

Practice Directive 61

“ANNEXURE 11”

<b>Case Title:</b>  David George Van Wyk and Thomas Cocklin	<b>Case No:</b>  HC-MD-CIV-ACT-DEL-2019/01835
	<b>Division of Court:</b>  HIGH COURT (MAIN DIVISION)
<b>Heard before:</b>  Honourable Mrs Justice Rakow, AJ	<b>Date of hearing:</b>  6 – 7 July 2020
	<b>Date of order:</b>  7 July 2020
<b>Neutral citation:</b>  <i>Van Wyk v Cocklin</i> (HC-MD-CIV-ACT-DEL-2019/01835) [2020] NAHCMD 272 (7 July 2020)	
Having read the record of proceedings as well as submissions made by counsels for the applicants and the respondent:	
<b>IT IS HEREBY ORDERED THAT:</b>	
a) The application for absolution from the instance is granted. b) The plaintiff ordered to pay the costs of suit c) The matter is regarded as finalised and removed from the roll	
<b>Reasons for orders:</b>	
<u>Background</u>	
[1] The Plaintiff in this matter is Mr. Van Wyk who is suing Mr. Cocklin, a farmer next to the B6 highway between Witvlei and Gobabis for damages resulting from a incident where the plaintiff was involved in a motor vehicle accident with a head of cattle belonging to the defendant on the evening of 26 September 2017.	
[2] The Plaintiff alleged that he suffered damages to his vehicle to the amount of N\$106 400, tow in service fees to the amount of N\$1090, storage fees for the written off vehicle for 578 days at N\$65 per day amounting to N\$35 070 and a loss of income at N\$10 000 for 19 months, amounting to N\$ 190 000. In total he alleged he suffered N\$367 360.	

### The Plaintiff's case

[3] The plaintiff testified that he drove at about 21h00 the evening of 26 September 2017 with his vehicle an Opel Essentia 2011 model, with registration number N9411WB on the way to Gobabis from Windhoek. At some spot a truck came from the front and he dimmed his vehicle's lights. After he passed the truck he again changed to the bright light mode, just to find a head of cattle right in front of his vehicle in the road. At that stage he was on a bridge and could not swerve to avoid hitting the head of cattle. He hit the head of cattle on the rear end and with the right front side of his vehicle. The head of cattle belonged to the defendant, whose farm manager came to collect it after the police contacted him. He instituted a claim against the defendant after the insurance of the defendant rejected his claim.

[4] The legal representative for the plaintiff then handed up, by agreement between herself and the representative of the defendant, three witness statements of Agnes van Wyk, Gabriella Appolus and Johannes Bezuidenhout. Mrs van Wyk was in the vehicle of the plaintiff, Mrs Appolus was an investigating officer of Nampol stationed at Witvlei who attended to the scene and assisted with the identification of the owner of the head of cattle and Mr. Bezuidenhout assisted the farm manager of the defendant to remove the dead head of cattle. There-after she closed the case of the plaintiff without leading any further evidence.

### Application for absolution of the instance

[5] Counsel for the defendant proceeded and brought an application for absolution of the instance and he submitted that the onus rests on the plaintiff to show that the defendant was negligent and therefore caused the damages which is being claimed for. He referred to the court to two cases, the first one *Willemse v Whitney Farming Enterprises*<sup>1</sup>. In this matter, the learned Jones J said the following:

“ The onus rests squarely on the plaintiffs to prove on a balance of probabilities that the defendant was negligent in one or other of the respects alleged. I put the position thus in an unreported judgment in the matter of *Van Zyl v Conradie* (Case No 1536/88 ECD delivered on 14/03/1991):

The defendant is not automatically liable if it is found that his cattle got into the road at night and caused a collision. This does not give rise to a presumption of negligence. There is no room for applying the *maxim res ipsa loquatur* [which, loosely translated, means that an inference of negligence can be drawn from the occurrence itself]. The plaintiff can only succeed by establishing by means of credible and acceptable evidence that the defendant was negligent and that his negligent conduct caused damage to the plaintiff. “

And a bit further he came to the following conclusion regarding whether a case was made out against the

<sup>1</sup> (1898/96) [2002] ZAECHC 4 (28 February 2002).

defendant in the first instance:

“ This argument is valid only if the plaintiffs are able to establish a *prima facie* case of negligence against the defendant in the first place. There can be no talk of a *weerleggingslas* if there is no *prima facie* case. There can be no talk of an adverse inference that the defendant was indeed negligent because it has failed to give an innocent explanation, in the absence of a *prima facie* inference of negligence being a likely explanation. To hold otherwise would be to place a real onus, and not merely a *weerleggingslas* or rebuttal onus, on the defendant. The authorities cited above are clear that it is not possible for me to conclude that there is a *prima facie* case of negligence from the mere fact that the defendant's heifers were on the national road at night. If I do not know how they got into the road, whether through a hole in the fence or through a gate which had been left open or in some other way from which an inference of fault might reasonably be drawn, I have to speculate about how they got on to the road and whether or not it was the defendant's fault. Speculation can never amount to proof on a balance of probabilities. “

[6] The second matter the court was referred to, is the matter of *Kaese v Theron*<sup>2</sup> where Maritz J, as he was then, discussed the duties of motorists and livestock farmers. He identified 4 issues that must be decided upon when faced with facts similar to the current matter. These are:

“ (a) whether the defendant had a legal duty to take measures to prevent the cow from straying onto the road; (b) if so, whether he was negligent in failing to take those measures thus causing or contributing to the collision and (c) whether the plaintiff's negligence caused or also contributed to the collision. “

The fourth issue, which was not in dispute, similarly to this matter, is the identity of the owner of the livestock.

[7] The argument for the defendant is that there is simply no allegation of a legal duty to take measures for the livestock of the defendant to stray onto the road. The other problem, if the court finds that this was indeed proved, would be that there is simply no evidence before court to proof the quantum of the damages of the plaintiff. No expert evidence was lead regarding the damage to the vehicle of the plaintiff, we do not even know what damages were caused to the vehicle except the fact that it was caused to the right front side of the vehicle and that the vehicle was subsequently written off. We do not have any idea as to what the value of the vehicle was at that time, or what the value of the wreck is. There is further no proof of the storage fees that the plaintiff allegedly is paying and neither has he made any attempt to limit his damage in moving the vehicle from that premises or selling the wreck. There is also no proof of the tow-in costs. The claim for loss of income is also not supported by any evidence presented by the plaintiff and cannot be entertained.

[8] Counsel for the plaintiff argued that the onus of negligence was created that needs to be rebutted by the defendant. In terms of regulation 348 of the Road Traffic and Transport Regulations, 2001 published in Government Notice 53 of 2001, creates a presumption of negligence by the owner of animals when

<sup>2</sup> ((P) I 486/2004) ((P) I 486/2004) [2008] NAHC 147 (10 July 2008).

animals are found a road that is fenced in. She further referred the court to the matter of *Jamneck v Wagner*<sup>3</sup> which was referred to in *Mofokeng v Moloji*<sup>4</sup> which deals with the instance where the prima facie onus is not rebutted and then become conclusive evidence. With regard to the damages which were not proved, she requested to re-open the case of the plaintiff but without putting any further arguments before court as how she intends to cure this shortcoming.

[9] A question of negligence was discussed in an unreported judgment in *Van Zyl v Conradie*<sup>5</sup> wherein it was found that :

“ (t)he defendant is not automatically liable if it is found that his cattle got into the road at night and caused a collision. This does not give rise to a presumption of negligence. There is no room for applying the maxim *res ipsa loquitor*... The plaintiff can only succeed by establishing by means of credible and acceptable evidence that the defendant was negligent and that his negligent conduct caused damage to the plaintiff. ”

The plaintiff therefore had to establish by leading evidence that the defendant was negligent and that the said negligent conduct of the defendant caused the damage to the vehicle of the plaintiff, as well as other related damages claimed for.

#### Basis for absolution from the instance

[10] The process for the application for absolution from the instance is set out in rule 100 of the High Court rules but it however does not set out what needs to be considered. The test for granting absolution from the instance at the end of a plaintiff's case is set out in *Claude Neon Lights (SA) Ltd v Daniel*<sup>6</sup> where Miller AJA said:

' (W)hen absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by the plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should or ought to) find for the plaintiff.'

[11] In *Ramirez v Frans and Others*,<sup>7</sup> this court dealt with the application and the principles applicable. With reference to case law, the following principles were extracted:

<sup>3</sup> 1993 (2) SA 54 (C).

<sup>4</sup> (A106/2014) [2014] ZAFSHC 140 (4 September 2014).

<sup>5</sup> (case no 1536/1988 ECD delivered on 14 March 1991).

<sup>6</sup> 1976 (4) SA 403 (A) at 409G - H.

<sup>7</sup> [2016] NAHCMD 376 (I 933/2013; 25 November 2016) para 28. See also *Uvanga v Steenkamp and Others* [2017] NAHCMD 341 (I 1968/2014; 29 November 2017) para 41.

“ (a) (T)his application is akin to an application for a discharge at the end of the case for the prosecution in criminal trials ie in terms of s 174 of the Criminal Procedure Act — *General Francois Olenga v Spranger*<sup>8</sup>,

(b) the standard to be applied, is whether the plaintiff, in the mind of the court, has tendered evidence upon which a court, properly directed and applying its mind reasonably to such evidence, could or might, not should, find for the plaintiff — *Stier and Another v Henke*<sup>9</sup> “

(c) the evidence adduced by the plaintiff should relate to all the elements of the claim, because in the absence of such evidence, no court could find for the plaintiff — *Factcrown Limited v Namibian Broadcasting Corporation*<sup>10</sup>.

(d) in dealing with such applications, the court does not normally evaluate the evidence adduced on behalf of the plaintiff by making credibility findings at this stage. The court assumes that the evidence adduced by the plaintiff is true and deals with the matter on that basis. If the evidence adduced by the plaintiff is, however, hopelessly poor, vacillating or of so romancing a character, the court may, in those circumstances, grant the application — *General Francois Olenga v Erwin Spranger*<sup>11</sup>,

(e) the application for absolution from the instance should be granted sparingly. The court must generally speaking, be shy, frigid, or cautious in granting this application. But when the proper occasion arises, and in the interests of justice, the court should not hesitate to grant this application — *Stier and General Francois Olenga v Spranger (supra)*.”

[12] Applying these principles in the above case, I find that the Plaintiff, in my mind, has tendered no evidence upon which this court, properly directed and applying its mind reasonably to the said evidence, might find for the plaintiff at the end of the case.

In the result, I make the following order:

- a) The application for absolution from the instance is granted.
- b) The plaintiff ordered to pay the costs of suit
- c) The matter is regarded as finalised and removed from the roll

\_\_\_\_\_  
E Rakow

Acting Judge

**Judge's signature**

**Note to the parties:**

<sup>8</sup> (I 3826/2011) [2019] NAHCMD 192 (17 June 2019), *infra* at 13 para 35.

<sup>9</sup> 2012 (1) NR 370 (SC) at 373.

<sup>10</sup> 2014 (2) NR 447 (SC).

<sup>11</sup> (I 3826/2011) [2019] NAHCMD 192 (17 June 2019) and the authorities cited therein.

	Not applicable.
<b>Counsel:</b>	
<b>Applicants</b>	<b>Respondent</b>
Mr. Erasmus	Ms. Naruses
<i>Francois Erasmus &amp; Partners</i>	<i>KL Naruses &amp; Associates</i>