008 (2) SA 428 (SCA). There is also the unreported decision of this court in Strang v Pelser (case no. 76709/2009, unreported judgment of Vorster AJ dated 7 September 2012), which was recently appealed to a full bench of this court.

[43] What these cases illustrate is that as is so often the case in matters of this nature, whether a particular defendant or respondent acted wrongfully or negligently in keeping blue wildebeest in proximity to cattle farming activities, will depend very much on the particular facts at hand.

[44] To succeed in a delictual action, both negligence and wrongfulness must be established against the blue wildebeest farmer. I have already dealt with the issue of negligence. As far as the element of wrongfulness is concerned, it is trite that not every infringement of a right will be regarded as being legally reprehensible. The *boni mores*, or legal convictions of the community, are used as a test to determine whether a particular infringement is wrongful or unlawful. This is essentially an objective test, based on the criterion of reasonableness. The question is essentially whether, in all of the particular circumstances of the case, a defendant has infringed a plaintiff's interests in an unreasonable manner. This requires a balancing of interests between the plaintiff and the defendant in light of all the relevant circumstances of the case. See in this regard Neethling et al The Law of Delict (6ed) p33-9

[45] In the present case, the question is whether the respondent acted wrongfully, as the appellant avers in his particulars of claim. I consider the following factors relevant for purposes of determining this question.

[45.1] It is a significant feature of this case that the appellant brought his cattle onto the farm Goa long after the respondent had commenced farming with blue wildebeest on his properties, and well knowing that blue wildebeest were kept on the neighbouring farms. This case differs from both the PGB Boerdery case and the Strang case referred to earlier in this regard. Those cases were concerned with circumstances in which game farmers wished to introduce blue wildebeest into areas where the applicants already had established cattle farming operations.

[45.2] In balancing the respective interests of the parties, it must be recognised that both have the right to the reasonable use of their properties. In the circumstances of this case, it is untenable to suggest that the respondent's conduct in keeping blue wildebeest on his property is *per se* unreasonable. The respondent testified to the fact that in all his years of farming with blue wildebeest on his properties, he has had no problem with the transmission of snotsiekte to other cattle in the area, despite the fact that a number of his other neighbours are cattle farmers.

[45.3] The respondent also denied that he had managed his farm in any manner as to create a heightened risk for the appellant. He pointed out that he had conducted his game farming operations for many years without incident. In addition, he testified that he complied with all the requirements laid down by the authorities when granting him the necessary permits to keep blue wildebeest. This evidence was not challenged.

[45.4] Of course, the appellant also has a right to the reasonable use of his property, which entails the right to farm cattle should he wish to do so. However, the mere fact that blue wildebeest are known to be carriers of the snotsiekte virus does not mean that the appellant's right to reasonable use trumps the concomitant rights of the respondent. The reasonable use of property between neighbours with competing interests necessarily involves a give and take on both sides.

[45.5] The appellant fails to acknowledge this fundamental principle. His entire approach is that it is the respondent that is required to "give" and that it is the appellant's right to "take". In other words, his case rests on the assumption that it was only the respondent that was obliged to take precautions to prevent the possible infection of appellant's cattle. This is evident from the following exchange during the course of the appellant's cross-examination:

"*Sou dit dan nou na wat ons bespreek het 'n regverdige opsomming wees om te sê dat u geen voorsorgmaatreels getref het om besmetting van blou wildebeest te bestuur of te beperk nie?*" The appellant's answer is "*Ja.*"

In answer to the question of what steps he expected the respondent to take to reduce the risk, the appellant answered: "*Ek verwag van 'n blouwildebees boer, van 'n beesboer om 'n kilometer van sy bure af wat met beeste boer 'n wildwering te span en sy wildebeeste te hou en sy diere op sy plaas te hou en weg to hou van sy bure af.*"

[45.6] I cannot accept the appellant's contention that the respondent was obliged to take this precaution and that his failure to do so constituted unreasonable and hence wrongful use of his property. On the appellant's own version, he brought cattle into hisproperty knowing that blue wildebeest were kept by the respondent on his neighbouring farms, as well as on other neighbouring farms. On his own evidence, the appellant sat back and did nothing to protect his own cattle from the risk of possible infection. He did not approach the respondent with a view to discussing measures to accommodate both of their farming requirements in this regard. As the respondent testified: "*As hy sy risiko wil verlaag sou hy eerder met my moes kom praat en dit met my onderhandel het daaroor praat sodat ons beide daaraan kon werk, of my in kennis*

stel as dit vir him 'n risiko was vir hom." It is common cause that the appellant did not do so.

[46] In my view, and taking all of these factors into account, it was not reasonable for the appellant to expect the respondent to take sole responsibility, at substantial cost to the respondent, for reducing the risk of possible snotsiekte infection, while at the same time taking no responsibility himself for reducing the risk. Even more so when, as the appellant testified, he viewed the risk of infection of his cattle to be "*bitter, bitter min*". To place this responsibility on the respondent would be contrary to the underlying principles governing the reasonable use of property between neighbours.

[47] The *boni mores* or legal convictions of the community do not require that courts should come to the assistance of a litigant who adopts an attitude of this nature. The facts of this case demonstrate that the appellant assumed the risk that his cattle might be infected and that he deliberately did nothing to prevent this. He proceeded on the assumption that if his cattle contracted snotsiekte, the law would hold the respondent liable for his loss. This was a mistaken assumption. I am of the view that there was no wrongful conduct on the part of the respondent upon which to pin delictual liability for any loss suffered by the appellant.

[48] For this reason too, even if it were to be assumed that the appellant established the element of factual causation (which I have held he did not), the appellant would not have succeeded in his action against the respondent.

[49] In light of my findings on the other elements of delictual liability, it is unnecessary to consider the question of whether the court a quo correctly found that the appellant had not proved his damages.

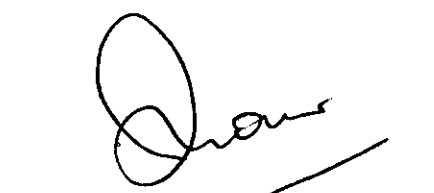
[50] For all of these reasons, I find that there is no merit in the appeal.

[51] I make the following order:

[51.1] The appeal is dismissed with costs, such costs to include those of senior counsel.

R M KEIGHTLEY AJ
Acting Judge of the Gauteng Division of the High Court, Pretoria

I agree.



J W LOUW J
Judge of the Gauteng Division of the High Court, Pretoria

HEARD ON	: 03 JUNE 2014
FOR THE APPLICANT	: I M BREDENKAMP SC
INSTRUCTED BY	: LEWIES & KITCHING ATTORNEYS
FOR THE RESPONDENT	: T STRYDOM SC
INSTRUCTED BY	: GRIESHABER ATTORNEYS