

NOT REPORTABLE

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
REASONS FOR JUDGMENT

Case No: I 1676/2011

In the matter:

ANANIAS ABNER

PLAINTIFF

and

**K L CONSTRUCTION
ALFEUS TEOFELUS**

**FIRST DEFENDANT
SECOND DEFENDANT**

Neutral citation: *Abner v K L Construction and Another* (I 1676-2011) [2013]
NAHCMD 139 (27 May 2013)

Coram: **VAN NIEKERK J**

Heard: 22 November 2012; 14 May 2013

Delivered: 15 May 2013

Reasons: 27 May 2013

Flynote: **Damages** – Value of cattle killed – Evidence of value given by owner –
Not called as an expert witness – Evidence of value disputed – Not
best evidence available – Value of mahangu millet bartered for meat in

mitigation of damages – No evidence of such value – Court not able to calculate damages – Absolution from the instance granted.

REASONS FOR JUDGMENT

VAN NIEKERK, J:

[1] On 15 May 2013 I granted the defendants' application for absolution from the instance with costs. These are the reasons for this order.

[2] The plaintiff instituted action against the defendants for damages of N\$50 000 arising from a collision which occurred on 12 August 2010 near the Kambelona Cattle Post in the Omusati Region, in which the second defendant, while driving a truck of the first defendant during the course and scope of his employment with the latter, collided with and killed eight head of cattle belonging to the plaintiff. In paragraph 9 of the plaintiff's amended particulars of claim the alleged damages are set out as being (i) two bullocks at N\$10 000 each, totalling N\$20 000; (ii) two heifers at N\$6 000 each, totalling N\$12 000; (iii) one springing heifer at N\$7 000; (iv) one young steer at N\$7 000; (v) one calf at N\$1 500; and (vi) one cow at N\$2 500.

[3] The defendants in their plea and amended plea denied the damages suffered and put the plaintiff to the proof thereof. This issue remained in dispute at the trial.

[4] The plaintiff himself testified and also presented the evidence of two herders in his employ who were herding the cattle in the early hours of that day. At the close of the plaintiff's case, Mr *Erasmus* applied on behalf of the defendants for absolution from the instance with costs. The gist of the application is that the plaintiff did not prove the damages he suffered (i) as he did not present expert evidence about the market value of the cattle killed; and (ii) as he did not place full evidence before the

court about the extent to which he mitigated his damages. In these reasons I shall only concentrate on the evidence presented in this regard.

[5] A plaintiff who is claiming for damages caused by the loss of his livestock by the negligence of another must prove the market value of such animals at the time and place of the loss.

[6] In *S M GOLDSTEIN & CO (PTY) LTD v GERBER* 1979 (4) SA 930 (A) the court stated the following (at p937G-938):

'The last of the defendant's grounds of appeal concerns the value of the roller when sold to Chicks Scrap Metals by defendant. It was contended on appeal that plaintiff failed to establish what that value was. In this regard counsel for the defendant referred to several passages in decided cases dealing with the onus which rests on a plaintiff to adduce evidence in proof of the damage which he claims to have suffered including the following passage in the judgment of GALGUT J in *Enslin v Meyer* 1960 (4) SA 520 (T) at 523 and 524:

"Nevertheless where there is evidence that damage is caused a court will make some assessment on the material before it even if the damage cannot be computed exactly (see *Turkstra Ltd v Richards* 1926 TPD 276). A plaintiff is, however, expected to lead evidence which will enable an accurate assessment to be made if such evidence is available (see *Klopper v Mazoko* 1930 TPD 860 at 865).

In *Lazarus v Rand Steam Laundries* (1946) (Pty) Ltd 1952 (3) SA 49 (T) at 51 DE VILLIERS J quoted with approval the following passage from *Hersman v Shapiro & Co* 1926 TPD 367 at 379:

'Monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the Court is very little more than an estimate, but, even so, if it is certain that pecuniary damage has been suffered, the Court is bound to award damages. *It is not so bound in the case where evidence is available to the plaintiff which he has not produced; in those circumstances the Court is justified in giving, and does give, absolution from the instance.* But where the best evidence available has been produced, though it is not entirely of a conclusive character and does not permit of a

mathematical calculation of the damage suffered, still, if it is the best evidence available, the Court must use it and arrive at a conclusion based on it.' " [The emphasis in the last passage is mine]

(See also *R Fordred (Pty) Ltd v Suidwes Lugdiens* 1983 (1) PH J.21).

[7] The question arises whether the plaintiff produced the best evidence available to prove his damages. While a suitably experienced stock farmer may give expert evidence about the value of cattle the plaintiff in the matter before me was not called as an expert witness. It is so that the opinion of the owner of a thing may be accepted as an estimation of its value, but where the estimate is challenged, only an expert's testimony carries weight (See LAWSA, 2nd ed. Vol 9, para. 711). For example, in a similar matter as the instant one, *Bondcrete Ltd v City View Investments Ltd* 1969 (1) SA 134 (NPD) stated:

'*Wigmore* states in para. 716, under the heading 'Personal - property value':

"Here the general test, that anyone familiar with the values in question may testify, is liberally applied, and with few attempts to lay down detailed minor tests.

The owner of the article, whether he is generally familiar with such values or not, ought certainly to be allowed to estimate its worth; the weight of his testimony (which often would be trifling) may be left to the jury; and Courts have usually made no objection to this policy."

See also *R v Beckett*, (1919) 29 T.L.R. 332. It is a matter of almost daily occurrence that the courts accept the evidence of the owner of stolen stock or the person in charge of them as to their value, if that evidence is left unchallenged and uncontradicted.'

[8] In the *Bondcrete* matter the evidence of a farm manager in the employ of the farm from which the animals killed had strayed gave an estimate on the value of the animals. This evidence was not challenged in cross-examination or contradicted by the defendant. On this basis the evidence as to value was accepted by the court.

[9] The plaintiff is an economist and statistician who was employed at the time he testified in the Ministry of Finance as a deputy director in budget management and

control. He grew up as the son of subsistence farmers on communal land in the North of Namibia. Since 1999 he began buying and selling livestock, mainly cattle, and since 2000 he held his own brand. He keeps cattle on a plot at Omakange and also assists his mother, who is a subsistence farmer. By his own admission he does not produce cattle for the market, but only to sustain his family. When he does sell cattle it is to obtain funds for a specific purpose to supplement his normal income. He regularly attends cattle auctions in the areas of Omakange, Okahao and Opuwo. He testified that at these auctions the prices for livestock are higher than at other auctions such as in the Otjinene area, because of buyers from Angola who are prepared to pay higher prices.

[10] The plaintiff deviated from the particulars of claim when he testified about the type of animals killed and their respective values. He nevertheless still came to a total value of N\$50 000. The bullocks he valued at N\$8 000 each. While he occasionally mentioned a cow as stated in the particulars of claim, he also spoke about four heifers, which included the cow. These four animals he valued at N\$ 6 500 each. He also valued the steer at N\$6 500. The calf he valued at N\$1 500. These values, he testified, were based on supply and demand.

[11] During cross-examination counsel for the defendants placed the plaintiff's valuation of his cattle in issue *inter alia* because the plaintiff did not testify about the age, condition and weight of the animals. Only when this issue was raised did the plaintiff place some details on record about the estimated age of what he referred to as the heifers, the steer and the calf. The plaintiff acknowledged that he did not know the age of the two bullocks. In fact, he did not personally buy them, but sent some of his employees to the auction where they saw these bullocks, liked them and purchased them for him at N\$8 000 each. The only other detail he mentioned was that the animals were a mixture of Simmentaler and Brahman. The plaintiff did not present any evidence that he was knowledgeable about the market prices of the different grades of animals in the area and did not testify into which categories the animals killed fell. (Cf. *Pitout v North Cape Livestock Co-Operative Ltd* 1977 (4) SA 842 (A) 854C-E).

[12] The plaintiff and one of his herders, Mr Benjamin Kalimbo, testified that the sum of N\$4 600 was obtained for the meat, as well as 5 x 50kg bags of mahangu millet, which was bartered for some of the meat. The plaintiff agreed that the amount of his claim should be reduced to take into account the proceeds from the meat sold, but added that his costs of transport and refrigeration of the meat should be added. He did not give any details of these costs. He also did not state what the value of the mahangu was.

[13] In my view the plaintiff did not present the best evidence available to prove his damages. It would have presented no difficulty to present the evidence of an expert about the market prices of the particular type of animals at the relevant time and place. One can ignore the costs of mitigating his damages on the basis that the plaintiff did not prove these and as the failure to do so works to the plaintiff's detriment. However, the plaintiff should have presented evidence about the value of the mahangu as the failure to do so prejudices the defendants.

[14] The cumulated effect of all these inadequacies is that the Court was not placed in a position to calculate the plaintiff's damages. In the result the defendants' application for absolution from the instance was upheld with costs.

K van Niekerk

Judge

APPEARANCE

For the plaintiff:

Mr J Diedericks

of Diedericks Incorporated

For the defendants:

Mr F Erasmus

of Francois Erasmus and Partners