

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH

Case No.: 1773/2018

Date Heard: 25 August 2020

Date Delivered: 26 January 2021

In the matter between:

GERALD DE PONTES

Plaintiff

and

STEPHEN KEGGE

Defendant

JUDGMENT

RONAASEN AJ:

Introduction

[1] On Sunday, 25 June 2017, at approximately 6:00, the plaintiff, while driving on the Seaview Road ("the road"), collided with a horse ("the horse") ("the collision"). The plaintiff suffered bodily injuries as a result of the collision and the horse, because of the injuries it sustained in the collision, had to be destroyed.

[2] The collision gave rise to a claim by the plaintiff against the defendant, the owner of the horse, for payment of damages he allegedly suffered as result of being injured in

the collision. The defendant, in turn, instituted a claim in reconvention against the plaintiff for the damages he allegedly suffered as a result of the horse being killed.

- [3] At the commencement of the proceedings I made an order by agreement between the parties in terms of which I was only required to determine the liability of the parties to each other for any damages they may have suffered as result of the collision (“the separation order”). It was agreed that the question of the extent of any such damages would stand over for later determination.

The pleadings

- [4] The plaintiff pleaded, in the following terms, in paragraph 6 of the particulars of claim, that the defendant owed him a duty of care:

- “6.1. The defendant kept the aforesaid horse on the aforesaid property at all material times;
- 6.2. The aforesaid property is located next to a busy road;
- 6.3. The defendant was under a duty of care to members of the public, including the plaintiff, to take reasonable steps to prevent horses from escaping from the aforesaid property and gaining access to the public road concerned.”

- [5] The defendant, initially, in his plea denied the existence of the alleged duty of care, but, prior to the commencement of the trial, admitted that he owed the plaintiff a duty of care in the circumstances foreshadowed in paragraph 6 of the particulars of claim.

[6] What was in issue between the parties was whether the defendant had breached the duty of care in the manner alleged by the plaintiff in paragraph 7 of the particulars of claim, as follows:

“7. The aforesaid collision was caused wrongfully and negligently by the defendant in one of more of the following respects:

7.1. He failed to take reasonable steps to prevent the aforesaid horse from escaping from the aforesaid property;

7.2. He failed to take reasonable steps to prevent the aforesaid horse having access to a public road, i.e. Seaview Road;

7.3. Without derogating from the generality of the aforesaid, he failed to take one or more or all of the following reasonable steps:

7.3.1. Installing spring loaded gates, alternatively gates that would automatically close if left open;

7.3.2. He failed to lock the gates to the aforesaid property;

7.3.3. He failed to pen the aforesaid horse at night in a secure paddock;

7.3.4. He failed to install double gates that would prevent horses from escaping if one gate were left open.”

[7] The defendant met the plaintiff’s averments of a negligent breach of the duty of care in the following terms in paragraph 8 of his plea:

“8. AD PARAGRAPH 7

8.1. The contents hereof, including sub-paragraphs, are denied as if specifically traversed;

8.2. It is specifically pleaded that the collision was occasioned solely by the negligence of Plaintiff who was negligent in one of the following respects:

- 8.2.1. He failed to observe the horse present on the trafficable surface of the tar road when, by exercise of reasonable care, he would have done so;
 - 8.2.2. He failed to keep a proper lookout;
 - 8.2.3. He failed to apply his brakes timeously or at all;
 - 8.2.4. He failed to exercise proper or adequate control over his motor vehicle;
 - 8.2.5. He drove the motor vehicle at an excessive speed in the circumstances;
 - 8.2.6. He failed to avoid a collision when, by the exercise of reasonable care and skill, he could and should have done so; and
 - 8.2.7. He failed to take cognisance of the fact that he was driving through a sumi-rural / agricultural area where he could and should have expected that from time to time stray animals might be present on the public road, when, by exercise of reasonable care, he could and should have done so.
- 8.3. In the event of it being held by the above Honourable Court that the Defendant was negligent, which is still denied, then and in that event the Defendant denies that his negligence was the cause of the collision. The collision was caused by the negligence of the Plaintiff. Particulars of the Plaintiff's negligence are set out in sub-paragraph 8.2 above;
- 8.4. In the event of it being held by the above Honourable Court that the Defendant was negligent and that his negligence was a cause of the collision, all of which is still denied, then and in that event the Defendant avers that the Plaintiff was also negligent and that his negligence contributed to the collision. Particulars of the Plaintiff's negligence are set out in sub-paragraph 8.2 above."

[8] The defendant's claim in reconvention was founded on the same allegations of negligence set out in the preceding paragraph and was met by the plaintiff by way of

a general denial, alternatively, a denial that any negligence which could be attributed to the plaintiff contributed to the cause of the collision, further alternatively, that in the event of his negligence being causally linked to the collision, the defendant's negligent breach of the duty of care as alleged in the particulars of claim contributed to the collision.

Summary of the evidence – plaintiff's case

The plaintiff

[9] On 25 June 2017, while driving on the road, he was involved in a collision with the horse. He was travelling from his then home in Seaview, Port Elizabeth to the Volkswagen factory in Uitenhage where he was due to do an installation at the instance of his employer, Brand Systems. He travelled on this road for that purpose three to four times a week.

[10] It was still dark prior to the collision and misty conditions prevailed. The plaintiff noticed a vehicle approaching from the opposite direction which, according to him, was travelling quite fast. He could not see the vehicle as it was misty on the road. The vehicle approached him as he was travelling under the N2 freeway. He had set the speed control of his vehicle at between 60-70 kilometres per hour. He estimated that visibility was between 100 hundred and 150 metres.

[11] Just prior to the collision he saw an eye before him. He did not see a horse. Next he woke up. He saw that a breakdown service had arrived on the scene and an ambulance, which later transported him to hospital.

[12] The approaching vehicle passed him and he glanced at it. A few seconds later the impact occurred. All he remembered is seeing an eye in his face.

[13] The plaintiff confirmed the location of the defendant's property adjacent to the Seaview Road with reference to an aerial photograph. He showed where his vehicle had come to a stop with reference to a police plan, which indicated the vehicle being stationary adjacent and to the left of the centre line in his lane of travel.

[14] He was unable to start his vehicle. He could not walk. There were people standing around but nobody spoke to him. Somebody did offer to help him make a phone call. He could not really see as the left portion of his face was "bashed in".

[15] At one stage the plaintiff sat on the bonnet of his vehicle. He was transported by ambulance to Livingstone Hospital. He did not move his vehicle post-collision. The impact of the collision was visible on the bonnet of the vehicle. The windscreen was missing and a portion of the roof was taken off. The post-collision photographs of the vehicle were taken at his home in Seaview. The photographs show that the vehicle was also damaged towards the rear end on the roof.

[16] The plaintiff did not see the horse after the impact.

[17] The plaintiff visited the defendant's property approximately two weeks after the collision. In accessing the property he noticed that on the driveway, close to the road there was no gate. There were horses in a fenced enclosure the gate to which was under a tree. The gate was secured by a lock. He visited the defendant's property on two occasions.

[18] The plaintiff, on his visits to the defendant's property, did not see the closing mechanism (i.e. a chain and a carabiner) on the gate depicted in the photograph below, which is the gate leading to the fenced enclosure where the defendant kept his horses:



[19] At the time of his visits the gate to the fenced enclosure housing the horses was closed by way of a chain and a padlock.

[20] The plaintiff in cross-examination confirmed that he travelled a lot for his work. In 2015 he lived in Port Elizabeth and then moved to Seaview. He moved to his current residential address after the collision.

[21] He drove to Uitenhage three to four times per week for work. Alternatively, he drove to Port Elizabeth. He stated that he knew the road well, having grown up in the area, and confirmed that there had been extensive development in the area around the road over the years. There were many smallholdings where animals were kept.

[22] The plaintiff had to be at the Volkswagen plant at 7:00 am in the morning. He was used to travelling the road in darkness. There were no streetlights on the road.

[23] On the morning of the collision he had left home at approximately 5:40/45. It was still dark at the time of the collision and patches of mist were visible. The lights of his vehicle were on dim and he also had his fog lights on which projected for approximately 40/50 metres.

[24] The trees on either side of the road were set back from the verge.

[25] In the plaintiff's direction of travel there was a kink in the road, which was clear at the time. Just past the kink near a place supplying pet food the plaintiff heard an approaching vehicle. The approaching vehicle passed him and approximately 5/10 seconds later he saw the eye and he hit the horse. He was travelling at approximately 60/65 kilometres per hour at the time of the collision. It was put to him in cross-examination that this meant he was travelling approximately 19 metres

per second and that in five seconds he would have travelled 100 metres. Thus, he should have seen the horse. He said he did not.

[26] He impacted the horse with the centre of his vehicle. He deduced that the horse must have been moving at the time of impact. It could have come from either side of the road. He struck the horse on its left rear side, which is confirmed by a photograph. He saw the eye on his windscreen. He was adamant that he did not see the horse prior to the collision and that if it had been standing still at the time of the collision he would have seen it. It was put to him that he did not see the horse as he was not paying attention to the verges adjacent to the road. He said that he had not expected to see animals on the road.

[27] It was further put to the plaintiff that had he been driving slower and kept a proper lookout he would have seen the horse. By not slowing down he did not see the horse and was accordingly not acting as a reasonable man. The verges were open and he should have seen the horse. It was also put to him that he was not looking at the verges because he was paying attention to the approaching vehicle. These propositions were denied by the plaintiff.

[28] The plaintiff reiterated that he did not see where the horse was coming from. He disagreed with the proposition that as there was a wide verge one should normally see the horse. It was put to him that although the horse was brown it had on a beige blanket which should have been easier to see in the dark.

[29] It was put to the plaintiff that he was driving at an excessive speed and that the impacted occurred after the sound of whistling tyres could be heard. He denied this and said that the speed control on his vehicle had been activated.

[30] The plaintiff confirmed that he was interviewed by a detective on 7 July 20 217 who had minuted a statement from him. In the statement he had said that there were no streetlights on the road but had made no mention of the speed control being activated. He stated that the oncoming vehicle played no part in the collision.

Gail de Pontes

[31] She is the wife of the plaintiff. She was notified of the collision by somebody on the scene and went there.

[32] On arrival she saw the BMW vehicle the plaintiff had been driving and an ambulance on the side of the road. She also saw the horse, which she was told was to be shot. She did not see a beige blanket on the horse.

[33] She visited the defendant's property some two weeks after the collision. The defendant was there. The defendant was emotional, which was the result of the recent death of his partner.

[34] The defendant paid her for the vehicle, less the value of the salvage in terms of a written agreement concluded between them.

[35] When there was an inspection of the property in 2019 the gate depicted in the photograph at paragraph [10] above was closed and secured by a padlock. There was no chain on the gate at the time of the inspection.

[36] The witness said that she had approached the defendant to pay her as she needed a vehicle. It was put to her in cross-examination that the defendant paid the witness as he felt sorry for her.

Summary of the evidence - defendant's case

The defendant

[37] The defendant identified the location of his property with reference to aerial photographs.

[38] He had recently moved to the area. He had brought his horses onto the property three days prior to the collision.

[39] He identified the enclosed area where his horses were kept with reference to an aerial photograph.

[40] He acquired a chain and a carabiner and secured the gate as shown on the photograph in paragraph [10] above. The chain and carabiner were fastened to the fence.

[41] The horse that died in the collision was a thoroughbred, which was brown with a white face and wore a beige blanket.

[42] The defendant's horses were secured in a fenced enclosure behind the gate depicted in the photograph reproduced in paragraph [10] above. The defendant on the Saturday evening before the incident had left the property in the afternoon and had secured the gate with the use of the carabiner as pictured in this photograph.

[43] At 6:30 on the Sunday morning of 25 June 2017 the defendant was in Kragga Kamma and was called to the property. He arrived on the scene of the collision at approximately 6:40/50. It was misty when he arrived.

[44] The defendant had nowhere else to keep his horse. He used a carabiner rather than a padlock.

[45] He had paid the plaintiff's wife for the vehicle because he felt sorry for her.

[46] The defendant conceded in cross-examination that anyone could have opened the gate of the paddock where the horses were kept. He, furthermore, conceded that had he locked the gate on the Saturday afternoon before the collision he would not have lost his horse.

Marie Lamont

[47] The witness, who was called as an expert, trains and sells show-jumping horses and bridles at her property in the area where the collision occurred.

[48] The entrance to her business is controlled by a gate with a delay switch.

[49] A horse would normally wander out of an open gate. A horse could not itself open the gate if secured in the manner shown in the photograph reproduced in paragraph [10], above. The horses has been adequately secured through the use of the mechanism in the photograph.

[50] In cross-examination she confirmed that humans leave gates open.

Kenneth Brown

[51] On the date of the collision the witness was living on the defendant's property in the double storey house he identified with reference to an aerial photograph.

[52] In the mornings the witness was often disturbed by annoying, loud tyre sounds emanating from the road.

[53] The defendant had not been living on the property for long at the time of the collision. When he moved onto the property he introduced himself and asked the witness to supply him with garage doors for his house. He wanted his existing doors replaced and motorised.

[54] The gate to the fenced off portion of the property occupied by the defendant, where his horses were also kept, was always secured with a chain. The previous owner also used the chain shown in the photographs reproduced in paragraph [10] above. The witness says he could always hear somebody opening the gate as the chain securing the gate made a distinctive sound.

[55] The defendant left the property the evening before the collision. The witness remembers hearing him closing the gate to the fenced area where he lived and where the horses were kept.

[56] The witness went to bed on the Saturday night before the collision at 22:00. Later that night the witness and his partner Carren were woken by the sound of an arriving car and heard knocking on a window. Someone by the name of Fransie, who had previously lived on the property had knocked on their lodger Vernon's window. Vernon lived on the ground floor of the house the witness and his partner occupied.

[57] Thereafter Vernon and Fransie went into the fenced area where the defendant's house was and where the horses were kept. They opened the gate. The witness saw car lights before he went back to bed. Later he heard and saw them come out of the fenced area. He did not take note of what they did with the gate. The rest of the evening was undisturbed, but he remembers that the horses sounded as if they were restless.

[58] The witness recalled that on the morning of the collision at 5:00 he heard the hoofs of a horse moving and saw a dark horse going past his house. His partner was also awake.

[59] The witness heard a car and the sound of tyres, which were quite loud. He had worked with cars for 20 years and was also a drag and top end racer. The sounds he heard were more high-pitched than usual. Then he heard a sound as if a bomb had gone off. He told his partner that a car had hit the horse. He went to the scene of the collision where he saw a BMW vehicle. The driver was sitting holding his head. He sent the defendant a text message advising him of the collision.

[60] Mr Brown's partner closed the gate to the fenced area where the horses were kept. It was open. According to him Vernon and Fransie had opened the gate.

[61] There was a lot of animal traffic on the road, which he regarded as a dangerous road for that reason. There were not many incidents of trespassing in the area although he was aware that somebody had been murdered in the surrounding vicinity. Other than the defendant's horses there was no more livestock on the property.

[62] The witness lived on the property for six months in all.

[63] On the morning of the collision the weather was cold, the grass was wet but it was clear with no rain or mist.

[64] The BMW vehicle driven by the plaintiff was severely damaged in the collision. The collision had occurred 50 metres from the witness' driveway. He had not heard any sound indicating that the BMW had braked prior to the collision.

[65] The BMW had been moved by the time the witness got to the scene. There were other people on the scene before the witness. His memory was vague but he seemed to recall seeing the plaintiff sitting on the gravel.

[66] The witness spoke to the defendant on the scene. The plaintiff could not speak.

[67] He did not look for brake marks on the road. What he saw on the scene was, in his view, not consistent with a high-speed collision. He had only heard one vehicle prior to the collision.

[68] He reiterated in cross-examination that Vernon and Fransie had opened the gate leading to the fenced area where the horses were kept.

[69] The witness continued living on the property for some three months after the defendant had moved there. He did not leave the property on good terms with the defendant.

Carren Michelle Lamprecht

[70] She is Mr Brown's fiancée. They lived on the defendant's property for six months.

[71] They normally did hear road traffic noise in the mornings. The road was busy with animals such as cows/dogs and cats. There was also movement of people on the road.

[72] On the Saturday before the collision she recalls the defendant being on the property in the afternoon. She did not see him leave.

[73] She heard a car arriving in the night. It was François Swanepoel who had arrived at the house (a.k.a. Fransie). He asked that they wake up Vernon, their lodger. After that she went back to bed. A few minutes later Mr Brown also came back to bed. A few hours later she recalls hearing what sounded like a horse moving outside their home.

[74] She heard a loud bang a few minutes later. She saw lights on the road as well as the BMW vehicle.

[75] The gate to the fenced enclosure where the defendant's horses were kept (depicting in paragraph [10], above) was open. She closed the gate with the carabiner.

[76] In cross-examination she stated that Vernon and Fransie had opened the gate shown in the photograph in paragraph [10], above during the night before the collision.

The issues to be determined

[77] A consideration of the evidence adduced in this matter and of the pleadings reaffirms that the principal issues to be determined in this matter are the following:

- 77.1. whether or not the defendant, negligently, breached his admitted duty of care to members of the public to take reasonable steps to prevent his horses from escaping from his property and gaining access to the road and, if so, whether his negligence was causally connected to the injuries the plaintiff sustained in the collision;
- 77.2. the possible negligence of the plaintiff and, if he was found to be negligent with regard to the collision, the extent, if any, to which his negligence contributed to the collision.

Did the defendant, negligently, breach his admitted duty of care?

[78] Given that the defendant's acceptance of the duty of care attributed to him the defendant had to have been aware of the fact that if the horses on his property were to stray onto the road, which was a public road adjoining the property, 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 horses from straying onto the road, particularly at night. ***Enslin v Nhlapo 2008 (5) SA 146 (SCA)*** at [4].

[79] It is not in dispute that the defendant, in fact, took certain steps to ensure that his horses did not intrude on the road. The horses were housed in a fenced enclosure, which was separated from the access road to his property that ran from the road by a gate ("the gate"). The gate was secured by means of a chain and a carabiner in the manner shown in the photograph referred to in paragraph [10], above. The evidence confirms that on the Saturday afternoon before the collision the defendant had secured the gate in this manner.

[80] As stated in *Enslin* at [5] with reference to *Mkhwanazi v Van der Walt 1995 (4) SA 589 (A)* at 594A-B it is an unfortunate fact of life that even though most people act with reasonable care most of the time, a normal degree of negligence is an everyday occurrence.

[81] In assessing the conduct of the defendant, thus, the real question is whether a reasonable person in the position of the defendant would have taken further precautions to prevent his horses from straying onto the road. It was the contention of the plaintiff in the particulars of claim that he was required to take one or more or all of the following allegedly reasonable steps:

- 81.1. installing a spring loaded delegate, alternatively, a gate it would automatically close if left open;
- 81.2. locking the gate;
- 81.3. installing double gates.

[82] In cross-examination and in argument the plaintiff seemed to confine himself to the defendant's admitted failure to secure the gate by means of a lock.

[83] In considering whether the defendant was required to have taken further steps to secure the gate the following objective facts must be borne in mind:

- 83.1. the access road to the fenced enclosure where the horses were kept was secured by only one gate, i.e. the gate to the enclosure. There was no gate at the entrance to the property where the access road joined the road;
- 83.2. the gate did not have an automatic closing mechanism, which would ensure that it could not be left open;
- 83.3. the gate, if left open, would, effectively, make the access road leading from the road to the enclosure part of the road. *Mkhwanazi* at 594C;
- 83.4. the defendant's concession in cross-examination that if he had locked the gate his horse would still be alive.

[84] The defendant's evidence and that of his expert that by securing the gate in the manner that he did, he had acted sufficiently reasonably in the circumstances as the area was relatively free from crime and trespassers was devalued by the further evidence adduced by him of Mr Brown and Ms Lamprecht that at the time of the collision the gate was open, allowing the horse to escape from the enclosure and intrude on the road. It is likely that the gate was left open by the persons known as

Vernon and Fransie. Whether or not they were the culprits does not really matter. The fact is the horse escaped, which can only be because the gate was opened during the night before the collision and left open, which allowed the horse to escape.

[85] In line with the authorities cited above I am of the view that it was indeed required of the defendant to take further steps to secure the gate, which could easily and inexpensively have been achieved by the use of a lock. The use of a chain and a carabiner were not sufficient to guard against those everyday occurrences of negligence by third parties, envisaged in the authorities referred to above (i.e., the gate being left open) and which should have been foreseen and guarded against by the defendant.

[86] By failing to secure the gate with a lock the defendant negligently breached the admitted duty of care and allowed for it to be left open by third parties and which would make it easy for the horses to escape. His negligence allowed the horse to escape and was thus causally linked to the collision and the injuries sustained by the plaintiff.

Was the plaintiff negligent?

[87] It is not disputed that the collision occurred whilst it was still dark. The plaintiff's visibility would also have been affected by the prevalence of mist on the road.

[88] Furthermore, the plaintiff's evidence that had the horse been stationary in the road he would have seen the horse and would have been able to take evasive action is not

disputed. From his evidence that all he saw in front of him in his windscreen at the time of the collision was an eye one must conclude that the horse came upon him suddenly, was moving at the time and approached him from one or other side of the road. This conclusion is supported by the fact that the horse was hit by his vehicle on its left rear side.

[89] It is difficult to find fault with the plaintiff's submission that a dark horse appearing at the last moment, in misty conditions, and in darkness, in front of his vehicle could not be avoided as there was no time to react. Where there is no opportunity to take evasive action to avoid a collision contributory negligence cannot be present.

[90] I, therefore, find that in respect of the collision the plaintiff was unable to avoid the collision and was not negligent.

Conclusion

[91] In the absence of contributory negligence on the part of the plaintiff, the defendant's negligence was the sole cause of the collision.

Order

[92] I accordingly make an order in the following terms:

1. It is declared that the defendant, in respect of the collision referred to in paragraph 3 of the particulars of claim, was causally negligent and is solely liable

for any damages the plaintiff may prove he suffered as a result of the collision at a trial on this issue, in due course.

2. The plaintiff is absolved from the instance in respect of the claim in reconvention.
3. The defendant shall pay the plaintiff's costs attendant on the trial of the issues separated in terms of the separation order.

O H RONAASEN

ACTING JUDGE OF THE HIGH COURT

Appearances:

For the plaintiff: Adv EC Labuschagne SC, instructed by Adams & Adams,
c/o Jacques Du Preez Attorneys, Port Elizabeth

For the defendant: Adv M Beneke SC, instructed by Joubert Galpin & Searle,
Port Elizabeth