Jm...

IN THE HIGH COURT OF SOUTH AFRICA
(REPUBLIC OF SOUTH AFRICA)
PRETORIA

CASE NO: 820/2012

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

8·8·2014
DATE

SIGNATURE

8/8/2014

In the matter between:

HENDRIK WILLEM PELSER	**FIRST APPELLENT**
MADIDABA GAME RANCH (PTY) LTD	**SECOND APPELANT**
and	
ANDRÉ WILHELMUS STANG	**RESPONDENT**

JUDGMENT

MSIMEKI J:

INTRODUCTION

[1] The respondent sued the appellants for damages arising from the death of his 10 stud dairy cows. He alleged that the appellants were liable in delict on the basis that the death of his stud dairy cows had been occasioned by a disease called Malignant Catarrhal Fever (MCF) transmitted by a virus from the appellants' blue wildebeest.

BRIEF FACTS

[2] The appellants and the respondent own adjacent farms in the district of Cullinan. The respondent's farm is 25 hectares in size. The farm came to this size after the respondent sold a portion thereof to the second appellant in 2001. The respondent has been farming with dairy cows on his farm since 1995. The dairy farming business has been intensive and the respondent has been milking approximately 120 cows daily.

Exhibit "B" is a map which denotes the farms in question. The first appellant's farm is marked on the map with a "1" while that of the second appellant has been marked with a "2". The respondent's farm has been marked with a letter "E". The farm of the first appellant is on the northern side of the farm of the respondent and is divided in two by a public road which runs from West to East. The parties in their evidence refer to the portion on the northern side as the portion above the road, while that on the southern side is referred to as the portion below the road. The portion above the road which is portion 44, which was fenced off with the game fence, is approximately 500-800m from the respondent's farm. The portion below the road is directly adjacent to the respondent's farm. The portion above the road was fenced off in 2001 and in 2003 the appellants located game which included wildebeest thereon. In 2007, the appellants after fencing off the portion below the road, located blue wildebeest thereon.

The respondent testified that he warned the first appellant of the danger of locating blue wildebeest on their farms in 2001. The first appellant however said that this was in 2003. The disagreement, in my view, is insignificant. The introduction of the wildebeest on the portion below the road was followed by the death of three of the respondent's cattle. The respondent met Dr Herman de Bruyn, a veterinary surgeon, who was on a neighbouring farm. The surgeon gave him the symptoms of

a disease called Malignant Catarrhal Fever ("MCF"). This proved to him that his three cattle had died from the MCF disease. Respondent contacted the first appellant who, at the time, was in Uganda about the mishap. The first appellant demanded blood test results to satisfy himself that the three cattle had died from MCF disease emanating from their blue wildebeest. More cattle died during the first half of 2009 necessitating the taking of blood samples from them. The medical examination report of Dr Lademan, a veterinary surgeon, confirmed that the cattle had died of MCF disease. This was followed by another conversation between the respondent and the first appellant. The appellants paid R80 000.00 to the respondent. The payment, according to the respondent, meant that the appellants agreed that the cattle indeed had died as a result of MCF disease which they contracted from the appellants' blue wildebeest. Again, there is disagreement as to the reason for the payment. I find the reason not worrisome. The parties then agreed that the appellants would remove the wildebeest from their farms. This did not happen until further cattle forming the subject matter of the present claims died. The appellants disputed and challenged the claims but lost in the trial court. This appeal is a sequel to the trial court having found in favour of the respondent.

[3] On 7 September 2012 the trial court gave judgment in favour of the respondent and ordered the appellants, jointly and severally, to pay any damages that the respondent may prove and/or that the parties may agree upon in respect of the respondent's first to ten claims. The appellants, in addition, were ordered, jointly and severally, to pay the respondent's costs on the scale as between attorney and client inclusive of:

3.1. The costs occasioned upon the services of two counsel;

3.2. The qualification and attendance fees of Prof M van Vuuren for the period 27 to 29 August 2012;

3.3. The qualification and reservation fees of Dr Williams;

3.4. The qualification and attendance fees of Dr Remito for 29 August 2012

3.5. The qualification and reservation fees of Dr Vroom; and

3.6. The qualification fees of Dr Grobler;

It is against this judgment and order that the appellants are now appealing.

THE ISSUES

[4] This court is called upon to make a determination on two issues, namely:

"1. Whether it has been proved that nine of the ten cattle making respondent`s ten claims died from MCF transmitted by the appellants'blue wildebeest.

2. whether, in the event that the preceeding question is answered in the affirmative, there existed any wrongfulness or negligence on the part of the appellants in allowing blue wildebeest onto their farms."

COMMON CAUSE FACTS

[5] The following facts are either common cause or are not seriously challenged. These are that:

1. The evidence of D Matemotja; M B Steyn; Dr J H Williams and Dr Vroom was not challenged.

Exhibit "E" which runs from page 887 to 890 of the papers forms the admissions relating to the evidence of these witnesses. I briefly deal therewith hereunder.

DAVID MATEMOTJA

His evidence deals with the drawing of blood sample relating to beast number 90 on 30 September 2009. The evidence further deals with the sealing and the transportation of the blood to Onderstepoort veterinary laboratory for analysis.

M B STEYN

His evidence deals with the drawing of the blood, the sealing and the transportation thereof to the laboratory for analysis. The blood relates to claims 3, 4, and 5. The blood was transported to the laboratory on 5 August 2009.

Dr J H WILLIAMS

She was a senior lecturer (pathology) in the employment of the University of Pretoria. She conducted a post-mortem examination on Stang`s (respondent's) beast number 72 (claim 9) which she received from him on 2 October 2009. Her histopathological investigation revealed that the beast died from wildebeest associated MCF.

The laboratory results revealed that beast 72`s tissues tested positive for blue wildebeest associated MCF virus and negative for bovine viral diarrhoea virus.

Dr VROOM

She visited the respondent on 21 September 2009 and asked that she be provided with blood specimen to enable her to test MCF. That was done on cow 38. The blood was transported by her to the laboratory for analysis. She

paid for the tests as she had needed them for her studies. The blood was drawn from the beast in her presence.

2. The appellants own two farms in the district of Cullinan which are adjacent to the respondent`s farm.

3. The respondent`s farm is 25 hectares in size.

4. The respondent runs a very intensive dairy farming operation on his farm and milks approximately 120 cows daily.

5. The respondent depends on dairy farming for his livelihood.

6. He started running the business since approximately 1995.

7. The appellants acquired their farms in 2001.

8. A public road divides the farms of the appellants in two. The parties have referred to the portion on the northern side of the road as the portion above the road while the portion on the southern side is referred to as the portion below the road.

9. After the second appellant acquired the farm the portion below the road became directly adjacent to the respondent`s farm.

10. At some stage the respondent warned the first appellant that the introduction of blue wildebeest on their farms might harm his dairy business as the blue wildebeest were carriers of MCF-virus which could infect his dairy cows. There is a dispute relating to when the discussions took place with the respondent alleging that that took place in 2001, while according to the first appellant, that took place in 2003.This, however, does not take the matter anywhere.

11. In 2003 the first appellant introduced wildebeest on the portion above the road. This portion was not directly adjacent to the respondent`s farm which was 500-800 meters away.

12. In 2007 the appellants fenced off the portion of their farm below the road which is directly adjacent to the respondent`s farm. The appellants then moved their wildebeest to this portion below the road bringing them even closer to the respondent`s farm.

13. Shortly after the moving of the wildebeest to this portion (below the road) three of the respondent `s cattle died. The respondent, on the strength of the information he received from Dr Herman de Bruyn, a veterinary surgeon, relating to the symptoms of MCF, telephonically contacted the first appellant about the deaths. The first appellant required the results of the blood tests to confirm the cause of the deaths.

14. During the first half of 2009 more of the respondent`s cattle died. This time the blood tests were done and Dr Laderman's medical examination report confirmed that the cows had died as a result of the disease MCF.

15. The respondent again contacted the first respondent who paid an amount of R80 000 00 to the respondent. It is noteworthy that these cattle do not form part of the present claim.

16. It was further agreed that the appellants would immediately remove the wildebeest from their farms to avoid further deaths to the respondent`s cows. The delay in the removal of the wildebeest resulted in further deaths of the respondent's cattle which form part of the present claim

[6] At the outset of the trial, and in terms of rule 33(4) of the Uniform Rules of Court, the trial court ruled that the issue of liability be separated from the issue of quantum. The trial court only had to make a determination on the merits.

As shown above, the issues to be determined were reduced to two, namely, the issue of causation and the issue of fault in the form of wrongfulness.

[7] The respondent testified and called 6 witnesses. The first appellant and Dr W J Wiese testified on behalf of the appellants. I have, above, already touched on the evidence of the respondent.

[8] **M W A Verster** was the previous farm manager of the appellants. He testified that the respondent, with his tractor, dragged a dead beast up to the drive way of the appellants' lodge. This was to prove to the witness that the problem the respondent had been referring to had become a reality. The witness was satisfied that the respondent's cows were dying of MCF emanating from the wildebeest. Verster had been a farmer for a considerable period of time and knew more about the MCF. Without wasting time, Verster contacted the first respondent to tell him what was happening to the respondent's cattle. The first respondent, according to Verster, did not take kindly to what he was told by Verster. He used foul language referring to the respondent adding that he would buy the respondent out of business and take his farm. Although it was suggested that Verster had a score to settle with the first appellant, the witness, as the trial court found, was a good and reliable witness. He was, in my view, honest.

[9] The drawing of the blood samples, packaging and transportation, in my view, do not appear to be problematic.

[10] The evidence of **G J Potgieter,** and **H Haarhoff** does not require any attention.

[11] "The trial court, in paragraph 8 of its judgment, says:

Alhoewel dit aanvanklik in geskil gestel is dat die beeste uiteengesit in bewystuck "C" se bloed getrek is en versend is na Onderstepoort veeartsnykundige laboratorium waar die monster getoets is en dat die betrokke monsters almal positief getoets het vir die virus wat snotsiekte besmettig veroorsak was dit uiteindelik nie meer in geskil nie. Die vraag op die meriete van die saak was uiteindelik of die betrokke beeste dood is aan snotsiekte en of hulle dood is aan`n ander besmetting wat nie snotsiekte was nie. In hierdie verband was dit gemene saak tussen die deskundiges wat namens die partye getuig het, dat die blote feit dat daar bewys is dat die betrokke bloed monster positief getoets het vir snotsiekte besmetting, dit nie bewys is van die feit dat die betrokke beeste wel aan snotsiekte gevrek het nie". (my emphasis)

[12] **Advocate J G Cilliers SC (Mr Cilliers),** on behalf of the respondent, submitted that the appellants` "attack on the PCR test results is nonsensical and came as a surprise". Indeed, that ceased to be in issue once the necessary admissions became evident as evidenced by what the trial court said above in respect of the issue. That that, as an issue, could now be resuscitated does not seem proper. That ceased to be their case. Mr Cilliers submitted in their heads of argument, correctly in my view, that it had not been suggested to any of the respondent`s witnesses that the PCR test results' accuracy had been in dispute and/ or questionable.

[13] **Mr Cilliers** further submitted that **Dr Wiese,** the appellants' expert, in his testimony, had accepted that the PCR test results had been accurate. Dr Wiese accepted that the 10 stud dairy cows had the wildebeest associated MCF virus. He conceded that the respondent should succeed with the sixth to the tenth claims.

[14] Dr **Remito,** on behalf of the respondent, testified that where some of the preliminary work was done by assistants, giving the example of Miss Mogotlane and Mr Ntombeni, he performed control and evaluation of all their results before a report was formulated. He made the final decision by determining if results were negative or positive. His testimony was that he would vouch for the results which revealed that the respondent's 10 stud dairy cows had been infected with wildebeest associated with MCF. They followed the procedure consistently. **Mr Cilliers** submitted that **Dr Remito**`s evidence on the PCR test results had not been disputed or challenged during his cross examination. This, notwithstanding, Mr Cilliers challenged and invited appellants' counsel in the manner following:
"I may leave that to my learned colleague if he disputes final results". (My underlining)

[15] Mr Cilliers, in his heads of argument, submitted that the undisputed procedure that had been followed in each of the PCR tests had included positive and negative controls which would easily have detected false positive results. The positive and negative controls, according to Mr Cilliers, remained undisputed. Neither the cross examination of the doctor nor any witness, on behalf of the appellants, according to him, challenged the positive controls.

CAUSALITY: PROOF OF MORTALITIES BY MCF

[16] Having regard to Dr Wiese`s concession, it would appear, as Mr Cilliers correctly demonstrated, that the argument, on behalf of the appellants, that the respondent had not proved that the cattle that form the subject matter of the claim against the appellants died as a result of the MCF disease, relates only to five of the respondent`s cattle. This then would, according to Dr Wiese, mean that five of the remaining respondent`s cattle died from causes other than MCF.

[17] A post-mortem examination was conducted on beast no 72 which is the subject matter of claim 9. The result was that the beast had in fact died from the MCF disease. This is common cause. Dr Wiese, on behalf of the appellants, accepted the evidence as absolutely correct.

[18] Having considered the evidence as a whole, it is also common cause that all ten cattle tested positive for the MCF disease contracted from the wildebeest.

[19] Evidence by the respondent and Verster who, at the time of the death of the cattle, was a foreman/ manager and a farmer who had run intensive farming operations for almost 40 years prior to the period relevant to this claim, and employed by the appellant, reveal that the symptoms that the respondent`s cattle exhibited were as a result of the MCF which they had contracted. Verster, who at the time, was still employed by the appellants saw some of the dead cattle. The eyes of the cattle, according to the respondent, first changed colour and the cattle ended up blind. A lot of mucus which came from their noses also changed from white to yellow. The cattle lost appetite and did not want to drink water. Verster was familiar with MCF disease and he, as a result, confronted the first appellant about what he had seen.

[20] The respondent became familiar with the disease when he was given information which confirmed the symptoms that his cattle had exhibited. Laboratory tests which were conducted also confirmed this. The first appellant paid R80 000.00 to the respondent after the death of the first set of the respondent's cattle which do not form part of the current claim.

[21] The tests which were conducted became common cause during the trial as their correctness was no longer disputed or placed in issue.

[22] Professor Van Vuuren from Pretoria University (Onderstepoort), a world renowned expert in the field, had no doubt that the respondent`s 10 cattle which form claims 1-10 in this matter had died as a result of the MCF disease which they had contracted from the appellant`s wildebeest. The Professor reached this conclusion after listening to the descriptions of the clinical symptoms of the disease that were given by the witnesses, who at the time, did not even have the right medical terms for such descriptions. Professor Van Vuuren, the respondent's witness, was honest enough to concede that there were diseases which had symptoms which resembled those of MCF disease while not being MCF. He testified that there was an outbreak of the MCF disease which occurred over a period of a few months.

[23] Regarding the causation issue, the appellants in this case base their argument on the evidence of Dr Wiese, their veterinary surgeon. Remarkable about his evidence is that:

1. It confirms Professor Van Vuuren`s evidence that all wildebeest in South Africa are carriers of the MCF virus.
2. It confirms that all 10 cattle that died had contracted the MCF virus.

3. He conceded that the respondent was entitled to claim damages for 5 cattle Involved in claims 6-10.
4. He did not think that claims1-5 ought to succeed because he had a little ("bietjie") doubt about them.

   This because he was not convinced that the five cattle had died from the disease.
5. He agreed that the symptoms described by the respondent and his witnesses that his dead cattle exhibited were typical of symptoms exhibited by cattle that contracted the MCF virus and died therefrom. All he did was simply to add that the same symptoms may also be seen and exhibited by cattle that contracted other diseases. Without disclosing the diseases, his argument remains unhelpful.

[24] Mr Cilliers, on a balance of probabilities, concluded that all 10 cows died from the MCF disease that they contracted from the appellant's wildebeest. The conclusion has merit.

UNLAWFULNESS

[25] **Advocate A R G Mundel SC (Mr mundel),** on behalf of the appellants, in the Appellant's heads of argument holds the view that the appellants' conduct in casu was not unlawful.

[26] Mr Cilliers agrees with Mr Mundell where he states that not all acts or ommissions that cause damages to another person are *per se* actionable on a delictual basis. He, however, cautions that regard must be had to all the relevant facts and circumstances of a particular conduct if one is to establish whether such conduct

was indeed unlawful and accordingly actionable. Each case, in my view, must be treated on its merits.

[27] Mr Cilliers correctly submitted that there are facts in this case which one should never lose sight of in determining the issue of wrongfulness. He is correct. These, according to him, are that:

1. The two farms which the appellants own in the district of Cullinan are adjacent to the respondent's farm which is 25 hectares in size. The farm compared to those of the appellants is small.
2. From this farm, the respondent, since about 1995 operates intensive dairy farming which forms his livelihood.
3. The appellants acquired their farms in 2001 which was 6 years after the respondent had established an intensive dairy farming business. This was before the appellants brought their wildebeest to their farms.
4. The appellants were warned of the dangers of wildebeest where people farm with cattle. This was duly explained by the respondent to the First appellant before they acquired the wildebeest.
5. No evidence was produced to demonstrate that the wildebeest farming business was a material portion of the appellants' activities on their farms or that they were wholly dependent thereon. Evidence tendered evinced that they did not depend on the wildebeest to exist towards the end of 2009 in that, they on their own, removed or killed the wildebeest. This indeed occurred after the death of the cattle forming the subject matter of the claim in this matter.
6. It must be borne in mind that the uncontroverted evidence of the respondent reveals that there were no deaths while the wildebeest were located above

the road. There were also no deaths once the wildebeest were either killed or removed.

7. Professor Van Vuuren and Dr Wiese agreed that the risk of the respondent's cattle being infected with the MCF virus became lesser the further one moved the wildebeest away from the portion below the road. It was further agreed that a distance of 1 kilometre would significantly reduce the risk of infection. This is borne out by the fact that there had been no deaths while the wildebeest were located on the portion above the road which was 500-800 metres from the respondent's farm.

[28] Mr Cilliers, regard being had to the facts of the matter, correctly submitted that the conduct of the appellants was unlawful and that the trial court had correctly arrived at an appropriate decision.

THE LAW

[29] Appeal courts are slow to interfere with the factual findings and evaluation of evidence by the trial courts. Trial courts have the advantage of seeing and hearing the witnesses testifying. They have the opportunity of observing the demeanour the appearance and the personality of the witnesses. The appeal court indeed does not have this opportunity.

See S v Francis 1991(1) SACR 198(A) at 198j -199a

In State v Hadebe and others 1997(2) SACR 641 (SCA) at 645e-f the court said:

> *"In short, in the absence of demonstrable and material misdirection by the trial Court, its findings of the fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong"*

It will be noted that both the cases relate to criminal appeals but I, nevertheless, hold the view that the principle finds equal and similar application in civil appeals.

[30] Regarding causation, the court in **Minister of Police v Skhosana 1977(1) SA 31(A)** shows that causation in the law of delict gives rise to two distinct problems. The first which is a factual problem relates to the question whether the negligent act or omission in question caused or materially contributed to the harm giving rise to the claim. If not, no legal liability arises. The second is whether if it did, the negligent act or omission is linked to the harm sufficiently closely or directly for legal liability to ensue or whether the harm is too remote. Put differently, the question is whether, on a balance of probabilities, the deaths would not have occurred but for such infection resulting from the appellants' unlawful conduct of keeping the wildebeest on the portion below the road.

See also Minister of Correctional Services v Lee 2012 (3) SA 617 (SCA)

[31] Dealing with the principle that conduct is wrongful and actionable if such conduct causes damages to another unreasonably, the court in **Herschel v Mrupe 1954 (3) SA 464 (A) at 490A** said:

> *"After all, law in a community is a means of effecting a compromise between conflicting interests and it seems to me that according to the principles of Roman-Dutch Law the Aquilian action in respect of damnum injuria datum can be instituted by a plaintiff against a defendant only if the latter has made an invasion of rights recognised by the law as pertaining to the plaintiff".*

Brand JA In Trustees Two Oceans Aquarium Trust v Kantey and Templer 2006 (3) SA 138 at paragraph [12] said:

> *"When we say that a particular omission or conduct causing pure economic loss is "wrongful", we mean that public or legal policy considerations require that such conduct, if negligent, is actionable; that legal liability for the resulting damages should follow. Conversely, when we say that negligent*

conduct causing pure economic loss or consisting of an omission is not wrongful, we intend to convey that public or legal policy considerations determine that there should be no liability; that the potential defendant should not be subjected to a claim for damages, his or her negligence notwithstanding."

The upshot of this is that negligent conduct will attract liability only if it is wrongful.

[32] **In Cape Empowerment Trust v Fisher Hoffman Sithole 2013 (5) SA 183 (SCA) at 195B-F** the court deals with the plaintiff's vulnerability to risk. The court therein states that the vulnerability of the plaintiff to harm from the defendant's conduct is therefore ordinarily a prerequisite to imposing a duty. No duty should therefore follow where the plaintiff could have taken steps to protect himself from the defendant's conduct and the defendant played no role in inducing the plaintiff to failing to take the necessary steps.

[33] It now appears to be settled law that wrongfulness in the context of delictual liability, is determined by considerations of legal and public policy. The criterion of wrongfulness depends on an identical determination of whether if all the other elements of delictual liability are present, it would be reasonable to impose liability on a defendant for the damages flowing from specific conduct. The judicial determination of reasonableness would then depend on considerations of public and legal policy in accordance with the dictates of the constitution. In this regard **See Country Cloud Trading CC v MEC Department of Infrastructure Development 2014 (2) SA 214 (SCA) at 221E to 223D; 224C-H.**

[34] The test of *boni mores* appears to be applied where it has to be determined whether an infringement of rights is unlawful.

Mostert R. in Universiteit van Pretoria v Tommie Meyer (Edms) Bpk Films 1977 (4) SA 376 at 387 C-D said:

> *" Onregmatigheid word basies aan die hand van die boni mores bepaal. Deur die maatstaf van die "regs oortuiging van die gemeenskap" (sien Ewels se saak, supra) toe te pas, verkry die regstelsel die voordeel van die wisselwerking tussen die ethos en geregtelike voorbeeld, en n soepelheid wat by meer presedentgebonde stelsels ontbreek. By die toepassing van die soepele boni mores-kriterium is dit basies nodig om die botsende belange van die applikant en respondent teenoor mekaar af te weeg. Ook die gemeesnkapsbelang is hier relevant".*

In Coronation Brick (Pty) Ltd v Strachan Construction co (Pty) Ltd 1982 (4) SA 371 (D) at 384E Booysen J said:

> *"In determining whether conduct is of such a nature as to be determined unlawful, the Court must carefully balance and evaluate the interests of the concerned parties, the relationship of the parties and the social consequences of the imposition of liability in that particular type of situation"*

A case which also deals with wildebeest is **PGB Boerdery Beleggings (Edms) Bpk v Somerville 62 (Edms) Bpk 2008 (2) SA 428. (The PGB Boerdery case).** Therein **Harms WN AP**, at 431-432, quotes the learned author **JRL Milton** as follows:

> *"An interference with the property rights of another is not actionable as a nuisance unless it is unreasonable. An interference will be unreasonable when it ceases to be a 'to-be-expected-in-the-*

circumstance' interference and is of a type which does not have to be tolerated under the principle of 'give and take, live and let live'. The determination of when an interference so exceeds the limits of expected toleration is achieved by invoking the test of what, in the given circumstances, is reasonable. The criterion used is not that of the reasonable man but rather involves an objective evaluation of the circumstances and milieu in which the alleged nuisance has occured. The purpose of such evaluation is to decide whether it is fair or appropriate to require the complainant to tolerate the interference or whether the perpetrator ought to be compelled to terminate the activities giving rise to the harm. This is achieved, in essence, by comparing the gravity of the harm caused with the utility of the conduct which has caused the harm".

At paragraph [10] the court said:

"Dit kan alleen die geval wees as die respondent 'n onredelike gevaar vir sy buurman se boerdery-bedrywighede skep. Die blote kans van skade is onvoldoende want, soos Miller R tereg opgemerk het,

The 'interference' with the neighbours right of ejoyment must be material or substantial, for it goes without saying that, especially in contemporary conditions, some inconvenience or annoyance emanating from the use of neighbouring property must needs be endured."

(De Charmoy v Day Star Hatchery (Pty) Ltd 1967 (4) SA 188 (D) 192A-B)"

[35] **Mr Mundell** relied on the PGB case for his argument that the farming by the appellants with the blue wildebeest was neither wrongful nor negligent. It was Mr Mundell's contention that the respondent had not proved that his cattle had died

from the MCF virus carried by the appellants' blue wildebeest. This, as he submitted, because the respondent did not lead evidence at the trial by the person who conducted the tests to prove it.

It must be borne in mind that the applicant in the PGB Boerdery case had brought an application for an interdict to prevent a neighbour from introducing allegedly infected game onto his farm. The applicant on the papers did not persuade the court that the envisaged conduct of the respondent (against whom an interdict was sought) was indeed unlawful.

[36] Mr Cilliers, in my view, successfully demonstrated that the PGM Boerdery case was distinguishable from the matter *in casu*. He arrived at this conclusion because-

1. The PGB Boerdery matter was an application while this is an action.
2. There was no damage suffered when the application was brought. There was also no evidence to show that there was a likelihood of damages ensuing. The action in this matter was brought against the appellants after some of the respondent's cattle had been infected by the MCF emanating from the appellants wildebeest and died. Dr Wiese conceded, as shown above, that at least 5 of the 10 cattle forming the subject matter of the claim had died as a result of the MCF emanating from the appellants' wildebeest.
3. The parties in the PGB Boerdery matter owned very big farms (900 and 7500 hectares respectfully) compared to the respondent's farm which is 25 hectares in size. On the big farms the cattle and the wildebeest would be separated in such a way that the risk of infection would be properly prevented. Indeed, the court in paragraph [11] said:

> *"..... die appellant deur 'n eenvoudige aanpassing van sy weidingsprogram die risiko van besmetting byna geheel en al kan uitskakel...."*

The evidence, at the trial, demonstrated that the respondent, with the size of his farm, could not do anything from his side and farm to protect himself and his cattle against the harm which would be inflicted by the appellants' wildebeest regard being had to the intensive farming that he carried on.

4. The respondent in the PGB Boerdery case offered to pay for the damages that the applicant would suffer in the event that the cattle got infected with the MCF and died. The appellants, in this case, paid R80 000.00 for the initial damages that the respondent suffered. The appellants disputed what the R80 000.00 was for. The reason does not advance the appellants case as they paid once the respondent's cattle died as demonstrated above. The respondent now claims from the appellants the damages that he suffered as a result of the further deaths of 10 of his cattle caused by the appellants' wildebeest which the appellants, this time, refuse to pay.

5. The PGB Boerdery case did not have evidence revealing the deadliness of the MCF. Here the experts namely Professor Van Vuuren and Dr Wiese are *ad idem* that once MCF is contracted by the cattle the chances are 100% that they will die.

[37] I must pause, for a moment, to point out that the deaths that the respondent complained about were not there when the wildebeest were still on the portion above the road that divides their farms. The minute the wildebeest were located on the portion below the road deaths occurred. Again, once wildebeest were removed or killed, the death of the respondent's cattle ceased. Evidence tendered, on behalf of the respondent, overwhelming as it is, is a pointer to nothing else but that the appellants' conduct was indeed unlawful. Mr Mundell's submissions that the respondent did not prove that nine of his 10 cattle making up his 10 claims died

from MCF transmitted by the appellants' wildebeest and that the appellants' conduct is neither wrongful nor negligent, in the face of the overwhelming evidence in favour of the respondent, have no merit.

[38] Applying the principles referred to above to the facts of this case, and having regard to the concessions made on behalf of the appellants, one is left with no other conclusion than that the respondent, on a balance of probabilities, clearly demonstrated that the appellants' conduct was wrongful and actionable and caused damages to him and that he is also entitled to sue for them.

[39] It is noteworthy that the appellants tendered no evidence to demonstrate that they would suffer financial loss and or other loss in the event that they removed the wildebeest from the portion below the road to the portion above the road or anywhere else far enough from the respondent's farm. There is also lack of evidence to show that they would suffer financial loss in the event that they were prevented from keeping the wildebeest on the portion of their farms which is adjacent to the respondent's farm. On the contrary, it is the respondent who would suffer financial loss to an extent of being crippled in his business if the wildebeest remained on the portion below the road or within a distance which would increase the risk of infection by them.

[40] The trial court, in the light of overwhelming evidence in favour of the respondent, most of which was undisputed, in my view, came to the correct conclusion that the respondent by means of the PCR test results proved that all of his 10 stud dairy cows were infected with wildebeest associated MCF emanating from the appellants

wildebeest. It is also noteworthy that Dr Wiese confirmed Professor Van Vuuren's evidence that all wildebeest in South Africa are carriers of the MCF virus.

[41] The trial court, in my view, correctly found that the respondent, on a balance of probabilities, proved that all 10 cows died as a result of MCF contracted from the appellants' wildebeest.

[42] Mr Cilliers, in the premises, correctly contended that there is no merit in the appeal which ought to be dismissed with costs which costs would then be inclusive of the costs occasioned upon the employment of two counsel. I agree.

COSTS

[43] Mr Mundell, regarding the issues of costs, contended that the trial court erred in granting costs on the scale as between attorney and client. Mr Cilliers implored the court not to so find. Indeed, the trial court has a discretion which has to be exercised judicially and properly. The trial court has the benefit of observing the demeanour, the appearance and the personality of the witnesses. Many of the issues which had initially needed the court's attention, became common cause, were followed by concessions or were not seriously challenged. The issues on appeal were narrowed to two. In light of all of these I find no fault with the result that the trial court arrived at. There is nothing to demonstrate that the trial court was wrong or misdirected itself when it ordered payment of costs on the scale as between attorney and client. Mr Mundell's contention is consequently without foundation.

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

The appeal is dismissed with costs which include costs occasioned upon the employment of two counsel.

M.W MSIMEKI
JUDGE OF THE NORTH
GAUTENG HIGH COURT

I agree

E.M KUBUSHI
JUDGE OF THE
NORTH GAUTENG HIGH COURT

I agree

S STRAUSS
ACTING JUDGE OF THE
NORTH GAUTENG HIGH COURT

COUNSEL FOR THE APPELLANTS:	**A.R.G. MUNDEL SC**
INSTRUCTED BY:	TUGENDHAFT WAPNIC BANCHETTI & VENNOTE
COUNSEL FOR THE RESPONDENT:	**J.G. CILLIERS SC** **ADV G.F. HEYNS**
INSTRUCTED BY:	SEYMORE DU TOIT BASSON PRETORIA INC
DATE OF HEARING:	24 MAY 2014
DATE OF JUDGMENT:	08 AUGUST 2014