

Republic of South Africa
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No.: **10013/08**

In the matter between:

STANLEY LAURENCE MANUEL	Plaintiff
and	
PIETER EDUARD LOUBSER Identity No.	First Defendant
PE LOUBSER BOERDERY (PTY) LTD Registration No. 1992/002944/07	Second Defendant
JACOB ELIZA DE VILLIERS LOUBSER Identity No.	Third Defendant
MOSSELBANK PLASE (PTY) LTD Registration No. 1988/000843/07	Fourth Defendant
MELT JACOBUS LOUBSER	Fifth Defendant

JUDGMENT: 20 MARCH 2012

MEER J.

[1] The plaintiff sues the defendants for damages in the sum of R1 007 628.00 allegedly sustained as a consequence of a collision between a motor cycle driven by the plaintiff and a bull alleged by the plaintiff to have been owned, possessed or controlled by the defendants. The collision occurred on 4 July 2005 at 19h30 on the Klipheuwel Public Road Road. Durbanville, Western Cape Province. As a result of the collision the plaintiff suffered severe bodily injuries.

[2] The first, third and fifth defendants are brothers who are directors of the second and fourth defendant companies. The fourth defendant owns Mosselbank Farm ("the farm") which is adjacent to Klipheuwel Road where the collision occurred. The second defendant is the entity which conducts the farming operations on the farm and the owner of all the cattle on the farm. The third defendant, Jacob Elisa De Villiers Loubser is in charge of the farming activities on the farm.

[3] In his particulars of claim the plaintiff alleged *inter alia*:

- that the collision was caused by the sole negligence of the defendants, alternatively of one or more of the defendants' employees who failed in their duty of care to ensure that cattle owned by them and/or in their possession and/or under their control and/or grazing on land owned by the defendants, did not stray onto the Klipheuwel Public Road;

that the defendants knew there were no sign boards in the vicinity of Mosselbank Farm to warn of cattle crossing, knew that Klipheuwel Road did not have street lights, and knew that the cattle in the vicinity of the farm had no illuminating signs to warn of their presence if they strayed onto the road at night;

- that the defendants knew that if cattle strayed onto the Klipheuwel Public Road at night when it was dark it was likely that vehicles or motor cycles would collide with such cattle;
- that in breach of their duty of care the defendants, alternatively one or more of their employees left the gate on the farm open which allowed the bull to stray onto the Klipheuwel Road;
- that the defendants, alternatively, one or more of their employees failed to install a cattle grid in the opening of the gate of the farm; failed to exercise reasonable control over the bull to prevent it from straying onto the Klipheuwel Public Road and/or failed to ensure that the camp in which the bull was grazing immediately prior to the accident, was enclosed by a fence.

[4] In their plea the defendants admitted that they had a legal duty to take all reasonable measures to ensure that any animal under their control did not gain access to the Klipheuwel Public Road. The defendants denied any knowledge of the collision, denied that they owned the bull, had it in their possession or under their control and denied further that the collision was caused by their negligence.

[5] In the alternative and in the event of it being found that the defendants' conduct was negligent, the defendants in their plea denied that any negligence imputed to them caused the collision, but alleged that the collision was occasioned solely by the negligence of the plaintiff. In the further alternative the defendants pleaded that the collision was occasioned by the joint negligence of the defendants and the negligence of the plaintiff.

[6] It is common cause that on Monday, 4 July 2005 at about 19:30 the plaintiff who was driving a motor cycle, collided with a black Angus bull on the Klipheuwel Road in the vicinity of the gate to the farm. At the time the plaintiff was travelling from Malmesbury in the direction of Durbanville. His friend, Mr. Adriaan Johan Jordaan was travelling on a motor cycle in front of the plaintiff. It is common cause that the gate to the entrance of the farm Mosselbank, does not have a cattle grid. It is also common cause that there were no sign boards to warn of cattle crossing, that there were no street lights and that the bull in question did not have an illuminating sign affixed to it. The details of the collision emerged from the testimony of the plaintiff and that of his friend, Mr. Jordaan.

Testimony of the Plaintiff

[7] The plaintiff testified that it was dark and the lights of his motor cycle were on. The road was dry. He was driving at approximately 100 km per hour near the farm when he saw a black animal 20 metres away, crossing the road from west to east, from the direction of the gate of the farm. He applied brakes but did not have time to swerve to avoid the collision. He hit the rear leg of the animal.

[8] The plaintiff fell to the ground and remained there, seriously injured until he was removed by ambulance. Whilst he was lying there a lorry drove by and collided with the bull. The plaintiff did not speak to the police after the accident. He furnished an affidavit to an assessor,

Mr. O'Reilly, in June 2006 concerning the accident.

Evidence of Adriaan Johan Jordaan

[9] Mr Jordaan testified that he drove in front of Plaintiff on the night of the accident with his lights on bright. There was visibility for about 70 metres in front of him from the lights of his bike and he was about 20 kilometres away from the bull when he saw its eyes. It was walking directly opposite a farm gate on the western side of the road. No person was controlling it. After the collision Jordaan had stayed with Plaintiff until the ambulance arrived. A photograph. Exhibit A14 shows that the collision occurred very close to an entrance gate (on the western side of the road), which gains access to a field where the second defendant farms with Angus cattle.

Testimony of Weimar O'Reilly

[10] Mr O'Reilly, the assessor who investigated the collision, has 12 years experience as an assessor. O'Reilly had approached the plaintiff to investigate the collision on a contingency basis, the understanding being he would be paid if the plaintiff succeeded with his claim. O'Reilly took photographs at the accident scene on 30 July 2005, some 3/4 weeks after the collision and inspected the fence for approximately 800 metres from the entrance to the farm in both directions. He found the fence to be in good condition, with no indication that it had been repaired.

[11] O'Reilly testified that he interviewed the third defendant on 15 August 2005. The third defendant said that the bull involved in the accident was his, that he was insured and asked O'Reilly not to trouble him about the incident. He directed O'Reilly to his insurers. The third defendant said that the bull had broken through the fence which had subsequently been repaired by farm workers. The bull was bought at an auction before the accident. After speaking to the third defendant O'Reilly interviewed two farm workers who said they had

buried the bull on the farm "Welgegund".

[12] O'Reilly interviewed the third defendant again in November 2005. At this meeting the third defendant changed his version by disavowing ownership of the bull that caused the collision. He said he had discovered three weeks after the accident, (as recorded in O'Reilly's handwritten notes of the meeting), that all the bulls were on the farm and none were missing. It was thus not a bull from the farm that was involved in the accident. He also said that one of the bulls had since been sold and slaughtered and showed O'Reilly a note attributed to such transaction. O'Reilly said the note did not make sense. O'Reilly emphasised that during his first consultation with the third defendant on 15 August 2005, (which was more than three weeks after the accident), the third defendant had made no mention of his discovery three weeks after the accident that all five bulls were present. Nor had he referred to the slaughter. The notes made by O'Reilly during this consultation record that Ice Kleynhans, a worker, indicated that the bull had been buried after the accident on the neighbouring farm "Kyperskraal".

[13] O'Reilly also interviewed Mr Hamman, the farm manager during the second visit to the farm in November 2005. Hamman told O'Reilly that he had accompanied the third defendant to the scene of the accident. Hamman said he accepted that the bull at the scene was one of two bulls that had arrived on the farm on the morning of the accident.

[14] The third defendant's version was put to O'Reilly as follows: the bulls on the farm belong to the second defendant. Even though the third defendant had inspected the gate and fence on the night of the accident and could not understand how the bull could have got out, he had accepted it was one of his bulls. He had reported the accident to his insurers thinking the bull was his. At a later stage Mr. Hamman informed the third defendant that all his bulls were in the camp. The slaughtering of a bull had occurred because it was the bull's time to be slaughtered. O'Reilly could not comment on the third defendant's version.

[15] During cross examination O'Reilly conceded that he could not exclude the possibility that the bull involved in the accident could have come from one of the other farms in the area but said this was unlikely as these farms were a distance away.

[16] O'Reilly said that on his first visit to the farm on 30 July 2005 the gates were secured with a lock and a chain. On 22 March 2006 he had again visited the scene and noticed that the gate had been left open. He had made enquiries in the area whether any farmer had lost a black Angus bull but could find nobody who claimed ownership of the dead animal. On 23 March 2006 he again passed the scene and observed once more that the gate was open. He took a photograph. He said he often drove along Klipheuwel Road past the farm. On one or two occasions he observed cattle in the camp and that the gate was not locked but closed and secured with rope. The evidence of O'Reilly was not seriously challenged and withstood cross-examination. He was a credible witness.

Evidence of Bongani Brian Lali

[17] Constable Lali of the Durbanville Police Station arrived on the scene of the accident shortly after the collision and prepared the accident report form dated 4 July 2005. The form records that the "cow" belonged to "Loubser P.E.". Lali testified that he got this information from a Mr. Loubser who was at the scene. Loubser informed him that he identified the "cow" as his, from the ear tag. The telephone numbers recorded by Lali on the accident report form are those of the third defendant. The form records the residential address of the owner as Welgegund farm. Durbanville.

[18] During cross-examination Constable Lali said he did not have an independent recollection of what happened that evening and had to rely on the accident report to stimulate his memory. When it was put to him that Mr. P.E. Loubser was not at the scene but that the third defendant his brother was, and that the latter claims not to have spoken to Lali, he responded "if he was the person that was at the scene of the collision, then he is the person I

spoke to". Lali was unable to identify the person who had told him he was P.E. Loubser, from those present in Court. Constable Lali was a credible witness.

Testimony of Johan Ackerman

[19] Mr Ackerman is the second defendant's insurance broker. He testified to being in the insurance business for over 40 years, working at Malmesbury. At the time of the collision the second defendant was insured against risks of public liability. On the evening of 4 July 2005, shortly after the accident occurred, Mr Ackerman received a telephone call from the third defendant informing him that an Angus bull belonging to the second defendant was involved in the accident. Thereafter, on 21

July 2005 Mr Ackerman interviewed the third defendant for the purpose of completing a Sentrasure Public Liability Claim Form. Mr Ackerman completed all the details that appear on the form in the presence of the third defendant after obtaining the information from him. The third defendant thereafter signed the form. The form provides the following information:

"Versekerde het nuwe bulle aangekoop en is deur bestuurder die dag ± 12h00 daar in kamp afgeiaai. 2 x nuwe bulle is in kamp afgelaai - Vermoede is dat hulle baklei het en dat een deur draad/konsertinahek gestamp is. Daar het wel hare aan drade gesit. Geen hekke was oop of drade stukkend me."

And:

"7. Is hekke en heinings in goeie toestand? ± 12h00 is die nuwe bulle in die kamp afgelaai - en een het die aand uitgekom op die openbare pad."

[20] When asked if the third defendant had any doubt about ownership of the Angus bull. Mr Ackerman testified:

"U Edele ja, hy was redelik oortuig dit is sy dier, een van die bulle wat op die pad beland het.

Daar was nie enige twyfel daaroor nie... Nee. Nee. The evidence of Mr Ackerman was not seriously challenged during cross-examination. He was a credible witness.

Testimony of Stuart Collins

[21] Stuart Collins is an insurance broker with Harnacks, the company that insured the plaintiff's motor cycle. Mr. Collins testified that he interviewed a Mr Loubser, who identified himself as the owner of the bull that caused the accident. The latter raised the following possibilities: that two new bulls were placed in a "kraal" with the cows. The bulls got involved in a fight. There may have been damage to the fence which enabled the bull to escape or the gate might not have been closed properly, which also would have enabled the bull to escape. The evidence of Mr Collins was not seriously challenged, save that it was put to Collins that the third defendant does not remember speaking to him.

Testimony of Gustav Kemp

[22] Mr Kemp, the plaintiff's attorney testified that he had inspected the farm, Mosselbank on the afternoon of 2 March 2011 and observed the gate, fence and camp where the Angus cattle are kept. After he entered, the gate was secured with plastic bale string. It was not locked. Mr Kemp was taken to the camp where cattle were grazing. He observed that there was no fence restricting the movement of cattle to the gate.

[23] During cross-examination Mr Kemp emphasised that the cattle had free access to the gate but conceded that there were no cattle in the vicinity of the gate. He had not tested the strength of the plastic bale rope which secured the gate.

Evidence for the Defendants

Testimony of Jacob Eliza De Villiers Loubser, the third defendant

[24] The third defendant as aforementioned is responsible for the farming activities

undertaken by the second defendant on the farm Mosselbank. He testified that the farm is situated on both sides of the Klipheuwel Road and at any given time it accommodates between 100 and 150 cattle. Mosselbank is not the only farm in the area to keep Angus cattle. They can also be found on a farm 2 to 3 kilometres away and on a feedlot, "Braams Voerkrale", 500 metres away. The third defendant estimated that 50 % of all cattle in the area are of the Angus breed.

[25] On the evening of 4 July 2005 when the third defendant received a telephone message that there had been a collision with a bull, he assumed that the animal was once again a stray bull. He testified that there were frequently "rondloper" bulls in the area which he had to identify on many occasions. He estimated that 99 % of the animals he had to identify were strays. I pause at this juncture to mention that at variance with this testimony, he later also testified with reference to stray animals that

this occurred, "van tyd tot tyd" ¹ and, "dit is nie 'n groot probleem nie" ² and further also ".....
ek was nog nooit in 'n situasie waar ek diere moes uitken tussen ander diere, of wat ook al nie" ³

[26] The third defendant was aware that at the time of the collision there were four or five black Angus bulls on the farm in a camp immediately adjacent to Klipheuwel Road where the accident occurred. Two of these had been bought shortly before the accident. He drove to the accident scene with his farm manager, Mr Hamman. They stopped at the spot where the bull was lying at the side of the road. The third defendant did not alight but observed the bull from his vehicle. It was pitch dark, there being no street lights. He recognized the animal as an Angus bull. According to him it had no identification. It did not look like a "rondloper" but resembled a commercial bull. He said it was very difficult for him to identify a dead animal but he accepted that it could have been his bull, explaining:

"Die feit dat dit 'n Angus Bui was, en dat hy by daardie hek gele het het my aanvanklik laat verstaan dat ek is seker dit is my bul".

¹ Record 354 line 2

² Record 355/8

³ Record 324/5

He was uncertain whether it had crossed his mind that the bull could have belonged to another farmer in the area.

[27] He could not satisfactorily explain during cross-examination why, given his avowed difficulty in identifying a dead animal, he had not alighted from the vehicle to examine the bull, more especially given his evidence in chief about the many reports he received of animals roaming on the road. His response when asked about his inaction, was:

" ek het nie gedink, ek het nie die nodigheid van dit gesien nie".

[28] The third defendant was questioned in some detail as to whether the bull was marked with an ear tag from which its ownership could be identified. His evidence on this aspect was confusing and contradictory. On the one hand he testified that his bulls were unmarked but that even unmarked, he was able to recognise his animals, as he did his children. On the other hand he said that even had he alighted and inspected the bull he could not have identified its ownership because adult bulls purchased are not marked on the farm. When it was suggested that the ear tag on the bull would have enabled him to link the animal with the farmer from whom he had purchased it, he replied:

"I don't know.... I honestly don't know". He also testified

"dit gaan my nie aan wat op die plaatjie van daardie bul gestaan het nie. Vir my was dit van geen waarde nie"⁴
and further

"die inligting se vir my niks, ek weet nie wat op die plaatjie gestaan het nie"⁵

During cross examination he testified that the bull at the scene did not have an ear identification tag but later went on to say, "Dit kan wees dat hy 'n merk aangehad het"⁶

[29] Ultimately the third defendant conceded that the bull at the scene of the accident could have had an ear tag belonging to its previous owner, and a reasonable person in his position would have alighted from the bakkie, recorded the number on the ear tag and then checked

⁴Record 359/17

⁵ Record 360/11

⁶ 358/22

with reference thereto if the animal was one of the two bulls purchased shortly before the accident. Then, at odds with this he went on to say that the information on the ear tag would have meant nothing to him as he did not record such information about bulls he purchased. A discovery affidavit by the third defendant recorded that he could not find documentation pertaining to the bulls he had bought shortly before the accident. Nor could he find their transportation certificates. During cross-examination the third defendant admitted that he had not complied with the provisions of the Animal Identification Act No 6 of 2002 and Regulations promulgated thereunder pertaining to the marking of bulls for identification purposes.

[30] After observing the bull the third defendant stopped at the accident scene and offered to help. A group had gathered and clean-up operations were in progress. The third defendant could not remember interacting with Constable Lali. He testified that he had absolutely no recollection that the police had spoken to him at the scene. When asked from whom then. Constable Lali would have obtained the information on the accident report form recording the owner of the "cow" as Loubser PE, and third defendant's telephone numbers and address, he replied that this would have been furnished by farmworkers at the accident scene.

[31] The third defendant proceeded from the accident scene to inspect the gate to the farm, which he was relieved to find was locked with a chain and padlock. He also inspected the fence at the scene and for about 1 km thence in either direction. This too he found to be in order. Notwithstanding his observation of the locked gate, the third defendant said he accepted the possibility that the bull at the scene of the accident could have come from the farm, and he had assumed this to be so subsequent to the incident.

[32] During cross-examination it was put to him that if it was found that the dead bull belonged to the farm, and it was accepted that the gate was locked and the fence in good order when he inspected it, then the only possibility was that before he, the third defendant

had arrived at the scene, the gate had not been locked with a chain and padlock and the bull had escaped. It was also pointed out that the third defendant could not have known at the time that he received the accident report, whether the gate was open or not. His response was that the probability that the gate had been open, was nil. Yet curiously the insurance claim form completed by the third defendant after the accident does not record that the gate was locked with a padlock and chain as testified by him.

[33] It was further put to the third defendant that when he saw that the gate was locked and the fence in good order he must have accepted that the chance of the bull belonging to the farm, was nil. He responded that on the way home from the scene he accepted that the chance of the bull being from the farm was small. However, in the light of this he could not satisfactorily explain why he had reported, as recorded on the insurance claim form, that the bull was his. He could moreover not explain why, when he telephoned Ackerman, his insurance broker, later that evening he informed him, as also recorded on the claim form, that he suspected that the two new bulls he had bought that day had fought and one had escaped through the gate. He conceded that given his testimony that the chance of the bull being his was slight, the statement on the claim form was far-fetched. He conceded also that he gave his broker a version which was at odds with the impression he had formed, adding that for insurance purposes he wanted to cover himself.

[34] He further explained that at the time he completed the insurance claim form he thought it was possible that the bull was his. Subsequently, when a head count of cattle revealed that all the bulls were in the kraal he had reported to his broker that the bull involved in the accident was not his. But he had not informed his advocate of this.

[35] It is apparent that the third defendant's perceptions as to whether the bull at the scene belonged to the farm or not, vacillated and certainly did not tally with his evidence that the gate was locked, fences were in good order and accordingly one of the bulls could not have

escaped. Upon receiving the report of the accident, his perception was that it was a rondloper" bull. On observing the animal his perception changed. He thought it was a commercial bull and accepted it could have been one of his. After checking the gates his perception changed again and he concluded the chances of this being so were nil. Then inexplicably he reported to his insurer shortly after forming this conclusion not only that the bull belonged to the farm but furnished a theory about how it escaped. Given these contradictions his evidence on this aspect is neither credible nor reliable and cannot be accepted.

[36] The probity of his evidence is further compromised by the fact that the insurer. Sentrasure was inexplicably not informed in the claim form that the gate was locked with a chain and padlock. Had that in fact been the case Sentrasure would certainly have been advised of this crucial information. When the third defendant was asked why he did not include this information on the claim form, he replied:

"Edelagbare, ek kan nie die vraag antwoord nie. Ek kan nie die vraag antwoord nie"⁷

It seems to me to be improbable that if the gate was locked, this would not have been recorded on the claim form. Likewise, if the third defendant was certain that the bull at the scene was not one of his, he would have said so on the claim form.

[37] I pause to mention that on page 2 of the claim form the third defendant used the term "konsertinahek"* in reference to the gate the bull went through. During cross examination he however testified:

"Ja Edelagbare, ek het vir die eerste keer in hierdie hofsak met die term, konsertinahek.te doen gekry.

Ek het nooit geweet wat dit is nie, ek het dit nog nooit in my lewe in landbou gebruik nie".

This too does not reflect well on his probity as a witness. Nor does his evidence below concerning the locking of the gate to the camp in which cattle were grazing, on the date of the accident.

[38] During evidence in chief the third defendant testified that he had locked the gate with a chain and lock. However in cross examination he conceded that he had not personally locked

⁷Record 409/23

the gates:

"...ek stel dit aan u dat u het visueel,persoonlik, nie waargeneem of die hek gesluit al dan nie?— Nee ek het nie daardie dag nie"⁸

He also said that as he had not been present when the bulls were delivered to the camp at noon on the day of the accident, he had not personally observed if the gates were locked. He did not doubt that his manager, Mr Hamman who was present at the time, would have locked the gates. Mr Hamman, however, was curiously not called to testify that he had indeed locked the gate on the day in question and there remains only the somewhat contradictory evidence of the third defendant on this aspect. The third defendant admitted that on the night in question there were no labourers in the camp to monitor that animals did not stray onto the road.

[39] As to the general locking of gates on the farm, the third defendant explained in some detail the procedure for securing gates with padlocks and chains. His instructions are that camp gates must always be secured with locks and chains whilst there are animals within. Once animals leave, the chain and lock are removed and used to lock the gate of the next camp to which they are moved. The gate to the empty camp is then secured with a bale rope. It is only the third defendant and farm manager Mr Hamman who keep keys to the locks. Surprisingly there are only 3 locks and chains but many more gates, even though the cost of a lock and chain, according to the third defendant, is between R200,00 to R300.00.

[40] Surprising also was the third defendant's testimony that he would never install a cattle grid to the gate at Mosselbank, as this is not a safe measure to prevent animals escaping. The lock and chain method employed by him. he said, was "300 % safer".

[41] The third defendant's memory failed him when it came to recollecting each of the interviews with witnesses O'Reilly and Collins in which he is alleged to have admitted ownership of the deceased bull. In similar vein he could not remember the conversation with Constable Lali in which he is also alleged to have claimed ownership of the bull.

⁸ Record 411/25

[42] His recollections of his meetings with O'Reilly were vague. Initially he could remember neither the first meeting in August nor the second in November. He then went on to recall only the November meeting, (at which he told O'Reilly that all the bulls were discovered to have been in the camp after the accident), and not the August meeting, at which O' Reilly testified that the third defendant admitted ownership of the deceased bull and explained how it escaped. It was however conceded on behalf of the third defendant that it cannot be excluded that the August meeting occurred.

[43] It was not put to O'Reilly that the third defendant could not remember the interview of 15 August and no explanation was proffered for this omission. It must be asked that if indeed it was discovered three weeks after the accident that none of the bulls on the farm were missing, why then was this not disclosed to O'Reilly at the first meeting of 15 August 2005? That meeting was more than three weeks after the accident.

[44] In the interview with Collins which eluded the third defendant's memory, the third defendant is alleged, apart from admitting ownership, to have furnished the same explanation of the bull escaping as he did on the claim form and to O'Reilly during the August interview. The corroboratory nature of this evidence, together with that of Lali about the third defendant's admission of ownership is, in the circumstances accepted over the unsatisfactory and vacillating evidence of the third defendant on this aspect, which I have rejected.

[45] In yet another instance which did not reflect favourably on the probity of his evidence, the third defendant furnished three contradictory versions about where the dead bull was buried. His plea recorded that the bull was buried on the farm Welgegund. His reply to the Plaintiffs Rule 36 (6) Notice recorded that the carcass was buried on Mosselbank. His testimony however was that the animal had in fact been buried on the farm Kyperskraal, owned by the fourth defendant. He could not explain why the pleadings recorded different

information, but denied that the burial place of the bull was concealed so as to prevent the plaintiff from exhuming the animal and checking its identity.

[46] All in all the third defendant was an unsatisfactory witness. His probity, credibility and reliability were severely compromised by the contradictory nature of his evidence on the crucial aspects of the identity and ownership of the deceased bull, its tagging, the locking of the gates on the day of the accident and his selective and perhaps opportunistic memory (concerning his failure to recall his alleged admission of ownership as corroborated by three credible witnesses). He was often not able to furnish explanations during cross-examination, and tended to evade questions by giving replies which were not relevant to the questions asked.

[47] In assessing the probabilities I come to the view that the bull that caused the collision belonged to the second defendant and was one of the bulls under the control of the third defendant. I further find that the animal could have been identified from its ear tag.

[48] The probabilities also point to the gate having been negligently left open and the bull having escaped through it. I say this because the margin for error and straying animals would in my view seem to be considerable in the absence of a cattle grid, and given the cumbersome procedure employed on the farm for the locking of gates as testified by the third defendant. With not every gate to every camp having its own separate lock, and bale rope, (the strength of which was untested in evidence), being used as an alternative to locks, the pre-existing margin for error becomes exacerbated. Also, it must be recalled from the testimony of Attorney Kemp, there was no fence restricting the movement of cattle to the gate. From the evidence of O'Reilly it is evident that there are times when the gate to the public road is left open. The probabilities are that the night of the accident was just such a time. The gate was negligently left open by persons in charge and in the employ of second defendant, and in the absence of a cattle grid the bull would have been able to escape.

[49] In *Mkhwanazi v Van der Walt* 1995 (4) SA 589 SCA at 594A it was said: "Ongelukking is dit 'n feit van die lewe dat alhoewel die meeste mense die meeste van die tyd met redelike sorg optree, nalatigheid van 'n gewone grad 'n doodgewone verskynsel is. Die ooplaai van 'n plaashek val in daardie kategorie van nalatigheid."

These words resonate in this case.

In *Enselin v Nhlapo* 2008 (5) SA 146 SCA at 148 J to 149 A it was said:

"It must be accepted, it seems to me, that the defendant had to have been aware of the fact that, if the cattle on his farm were to stray onto the adjoining public road, they could endanger the lives of road users. A reasonable person in the position of the defendant would thus have taken steps to prevent the cattle from straying onto the public road particularly at night. " and at 150 C-D,

" The use of a padlock to secure the steel gate or the installation of a cattle grid on the access road shortly before it joined the public road would have been easy, inexpensive and effective measures to prevent the cattle straying onto the public road.

Considering the respective interests of the defendant on the one hand and the road users of the public road on the other, the use of a padlock or a cattle grid as precautions were so easy and relatively inexpensive to take, that a reasonable person would have taken at least one if not both of them. The defendant's failure to take either precaution meant that he had been causally negligent in relation to such damage as may in due course be proved by the plaintiff So too the causal negligence in the instant case.

[50] It was agreed between the parties that in the event of the plaintiff discharging the onus of proof, as, given my findings above, he now has, the second defendant as the owner of the cattle on the farm Mosselbank would be the only party to be held liable. This is indeed so. Whilst the third defendant referred at times to his ownership of the dead bull, it is common cause that he in fact does not own the cattle on the farm. No basis in fact or in law was established for the relief sought to be granted against any of the defendants other than the second defendant. An order of absolution

from the instance must therefore follow as a matter of course in respect of the other defendants.

Costs

[51] Mr McLachlan for the defendants submitted that the plaintiff should bear the wasted costs for 14 February 2012, the date to which the matter was postponed at the previous hearing on 6 December 2011. On that latter date Mr De Vos for the plaintiff was cross examining the third defendant and sought a postponement to enable him to have a further consultation. On 14 February 2012 Mr De Vos however indicated that he had completed his cross examination and continued no further. As neither counsel had prepared written heads for the 14 February hearing, on the understanding that the trial would continue on that date, no more than five minutes was spent in court and the day was in effect wasted. I am of the view that it is in the circumstances proper for the plaintiff to bear the wasted costs for that day. For had it been timeously conveyed on behalf of the plaintiff that the trial was not to continue on 14 February, arrangements could have been made for argument to be heard on that date.

[52] I accordingly grant the following order:

1. The Second Defendant is causally liable for any damages sustained by the plaintiff as a consequence of the collision between the motorcycle driven by the Plaintiff and a bull on 4 July 2005;
2. Absolution from the instance is granted against the First, Third, Fourth and Fifth Defendants;
3. The Second Defendant shall bear the costs of the matter, save for the wasted costs occasioned on 14 February 2012;
4. The Plaintiff shall pay the wasted costs occasioned on 14 February 2012.

Y.S. MEER J.