



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

20/05/2016
CASE NUMBER 21717/13

In the matter between:

JACQUES MULLER

PLAINTIFF

and

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHERS JUDGES: YES/NO
(3)	REVISED
20/05/2016	_____
DATE	SIGNATURE

NEL VAN BRUGGE

DEFENDANT

JUDGMENT

THULARE AJ

- [1] Plaintiff's claim is for injuries sustained and damages to the vehicle arising out of a collision between a Mazda Drifter double cab (the vehicle) and two horses owned by the defendant about 6km outside Carolina on the Wonderfontein- Carolina road (the road). The defendant also lodged a counterclaim for loss of the two horses as well as for her shock and trauma as a result of the loss.

- [2] There are only three issues that this Court is called upon to pronounce itself on, which are:
- (a) the weather conditions at the time of the collision
 - (b) the *locus standi* of the defendant in relation to her counterclaim
 - (c) whether any of the parties was negligent, which negligence was the cause of the collision.
- [3] The scene is a road between Carolina and Wonderfontein. It is on a descent. There is only one lane for traffic driving from Wonderfontein to Carolina, and two lanes for traffic driving from Carolina to Wonderfontein. The speed limit there is 120km per hour. As you drive down the descent, from Wonderfontein to Carolina, the farm Boesanspruit Gedeelte 1, Carolina (the farm), from which the horses escaped is to your right. There is a border fence on the farm running next to the road.
- [4] As you go down the descent, on the right side of the road, parallel to the fence, there are clear signs of natural erosion on the ground where the water runs, as the road and area slopes towards the farm, causing the water coming from the upper area to run towards the farm. At the time of the collision, there was a ditch along the fence. The authorities have since the incident, on the side of the road outside the border fence, built some system to control and direct the water flow in that area just above where the ditch was. In the area where the ditch was, the fence was broken and flat on the ground for between 10m to 20m and it is agreed that this is where the horses left the farm for the road. The collision happened further down the descent, on the tar road.
- [5] Plaintiff was the driver of the vehicle on the evening of 13 March 2012 around 22H00. He had earlier left Carolina towards Wonderfontein to help another car which had problems along the road. After assisting that car, he was driving back towards Carolina and there were no cars in front of him nor coming from the opposite direction ahead. In his direction there was only one lane, and there were two lanes on the opposite

direction. He was driving towards a bridge at the bottom of the descent on the road. There was a BMW vehicle following him.

- [6] The streak of his lights could reach between 50m and 100m and that is how far he could see ahead of him, as the road was dark. It was not raining that evening and the day had been a sunshine day with no rain. He looked at his speedometer, and saw that his speed was 110km. When he lifted his eyes back into the road, he saw horses on the road. They were about 5 or 6 and they were right across the road. He applied his breaks and swerved to the left to try and avoid the horses. He drove into two of the horses. The one horse hit the left side of the vehicle and, went over the vehicle and landed on the BMW that was following him. The other horse hit the front of the vehicle and went over the vehicle and took the roof of the vehicle. The vehicle spun and faced the direction from which it came from. The vehicle was damaged and had no lights as a result of the impact.
- [7] A stranger assisted a lady who he was with whilst he called for the police and the ambulance, and they were both taken to Carolina Hospital. The next morning he went to the scene. One of the horses was still on the scene and the other had been removed. He then took pictures of the scene. At the scene he met the defendant, who identified herself as the owner of the horses. She amongst others told him that the flash floods of the previous day were the reason the fence was down. The plaintiff denies that he was negligent, which negligence caused the collision.
- [8] The defendant was the tenant on the farm which was owned by Robert Ernst Benson (Benson). She had about 8 to 9 horses that she kept on the farm. She owned some and others were on lease to her. She had been a tenant on the farm for about ten years. Benson bought the farm whilst she lived on it and continued to live for the 6 of the ten years she spent on the farm whilst the farm was owned by Benson. When Benson took over, he brought down all the border fences and erected new ones. Benson put on

strong poles wires around the farm, including the borderline fence of the road. Benson used that area of the farm where the borderline fence with the road is, to graze his cattle.

- [9] The defendant had used the camp next to the house to keep the horses. Leading up to the day of the collision, Benson had removed his cattle from the camp next to the borderline fence to another camp, and had allowed her to use that camp to graze her horses. This was because the horses were fewer and horses generally feed on volume of grass far less than cattle. The horses had not been long in that camp, when the collision occurred.
- [10] She and her family used that road on a daily basis and as they drive, naturally, they would also check on the state of the borderline fences. The area where the ditch was, and in particular where the fence was broken, is not clearly visible from the road, as the road is high up than where the fence runs. The last time she had been to that area, on an inspection of the state of the fence, was about a week before the collision.
- [11] She received a call notifying her about the collision on the same evening. As the report suggested that her horses were involved, she drove to the scene. She could immediately identify the young foal as her own but could not immediately recognize the older mare. It was through the help of an acquaintance, on observing the hoof, that she was able to recognize the mare as the horse she owned. The two horses were lying dead on the side of the road. She went on the lookout for the other horses and found them high up the road, and she led them back to the farm. She started searching for where they could have escaped from the farm and around 2 o' clock in the early hours of the morning she found the place. It was where there was a ditch, and the fence was lying flat on the ground, at the descent.

- [12] Two days before the incident, it had rained heavily. It was a flash flood. The storms of water must have washed away the soil that held the poles and caused the fence to fall. Her husband took photos of the broken fence and the ditch at the time of the incident, and also took the photos after the authorities had attended to the water flow on the side of the road outside the border fence in the vicinity of the area where the fence had fallen. She denies that she was negligent, which negligence caused the collision.
- [13] Benson is a cattle farmer since 1997 and has owned the farm since 2003. After he bought the farm, he replaced all the border fences with a o.22 double and fully galvanized wire. It was for its strength and its capability to keep longer, as he intended to keep cattle in the camps on the farm. There are specific requirements he had to meet to qualify for partial re-imbursements from the road authorities, as regards the erection of the fence, which he complied with and was re-imbursed for expenses. The borderline fence of the farm that runs next to the road in the area of the scene of the collision met with compliance requirements for such a fence.
- [14] He received a report about the collision the next morning after it occurred and dispatched his father and a labourer to the scene to repair the fence immediately.
- [15] In his opinion, the water flash, running downhill, washed off the loose soil and loosened the poles from the ground, causing the tension to snap the wires and the fence fell. He had driven from the farm about two days before the collision and he drove in a heavy storm.
- [16] The evidence of both parties is that the area where the fence was damaged and flattened to the ground, on the morning after the collision at around 9, was dry. This supports the version of the applicant that on the day of the collision, it was sunshine with no rain. Having regard to the fact that it is common cause that the nature of the area is such that, at that time, water from other areas would run down the slope along

this specific area where the fence was damaged, it is highly improbable that that area would have dried up overnight if it had rained the previous day. The evidence of the respondent as regards the rain on the day of the collision is rejected.

- [17] The respondent testified that she is the owner of the two horses that were involved in the collision with the vehicle of the plaintiff. She has thereby established her *locus standi* in respect of her counterclaim.
- [18] The question is whether the plaintiff has established, on a balance of probabilities, that the collision was caused by negligence attributable to the defendant.
- [19] It is common cause that the horses which caused the collision on the public road, ended on the tar road in that they went over, and not through, the damaged part of the fence which was lying flat on the ground. The damage to the fence was such that anyone who had sufficiently inspected that fence, must have seen the damage. It was estimated at about 10m to 20m wide. The owner of the farm, Benson, could not tell when exactly he had last inspected that area of the fence. The defendant, who leased the farm and whose horses were in the camp which had the specific fence as a border with the road, last inspected that area about a week before the collision.
- [20] The plaintiff carries the onus to prove on the balance of probabilities that the damages he suffered was as a result of the defendant's negligent conduct. The road is a national path of travel which runs next to the farm occupied by the defendant. In my view, the defendant, under the circumstances, had a legal duty to take reasonable steps to ensure that the fence is in a good state of repair so that her horses do not land on the road. This legal duty included an obligation to regularly inspect the fence, more especially because of the position of the farm as regards the national road, as well as the water that runs down the slope onto the farm which could affect the fence. (*Swartz v Delport* [2002] 2 All SA 309 (A) paragraph 12).

[21] In *Arthur v Bezuidenhout and Mieny* 1962 (2) SA 566 at B-H Ogilvie Thompson JA said:

*"It is, of course, trite that, in a case such as the present, a plaintiff must prove that the damage he has sustained has been caused by the defendant's negligence. It is equally trite to say that the onus thus resting upon a plaintiff never shifts. While the maxim res ipsa loquitur has no general application to highway collisions, no sufficient reason appears to me to exist why the maxim should not, in a restricted class of case, sometimes apply. Without in any way attempting to define the limits of such application – and see on the question generally, *Hamilton v MacKinnon*, 1935 AD 114 at pp. 125 et seq; and pp. 360 et seq:- I am of the opinion that on the facts of the present case the maxim may rightly be applied. For when the plaintiffs proved that the defendant's truck for no apparent reason suddenly swerved on to its incorrect side there to collide with their truck, plaintiffs proved facts from which an inference of negligence against defendant may, in the absence of any explanation, be drawn- res ipsa loquitur. ... The maxim res ipsa loquitur is no magic formula. In the words of Lord Shaw in *Ballard v Northern British Railway Co.*, 60 Sc L.R 448 and 457, cited with approval by Stratford, C.J., in *Naude's case*, supra at p. 396,*

'the expression need not be magnified into a legal rule: it simply has its place in that scheme of and search for causation upon which the mind sets itself working'.

Proof by a plaintiff of an event properly falling within the maxim – that is to say, proof of an event which, in the absence of anything to the contrary, tells its own story – may justify an inference of negligence against the defendant. But that inference may, again to employ the words of LORD SHAW in Ballard's case, be displaced by the remainder of the story: if the remainder of the story does not do so, then the inference remains – res ipsa loquitur."

At page 574 H the learned Judge continued:

"As appears from the above general statement from Wigmore, and as is reflected in any specific statement of the res ipsa loquitur maxim, once the plaintiff proves the occurrence giving rise to the inference of negligence on the part of the defendant, the latter must adduce evidence to the contrary. He must tell the remainder of the story, or take the risk of judgment being given against him."

- [22] From the evidence before me, it remains unknown as to how long the fence had been in this state of disrepair, lying flat on the ground, before the date of the collision, whilst the horses were using that camp. The defendant's driving past the area, if it was an inspection at all, was not enough to be able to detect the fallen fence. The defendant herself was aware that her inspections through driving past the area were ineffective, for she could not see the area where the fence had fallen, from her vehicle. In any event, it was the duty of whoever was doing the inspection, to make sure that area which were obscured from vision, were visited to see how the fence is below the road. The sole purpose of an inspection must be to see if there is no opening or damage to the fence, which may render the fence ineffective in that it would not be able to keep the animals inside the camp where such animals were grazing. The fallen fence was not effective for that purpose and it was ineffective for an unknown period of time.
- [23] Where there is a fence erected along a public road, it is the duty of the owner or the person in lawful care and control of that fence to ensure that the fence is as effective so far as it reasonably can be done and to take steps which a careful reasonable person under the circumstances should take to ensure that the fence serves the purpose for which it has been erected. The care of the fence was not effective and in this respect the defendant was negligent. The defendant could and must have foreseen that if the fence is not kept in an effective state of repair, it will not serve its purpose of keeping the horses in the camp, and that the horses would move over the fence and if that happens, they would land on the road. The horses moved across the road. This is precisely what the defendant should have expected the horses would do if they moved over the fence. The negligence of the defendant caused the collision (*Coreejees V Carnavon Munisipaliteit en n' Ander* 1964 (2) SA 454).
- [24] The opinion of both the defendant and Benson as to how the fence was brought down and when it fell is speculative and irrelevant. Benson does not know when last he

inspected the fence. The Court accepts that the area experienced a rainfall two days prior to the collision. Be it as it may, neither Benson nor the defendant are able to tell the Court what the position of the fence was before the rain two days before the collision. Speculation and conjecture can never amount to proof on a balance of probabilities. The explanation is rejected for these reasons.

[25] To avoid liability, the defendant first alleged that it was the Road Agency that was responsible for the maintenance of the fence, which led to the applicant to seek to join the Road Agency, and when that happened she changed her tune. She also alleged that one of the horses was leased and when she was faced with the challenge of *locus standi* for her counterclaim, she conceded ownership of the both horses. This is how opportunistic the defendant is prepared to stoop to avoid the consequences of her actions.

[26] For what it is worth, the suggestion that a flash rain would wash away well- planted poles and flatten 10m to 20m of five strands of 0.22 double string fully galvanized wire fence attached to such poles, in my view, is simply far-fetched. Where the area, despite its set-up as regards the water flow, has withstood rainy conditions throughout the years that defendant was on the farm without any incidents, in my view, it is highly unlikely that one sudden and heavy pour of rain would wash away the soil and cause a trench deep enough to swallow all the poles, of average size border fence for farms on national roads, in its immediate vicinity, and cut off the five strands of 0.22 double string fully galvanized wire, which according to Benson, is known for its strength and long life. The slope and the water flow on that descent, and the presence of a trench in the vicinity of the area where the fence had fallen, became fodder for the opportunistic defendant to feed her conjecture.

As the owner of the farm and the fence, Benson has reason to support the defendant, even if it is at the price to his integrity, for opportunistic reasons as well.

[27] The next evaluation relates to the manner in which a reasonable man, in the position of the plaintiff, would have driven within the context of the conditions which existed at the time of the collision. Against the background that the *res ipsa loquitur* maxim is no magic formula (*Arthur v Bezuidenhout, supra*), it is my view that the maxim need not be magnified into a legal rule which infers 100 percent extend of negligence on a defendant. In my view, the research for causation, in deserving circumstances, must continue beyond the determination of the facts satisfying the maxim. In deserving cases, in my view, the inference of 100 percent negligence may be displaced by the evidence. In my view, the fact that the owner or the person in whose care and control the fence is, has through the presence of the fence created an impression to road users, that the fence would prevent that the animals would land up in the road, does not absolve the driver of a vehicle using that road from the duty to act as a reasonable driver.

[28] The approach to determine whether plaintiff as a driver was negligent, was set out by Holmes JA in *Kruger v Coetzee* 1996 (2) SA 428 (A) at 430 E-G as follows:

"For purposes of liability culpa arises if –

(a) A diligens paterfamilias in the position of the defendant –

(i) Would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and

(ii) Would take reasonable steps to guard against such occurrence; and

(b) The defendant failed to take such steps.

This has been constantly stated by this Court for some 50 years. Requirement (a) (ii) is sometimes overlooked. Whether a diligens paterfamilias in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend upon the particular circumstances of each case. No hard and fast basis can be laid down. Hence the futility, in general, of seeking guidance from the facts and results of other cases."

[29] In *Jordaan v Krone Broers and Others* [1999] 3 All SA 57 (C) at 66 Davis J said:

"Plaintiff was aware that cattle were found in the immediate vicinity. Where the road in the area of the accident is characterized by crests and dips a motorist who possesses the knowledge of plaintiff would not have driven at the maximum allowable speed particularly at that time of night and on that section of the road. As Cooper writes "the prudent motorist driving on a road commonly used by the public should foresee the possibility of encountering stationary, slow, or fast moving traffic; pedestrians, animals and obstructions generally" (at 147). This is not to suggest that a driver who collides with a visible object must be found to have failed to regulate his speed according to his range of vision and hence be found negligent; an ex post facto determination. However in a rural area a motorist such as a plaintiff, driving at night, on a road with crest and dips should foresee the possibility of encountering animals wandering across the road (Cooper at 155)."

[30] In my view, the plaintiff was not keeping a proper lookout, as a driver who knows the area and is aware that it is a farming area. If he did exercise a proper lookout, he would have seen the stray horses that were across the road, occupying his path of travel, timeously. The plaintiff was also driving at an excessive speed in my view. He should have regulated his speed to accord with his range of vision of 50m to 100m before him in that farming area, where there is a possibility of encountering animals wandering across the road. The plaintiff did not take all the reasonable steps that could be taken under the circumstances. In my view, he was negligent, which negligence caused the collision. Had he driven slower and maintained a proper lookout, he could have avoided the collision.

For these reasons I make the following order:

1. The negligence of the plaintiff is causally connected to the collision to the extent of 35%.

2. The negligence of the defendant is causally connected to the collision to the extent of 65%.
3. The defendant is to pay the costs, including the costs in relation to the third party.

A handwritten signature in black ink, consisting of a large, stylized loop with a small flourish at the top.

DM THULARE
ACTING JUDGE OF THE HIGH COURT