

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT

Case no: HC-MD-CIV-ACT-DEL-2017/01216

In the matter between:

PIETER STEYN

PLAINTIFF

and

CORNELIUS ISRAEL STANLEY

DEFENDANT

Neutral citation: *Steyn v Stanley* (HC-MD-CIV-ACT-DEL-2017/01216) [2018]
NAHCMD 400 (7 December 2018)

Coram: USIKU, J

Heard on: 3 & 5 July 2018 and 13 September 2018

Delivered: 7 December 2018

Flynote: *Animals – Actio de pauperie* – Defendant's dogs allegedly having attacked and killed Plaintiff's livestock on Plaintiff's farm – Dogs having acted *contra naturam sui generis* in the circumstances – Defendant liable for damages caused to the extent as proved by evidence.

Summary: Plaintiff's sheep was discovered dead on Plaintiff's farm. It was observed that the sheep died in consequence of dog-bites. A spoor from the scene of the attacked sheep led to the neighbouring farm owned by the Defendant. The Defendant's two dogs were found with snouts covered in blood. Court held that the

dogs that killed Plaintiff's sheep are dogs owned by the Defendant. However, the Defendant is only liable for damages caused by the dogs to the extent as proved by the evidence.

ORDER

Judgment is granted in favour of the Plaintiff against the Defendant in the following terms:

1. payment in the amount of N\$ 26 800.00;
2. interest on the aforesaid amount at the rate of 20% per annum calculated from 04 February 2017 until the date of final payment;
3. costs of suit, such costs to include costs consequent upon the employment of one instructing and instructed counsel;
4. the matter is removed from the roll and regarded finalized.

JUDGMENT

USIKU J:

Introduction

[1] This is an action based on *action de pauperie*, alternatively based on negligence, in which the Plaintiff claims for damages, as well as for future damages, against the Defendant.

[2] The Plaintiff alleges that two dogs owned by the Defendant had during the period of August 2016 and October 2016 entered upon the Plaintiff's farm, and without provocation attacked and killed the Plaintiff's livestock (sheep).

[3] In his particulars of claim, the Plaintiff claims for relief in the following terms:

AD CLAIM 1:

1. Payment of an amount of N\$ 136,900.00;

AD CLAIM 2:

2. Payment of the amount of N\$ 37,600.00

AD CLAIM 1 AND 2:

3 Interest at a rate of 20% per annum calculated from 4 February 2017 until the date of final payment;

4 Costs of suit;

5 Further and/or alternative relief'

[4] Claim 1 is in respect of 100 sheep that were allegedly attacked and killed by the Defendant's dogs. Claim 2 is in respect of loss suffered by the Plaintiff in relation to 47 ewes that were pregnant, and the claim represents an average marketable offspring value that could have been generated from the 47 pregnant ewes.

[5] The Defendant denies, among other things, that the dogs that attacked and killed the Plaintiff's livestock are dogs owned by him. The basis for the denial is alleged to be that the Defendant's dogs in question were two 7 months old, small, fox-terrier dogs, which could not kill a sheep. The Defendant further alleged that he had put the dogs down on or about 29 August 2016, soon after Plaintiff's father alleged that the dogs had attacked and killed Plaintiff's stock, and the dogs could not have attacked and killed Plaintiff's sheep after 29 August 2016.

The Plaintiff's case

[6] Four witnesses testified in support of the Plaintiff's claim, namely: Mr Stephanus Johannes Steyn ("Mr Steyn Snr"); Mr Pieter Steyn ("the Plaintiff"); Mr Silas Hailwa ("Mr Hailwa") and Mr Leon Swartz- the expert witness, ("Mr Swartz").

[7] Mr Steyn Snr testified that on Sunday the 28 August 2016, at noon, he received a report from certain employees of the Plaintiff that they had seen two dogs having attacked and killed Plaintiff's sheep on Plaintiff's farm. He immediately drove with those employees to the scene of the attack. At the scene he noticed three dead sheep that were killed by dogs. Thereafter, he together with the employees in question followed the spoor (trail) of the dogs from the scene of the attack up to the premises of the Defendant (on Defendant's farm which is neighbouring the Plaintiff's farm). There they found two dogs whose snouts (mouths) were covered in blood and had sore paws.

[8] Mr Steyn Snr further related that he approached the Defendant and informed him that his dogs had attacked and killed the Plaintiff's sheep on the Plaintiff's farm. He then invited the Defendant to drive with the Plaintiff's employees to the scene of the attack to inspect the dead sheep. The Defendant complied and drove with the Plaintiff's employees to the scene and thereafter collected the three dead sheep.

[9] The next day, Monday 29 August 2016, Mr Steyn Snr instructed the Plaintiff's employees to conduct inspection on the camps, on the farm, to see whether there were other sheep killed. The employees only managed to inspect three camps on the farm. After a while the employees returned and reported that they had found a further 13 dead sheep and one sheep injured but still alive.

[10] According to Mr Steyn Snr, at that point the total number of the Plaintiff's sheep that were killed or injured due to the Defendant's dogs' attack were 15 Dorper ewes, 1 Dorper ram and one Dorper lamb (weaner).

[11] Mr Steyn thereafter drove to the Defendant's farm and invited the Defendant to go to the Plaintiff's farm to inspect and collect the 13 dead sheep as well as the injured sheep. The Defendant replied that the dead sheep would probably be rotten by then and that the Plaintiff's employees should take the injured sheep for themselves. Mr Steyn Snr advised the Defendant that he was going to contact the police about the dogs' attack matter. Mr Steyn Snr left and went to conduct inspection on water points on Plaintiff's farm.

[12] Upon his arrival at his home, Mr Steyn Snr found the Defendant there waiting for him. He noticed that the Defendant had the injured sheep (lamb) on the back of his bakkie. According to Mr Steyn, the Defendant informed him that he accepts full responsibility for the sheep that were killed by his dogs.

[13] The Plaintiff testified that he is a farmer who predominantly farms with sheep on farm Aandster, in Aranos district. Towards the end of July 2016 he, among other things, counted and recorded the number of his sheep grazing in 7 out of his 64 different camps, on his farm. He recorded the sheep in the 7 different camps in a ledger in classes of ewes, lambs and rams, which altogether totaled 688 sheep.

[14] On the 28 August 2016, the Plaintiff left for Cape Town. That same day in the evening he contacted Mr Steyn Snr, (the Plaintiff's father) to inform him that he had arrived safely. Mr Steyn Snr then informed the Plaintiff about the three sheep that were attacked and killed by the Defendant's dogs.

[15] On the 6th September 2016, the Plaintiff returned to his farm from Cape Town. He invited the Defendant to visit him at his farm to discuss the issue about the killed sheep. The Defendant complied promptly. According to the Plaintiff, the Defendant confirmed to him that he would take responsibility for the sheep that were killed or injured by his dogs.

[16] During the discussion, the Plaintiff provided the Defendant with an invoice in the amount of N\$ 26 800.00 in respect of the 16 dead sheep and one injured sheep which were found on 28 and 29 August 2016. The invoice reflected the value aforesaid of the following sheep, namely 15 Dorper ewes, one Dorper ram and one Dorper lamb.

[17] The Plaintiff further recounted that the Defendant, upon enquiry by the Plaintiff about the whereabouts of the responsible dogs, informed the Plaintiff that he had shot them immediately after he was informed that they had killed the Plaintiff's sheep.

[18] The Plaintiff handed the aforesaid invoice to the Defendant who accepted it. However the Defendant failed to pay the invoice.

[19] During the first week of October 2016, the Plaintiff found a further 79 sheep carcasses in the 7 of his camps. During this time he again counted the number of his sheep grazing in the 7 camps which he had counted during June 2016. After the count, he deducted from the number the 17 sheep killed/injured which were found during 28 and 29 August 2016, and deducted the 79 carcasses, and discovered that a further 4 sheep were missing from the count he did during end of June 2016. Upon this count, the Plaintiff discovered that, in addition to the 17 sheep already referred to, the following sheep were either killed or missing: 47 Dorper ewes (which were pregnant), 32 Dorper lambs and 4 Dorper rams.

[20] In his opinion, the 4 sheep were missing because they were killed by the Defendants dogs, as there were no other natural explanation for their being missing.

[21] After the Plaintiff had finished counting and recording the number of his sheep in the relevant 7 camps, he contacted the Defendant and informed him that he had finished working on his sheep and invited the Defendant to come to his farm to discuss and finalise the matter. The Defendant promised to come but failed to show up. Later on it became apparent to the Plaintiff that the Defendant was no longer interested in discussing the matter.

[22] Thereafter, the Plaintiff contacted the police. Detective Warrant Officer Silas Hailwa and two other officers arrived at the Plaintiff's farm on the 17 November 2016. The Plaintiff showed the officers the carcasses and skins of dead sheep that were killed by the Defendant's dogs. Then the police officers drove to fetch the Defendant from his farm. The Defendant and the police officers arrived at the Plaintiff's farm.

[23] Later on, the parties discussed the issue with a view to reach an amicable solution. However, the parties could not resolve the matter amicably.

[24] Presently, the Plaintiff sues the Defendant for damages in respect of a total number of 100 sheep which were allegedly found killed by the Defendant's dogs or missing, when the Plaintiff counted his sheep during October 2016. The 100 sheep are made up as follows: 15 Dorper ewes, 47 Dorper ewes (which were pregnant, 32 Dorper lambs, 5 Dorpers rams and One Dorper lamb. According to the testimony of the Plaintiff, the Plaintiff suffered a total loss to the amount of N\$ 174, 500.00, being

the fair and reasonable value of the Plaintiff's livestock killed by the Defendant's dogs.

[25] Mr Hailwa testified that he was contacted by the Plaintiff and had travelled to the Plaintiff's farm in the company of two other police officers on the 17 November 2016. At the farm, the Plaintiff took them to a certain camp where they were shown some decomposed skins of dead sheep. During the ensuing discussions aimed at finding an amicable solution, the Plaintiff and the Defendant could not reach amicable solution.

[26] Mr Swartz testified that he has sufficient knowledge of the fair and reasonable market value of live Dorper sheep, marketing and the lambing percentage of Dorper sheep, to qualify him as an expert. In his expert opinion, the fair and reasonable market value of live Dorper sheep in the Aranos district is:

- a) Dorper ewe: N\$ 1500
- b) Dorper ewe (pregnant): N\$ 1500
- c) Dorper lamb (weaner): N\$ 800
- d) Dorper ram: N\$ 3500

[27] He further related that a Dorper sheep has a high reproductive capacity. The lambing percentage of a Dorper sheep averages between 120% to 130% lambs born per ewe mated. Therefore, should a farmer have 100 Dorper ewes that have mated, that farmer will on average have a lamb crop of between 120-130 lambs. If such formula is applied to the 47 pregnant ewes of the Plaintiff, the Plaintiff would have expected a lamb crop of between 56 and 61 lambs. In his opinion, the lamb crop of 47 lambs claimed by the Plaintiff from 47 mated ewes, is reasonable in the circumstances.

The Defendant's case

[28] Two witnesses testified in support of the Defendant's defence, Mr Leonard Cloete ("Mr Cloete") and Mr Cornelius Stanley ("the Defendant").

[29] Mr Cloete, in essence, testified that the two dogs then owned by the Defendant were two small dogs of about 7 months and as such, those dogs could not attack and kill a sheep.

[30] The Defendant testified that on or about 28 August 2016 Mr Steyn Snr came to him at this farm, and alleged that he had followed foot-prints of the Defendant's dogs from 3 carcasses of sheep from the Plaintiff's farm. Mr Steyn Snr invited the Defendant to go and see for himself the aforesaid sheep carcasses. The Defendant together with his employees went to the scene, and were shown the 3 carcasses. Thereafter, the Defendant called Mr Steyn Snr and informed him that he was prepared to pay for the 3 sheep allegedly bitten by his dogs. However, the Defendant underlined that his undertaking to pay for the 3 sheep was aroused by the need to keep good neighbourliness, and should not be construed as an admission of guilt.

[31] On or about the 30th August 2016, Mr Steyn Snr informed the Defendant that more sheep were discovered which were allegedly bitten and killed by the Defendant's dogs, which brought the total number of the sheep killed to 17 sheep.

[32] When the Plaintiff arrived from Cape Town, the Plaintiff sent an invoice of N\$ 26 800.00 to the Defendant for payment, in respect of the 17 dead sheep. The Defendant responded he was not prepared to pay since the number of the dead or missing sheep keeps increasing without proof. The Plaintiff indicated that he was going to do a head count of his sheep and was going to send the Defendant more invoices.

[33] According to the Defendant, after some time the number of the dead sheep at the Plaintiff's farm increased to 81 sheep. The Defendant informed the Plaintiff that he will not take responsibility till proof that all such sheep were bitten by the Defendant's dogs was furnished.

[34] During November 2016 the Plaintiff reported the matter to the police. The Defendant in the presence of the police had indicated that he was prepared to pay for the initial 17 dead sheep only, out of good-heartedness.

[35] The Defendant maintains that there is no way his dogs could have bitten and killed the Plaintiff's sheep.

Analysis

[36] The Plaintiff bears the burden to prove the elements of *actio de pauperie* namely that:

- (a) the Defendant is, or was, the owner of the dogs that killed the Plaintiff's livestock;
- (b) the dogs were domesticated animals, and,
- (c) the dogs acted contrary to the nature of domesticated animals generally, in causing damages to the Plaintiff.¹

[37] If the onus is discharged, the Plaintiff is entitled to recover from the Defendant such damages as are proved to have been suffered by the Plaintiff in consequence of the conduct of the Defendant's dogs.

[38] The standard of proof in a civil case was succinctly outlined by Lord Denning in *Miller v Minister of Pension [1947] 2 ALL ER 373 at 373* as follows:

'If the evidence is such that the tribunal can say that it is more probable than not the burden is discharged.'

[39] In *Govan v Skidmore 1952 (1) SA 732 (N) Selke J* observed at p734C as follows:

'.....for, in finding facts or making inferences in a civil case, it seems to me that one may, by balancing probabilities select a conclusion which seems to be the more natural, or

¹ *Loriza Brahman En'n Ander v Dippenaar 2002(2) SA 477 SCA.*

plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one.'

[40] In the present matter, I would consider the livestock in question under three categories, namely:

- (a) the three sheep found killed on 28 August 2016;
- (b) the 13 sheep killed and one sheep injured, found on 29 August 2016 and;
- (c) the 79 carcasses or decomposed skins and 4 sheep discovered missing during October 2016.

The three sheep found killed on 28 August 2016

[41] The three dead sheep found by Mr Steyn Snr on 28 August 2016 falls to be considered against the background of the following common ground facts:

- (a) the three dead sheep were attacked and killed by dog(s);
- (b) Mr Steyn Snr and the Plaintiff's employees followed the spoor of suspected dogs from the scene of the attack, on the Plaintiff's farm, to the premises of the Defendant, on the neighbouring farm;
- (c) the Defendant, after he was informed by Mr Steyn Snr that the Plaintiff's sheep were attacked and killed by the Defendant's dogs, the Defendant went to the scene of the attack, collected the dead sheep and thereafter put down his two dogs.

[42] On Mr Steyn Snr's version, the Defendant's dogs had sore paws and their snouts (mouths) were covered in blood. Furthermore, according to Mr Steyn Snr's evidence, the three dead sheep were killed as a consequence of dog-bites.

[43] It should be underlined that when the Defendant was informed by Mr Steyn Snr about his dogs having killed the Plaintiff's sheep, the Defendant did not at that time remonstrate that his dogs were too young and small to kill a sheep. However, the Defendant went to the scene of the attack, inspected the dead sheep, collected the dead sheep, and later put his dogs down.

[44] I accept Mr Steyn Snr's version as truth that the dogs spoor from the scene of the attack to the premises of the Defendant was that of the Defendant's dogs. I also accept as truth the version of Mr Steyn Snr that snouts of the Defendant's dogs were found covered in blood and had sore paws. Mr Steyn Snr's observations transpired at approximately noon-time, under normal conditions of visibility.

[45] On the other hand, it is highly unlikely that the Defendant being aware of the age and size of his dogs, and after having inspected the bodies of the dead sheep, killed in consequence of dog-bites, would have proceeded to collect the dead sheep, and immediately put down his dogs, without being convinced that his dogs killed the dead sheep. I reject the Defendant's version on this aspect, insofar as it contradicts the evidence given by Mr Steyn Snr.

[46] In regard to the three sheep found dead on the 28 August 2016, I am satisfied that there is sufficient evidence for the inference that the dogs which attacked the Plaintiff's livestock, on this occasion, were the Defendant's two dogs.

The 13 sheep killed and one injured sheep found on 29 August 2016

[47] According to Mr Steyn Snr's evidence, the 13 dead sheep and one injured sheep met their fate in consequence of having been bitten by dog(s). Mr Steyn Snr invited the Defendant to the scene of the attack, as he believed that the dogs that had killed the sheep killed on 28 August 2016 are the same dogs that killed the sheep found dead on 29 August 2016. The Defendant inspected the dead sheep and collected the live, but injured sheep.

[48] In my opinion, the finding of the 13 dead sheep and the injured one, on 29 August 2016 was proximate in time to the killing of the initial three dead sheep found on 28 August 2016. The evidence I relied on for finding that the Defendant's dogs

killed the initial three sheep, is similarly relevant to the dead sheep found dead on 29 August 2016. I am therefore satisfied that there is considerable circumstantial evidence which supports the conclusion that the Defendant's dogs killed/injured the sheep discovered on 29 August 2016. I therefore find that the Defendant's dogs killed/injured the sheep found on 29 August 2016.

The 79 carcasses/decomposed skins and the 4 missing sheep discovered during October 2016

[49] There is no direct evidence as to how the livestock under this category met its fate. However, the Plaintiff seeks that an inference be drawn that the Defendant's dogs also killed this livestock. The Plaintiff argues that during the period of June 2016 to October 2016 there were no predators, such as jackals, lions, leopards and there was no fire, lightning or sickness, and that the only probable cause for the loss or disappearance of the livestock is that it was attacked and killed by the Defendant's dogs.

[50] In my opinion the above argument appears to overlook the evidence by Mr Steyn Snr that the Defendant is not the only person who owns domesticated dogs in the area,² and that in the area there jackals and other scavengers, albeit their number is very few.³

[51] In my opinion, the evidence adduced in this matter does not justify the conclusion that the Defendant's dogs were also responsible for the loss of the Plaintiff's livestock under this category. The circumstantial evidence available, is not sufficiently compelling to enable the Plaintiff to contend that it has discharged its onus of proof on the balance of probabilities.

Conclusions

² Page 17 of the record of proceedings.

³ Page 40 of the record of proceedings.

[52] In conclusion, I find that there is sufficient proof that the 17 sheep found on 28 and 29 August 2016 were killed/injured by the Defendant's dogs. These sheep are made up as follows:

a)	15 Dorper ewes:	N\$ 22 500.00
b)	1 Dorper ram:	N\$ 3 500.00
c)	1 Dorper lamb (weaner)	<u>N\$ 800.00</u>
	TOTAL	N\$ 26 800.00

[53] There is *prima facie* evidence in support of the Plaintiff's claim for damages. There was no evidence led to contradict the Plaintiff's case on the quantification of damages.

[54] I am satisfied that the costs in this matter should follow the event and that the Plaintiff is entitled to the costs in the circumstances.

[55] In the result, I make the following order:
Judgment is granted in favour of the Plaintiff against the Defendant in the following terms:

1. payment in the amount of N\$ 26 800.00;
2. interest on the aforesaid amount at the rate of 20% per annum calculated from 04 February 2017 until the date of final payment;
3. costs of suit, such costs to include costs consequent upon the employment of one instructing and instructed counsel;
4. the matter is removed from the roll and regarded finalized.

B Usiku
Judge

APPEARANCES:

PLAINTIFF: CJ Van Zyl (with him F Erasmus)
instructed by Francois Erasmus and Partners,
Windhoek

DEFENDANT: M Tjituri
of Tjituri Law Chambers,
Windhoek