

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: 40602/08

Heard: 11 November 2013

Delivered: 10 December 2014

In the matter between:

BUFFALO CONSERVATION 97(PTY) LTD**PLAINTIFF**

and

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO THE JUDGES: YES/NO
(3)	REVISED

[Handwritten signature and date 12/12/14 over the form]

MTSHALI DI**FIRST DEFENDANT****THE NATIONAL DIRECTORATE OF ANIMAL HEALTH****SECOND DEFENDANT****OF THE DEPARTMENT OF AGRICULTURE AND****ENVIRONMENTAL AFFAIRS OF THE REPUBLIC OF SOUTH AFRICA****THE MINISTER OF AGRICULTURE AND ENVIRONMENTAL****THIRD DEFENDANT**

JUDGMENT

BAQWA J

Delictual damages - stabilization of the buffalo population - prevention of Foot and Mouth and other related diseases in terms of the Animal Diseases Act - control of movement of buffalo - delictual action arising out of failure of veterinary officials to act - where repository of statutory power fails to take precautions to avoid damage - whether entitled to claim immunity in terms of section 27 of the Act.

Summary

During the period 2002-2007 plaintiff conducted a buffalo breeding project breeding "clean" buffalo from parent stock that were infested with comdor disease.

It was precluded from moving the buffalo it had bred without them first being tested for animal diseases and without written authorization from the Department and a permit authorizing their movement being issued. During or about September 2005 it requested officials of the second defendant Department to test the buffalo for the purposes of moving them. The Department tested the buffalo as requested. Thereafter though, the Department and its officials intentionally alternatively negligently refused to perform their statutory functions and in particular refused to test the buffalo or authorize movement of the buffalo – As a result of the failures the plaintiff was precluded from moving or selling the progeny buffalo and was compelled to keep and feed them thereby incurring costs it otherwise would not have incurred. Defendants defended the action on the basis that there was no merit in

the claim. The Defendants claimed protection in terms of Section 27 of the Animal Diseases Act 35 of 1984 which provides that:

“Except where otherwise provided in this Act, no person, including the State, shall be liable in respect of anything done or omitted in good faith in the exercise of a power or the performance of a duty under, or by virtue of this Act, or in the rendering of any service in terms of this Act, or in respect of anything which may result therefrom.”

Held : That a positive duty is imposed in terms of regulation 20 upon the defendants to register buffalo farms and to test all progeny born from the buffalo introduced. Testing is necessary for purposes of moving the animals from one farm to another farm under the authority of the reasonable State veterinarian. Failure to test the animals increased the risk of disease escalating in a buffalo farm resulting in loss or harm to the owner. This ought to be foreseeable by any reasonable person who would have guarded against conduct causing the plaintiff to suffer damages.

Held further, that defendants forfeited the immunity provided by Section 27 in the circumstances.

Annotations

Case law

Choice Decision v MEC Development and Planning & Local Government 2003

(6) SA 308 (w) par [7] at P301 and 311

Van Eden v Minister of Safety 2001 (4) SA 389 (SCA)

Simonstown Municipality v Dews and Another 1993 (1) SA 191 (A) at 196 H

Premier, Western Cape v Fair Cape Property Developers (Pty) LTD 2003 SA 13 (SCA) at 37B-C

Johannesburg City v Television Electrical Distributors 1997 (1) SA 157 (A) at 1641 – 1651

Kruger v Coetzee 1966 (2) SA 428 (A) at 430 E,

Mkhatswa v Minister of Defence 2000 (1) SA 1004 (SCA) par [19] to [22] at 1111 to 1112

Minister of Safety and Security v Van Duivenboden 2002 (6) SA 431 (SCA) par

Minister of Safety and Security v Carmichele 2004 (3) SA 305 (SCA) par [45] at 325

Nkumbi v Minister of Law Order 1991 (3) SA 29 (E) at 35E

Introduction

- [1] The is a delictual claim for various sums of money being damages suffered by Plaintiff as a result of Defendants failing to fulfill certain statutory duties in terms of the Animal Diseases Act 36 of 1984(the Act) and the Regulations promulgated pursuant thereto.
- [2] The Plaintiff is an operator of a buffalo breeding project at Magudu Game Reserve (Magudu) in the Northern part of Kwazulu Natal.

- [3] First Respondent is the Director: Veterinary Services in the North Region, Kwazulu Natal, approved as such by the Provincial Department of Agricultural and Environmental Affairs (Kwazulu Natal). He was incorrectly described by the Plaintiff as the head of the Department of Agricultural and Environmental Affairs of the Republic of South Africa. There was however no objection to the said citation of the first respondent.
- [4] The Second Respondent is the National Directorate of Animal Health of the Department of Agricultural and Environmental Affairs of the Republic of South Africa (the Department) being the responsible authority for the approval and registration of buffalo breeding projects in the Republic of South Africa.
- [5] The Third Respondent is the Minister of Agricultural and Environmental Affairs of the Republic of South Africa in her capacity as the political head and representative of the Department of Agricultural and Environmental Affairs.
- [6] When this case came before me the parties agreed that quantum and merits be separated. I accordingly made an order in terms of Rule 33(4) separating the issues as raised in paragraphs 5, 3,9,10 and 11 of the particulars of claim together with the issues relating to quantum in paragraph 7.3 and 12 of the Plea.

The Pleadings

[7] The Plaintiff seeks payment of the sum of R8 426 086.10 as damages and pleads that:

- 7.1 During the period 2002-2007 it conducted a buffalo breeding project breeding "clean" buffalo from parent stock that were infected with Corridor disease.
- 7.2 It was precluded from moving the buffalo it had bred without them first being tested for animal diseases and without written authorization from the Department and a permit authorizing their movement being issued,
- 7.3 During or about September 2005 it requested officials of the second defendant Department to test the buffalo for the purposes of moving them.
- 7.4 The Department tested the buffalo as requested.
- 7.5 Thereafter, the Department and its officials intentionally, alternatively, negligently refused to perform their statutory functions and in particular refused to:
 - 7.5.1 carry out further tests on the buffalo,
 - 7.5.2 authorise the movement of the buffalo or issue permits enabling

the buffalo to be moved or do what they were required to do under the Act and the Regulations in order to enable the Plaintiff to move the buffalo.

7.5.3 register the Plaintiff's breeding project or apply the protocol.

- 7.6 As a result of the failures the Plaintiff was precluded from moving or selling the progeny buffalo and was compelled to keep and feed them.
- 7.7 In keeping the progeny the Plaintiff incurred costs that it would otherwise not have incurred and did not earn interest that it would otherwise have earned and therefore suffered damages as a result of the Defendant's failures, in the amount of these costs and foregone interest.

[8] The Defendants contest the Plaintiff's claim on the basis that Plaintiff has not established that it made any request for testing for movement in or about September 2005 as pleaded or thereafter. They further base their contestation on the basis that the State veterinarian, Vryheid Dr Skhumbuzo Mbizeni could not have issued a movement permit when the Plaintiff's breeding project did not comply with the requirements of the protocol.

The background

- [9] The Act and the Regulations provide for the regulation of the keeping and movement of buffalo generally and the special requirements for projects raising "disease free" buffalo.
- [10] Buffalo carry and spread four diseases which are dangerous to South Africa's Agricultural industry namely, foot and mouth disease ("FMD"), bovine tuberculosis ("BTB") Corridor disease ("CD") and brucellosis ("CA"). Buffalo are not affected by FMD or Corridor disease being simply carriers.

These diseases are endemic to South Africa. Buffalo do however become ill if they are infected with BTB or brucellosis. Cattle become ill if infected with any of the four diseases and CD is generally fatal to cattle.

- [11] Corridor disease is spread through the bite of the brown ear tick (which is usually referred to as the "Vector"). The tick does not occur in all areas of South Africa, notably most of the Northern Cape and Free State, where brown ear ticks have not historically been reported and these areas are known as "vector free areas".
- [12] Some areas where the brown tick is present do not have Corridor disease. There are only two regions in South Africa which have Corridor disease. These are Northern KwaZulu-Natal and the Eastern Lowveld of Mpumalanga and Limpopo, adjoining the Kruger National Park. These areas are referred to as "corridor disease control zones."

- [13] It is because of the potential for buffalo to spread disease that their keeping and movement is controlled. Regulation 20A(1) of the Regulations provides that no person shall keep buffalo on any land that is not registered by the National Director of Animal Health ("the Director") while Regulation 20(1)(a)(v) of the Regulations provides that no person shall move any live buffalo from the land on which they are kept to any other land " *except under the authority of a permit issued by the responsible State Veterinarian and otherwise than in accordance with the conditions specified in such permit.*"
- [14] For the above reasons, no land outside of the Corridor Disease control zones was registered for the keeping of buffalo with Corridor Disease, and no buffalo from the Corridor Disease control zones could be moved outside of those zones (because they were presumed to be infected with Corridor Disease).
- [15] During 1997 and at the request of the South African National Parks, the National Directorate agreed to allow projects to be established to breed from parent stock infected with BTB, buffalo calves that would be free from all four of the main diseases. This was due to a concern that BTB could pose a threat to the survival of the buffalo population. These projects were intended to create a nucleus of genetic material for the future and were subsequently extended to include breeding from parent stock infected with Corridor Disease, buffalo calves that would be free from all four of the main diseases.

The Buffalo Advisory Committee

- [16] The National Department established a committee of experts, known initially as the Buffalo Policy Committee and subsequently the Buffalo Advisory Committee ("the BAC") to manage the risk of spreading disease such projects introduced because the buffalo bred in the projects would be permitted to be moved out of the corridor disease control zones and into areas in which the brown ear tick was present.
- [17] The BAC compiled a protocol for the management of disease risk ("the protocol"). The protocol initially dealt with buffalo breeding projects but was subsequently expanded to regulate both the keeping and movement of buffalo generally. The protocol was a living document encompassing scientific knowledge about the risks involved in such projects and it was improved, adapted and modified on an ongoing basis. In relation to breeding projects, the protocol contained extensive specifications in relation to physical requirements for the facilities such as separate quarantine facilities for adult diseased buffalo and clean calves, single locked access gate accessible to only authorized personnel, work uniforms for personnel and an exclusion zone completely clear of vegetation. The protocol also required extensive monitoring, supervision and record keeping.
- [18] From 2000, the protocol included a requirement that all projects be approved by the National Director and registered.

- [19] The protocol also prescribed a series of stages to be followed in the raising of clean buffalo by a project, with tests to be carried out for Corridor disease during each stage, before any buffalo born in a project could be released onto a farm which was outside the Corridor disease control zone. Three tests were prescribed initially but subsequently five tests were required.
- [20] The BAC's main functions were to recommend and amend buffalo policy, evaluate and advise the national director regarding applications for new projects and recommend actions to address problems in existing projects. Approximately 22 projects were subsequently registered in Corridor disease control areas and a further six in vector free areas.
- [21] The protocol was subsequently declared *ultra vires* the Act read with the Animal Diseases Regulations promulgated in terms thereof in a judgment by Van der Merwe DJP in an application brought by the Plaintiff against the Defendants in Case No. 10419/07. The judgment was delivered on 8 January 2008 ("The protocol judgment").

The Phinda Project

- [22] The facts regarding the Phinda Project are succinctly summarized in the protocol judgment as follows:

"In 1996 a TB quarantine facility was established at Phinda Private Game Reserve ("Phinda") which is situated in the northern regions of Kwazulu Natal. According to the applicant the quarantine facility was operated in close collaboration with the national and provincial departments of veterinary services to identify animals infected with TB, which animals would then be put down. This appears to be common cause. From this TB program, a further program developed during 1997 in which so called disease free buffalos were being bred from parents only infected with corridor disease. The applicant states that the department and its officials were aware of this breeding project. Members of the department's staff visited the breeding facilities and assisted the applicant with the carrying out of tests and the taking of blood samples. Members of the department's staff also inspected the facilities at Phinda and approved of the breeding project. Overseas visitors were even brought to Phinda to visit/view the breeding project and its facilities.

The first respondent, who took over from Dr D.B Weaver as director of veterinary services for the province of Kwazulu Natal in 2005, denies that the department and/or its officials had any knowledge of or approved the breeding project, Dr Weaver in a supporting affidavit to the replying affidavit refutes the first respondent's denial. So does Dr M.J.Nel who worked as a State veterinarian under Dr Weaver until she resigned in the beginning of 2003. Prior to that she was the person on behalf of the department who had direct contact with the quarantine and breeding projects. Dr Nel states

categorically that her superiors, including members of the department were aware of and condoned the applicant's breeding project.

The facilities at Phinda were made available by the owners thereof for a limited time only. The quarantine project at Phinda also drew to an end during the latter part of 2003. Breeding facilities were constructed at Magudu at a cost in excess of R 1 million. All the animals used in the breeding project were then relocated to Magudu."

For the sake clarity I should mention that the plaintiff in the present case was the applicant and the defendants were the respondents in the judgment referred to above. Over and above the declarator the Court also ordered the respondents to take steps to test certain buffalo and in the event of those buffalo testing negative, to grant authorization for the movement of such buffalo. The Court Order was carried out as ordered. The judgment was not appealed against.

The Magudu Project

[23] The Magudu Project was built by the plaintiff as a dedicated facility for the raising of disease-free calves in or around 2002.

[24] At the end of 2003 plaintiff moved about 48 Buffalo, infected with Corridor disease from Phinda to Magudu to be what it described in correspondence in

September 2003 as “the nucleus of a clean breeding project the(plaintiff) is establishing.”

[25] In Van der Merwe DJP’s judgment (supra) the following is stated:

“The applicant states that the relocation of the parent stock infected with Corridor disease (and used in the breeding at Phinda) to Magudu, took place with the full knowledge, consent and co-operation of the department and the staff of the provincial veterinary services, Kwazulu Natal. This is confirmed by Weaver and Nel.

In his answering affidavit the first respondent merely states that the applicant did not operate a breeding a breeding project and that any movement of buffalo would have been illegal. It is the applicant’s case that the breeding project at Magudu was for all intents and purposes a continuation of the breeding project previously established at Phinda. The breeding project at Phinda was not registered by and stated in the protocol referred to earlier. When the relocation to Magudu took place Dr Weaver advised the applicant that written approval of the breeding program was required.”

[26] The plaintiff submitted an application for the registration of the project at Magudu in a letter which was addressed to the provincial director, Dr Brian Weaver dated 15 September 2003.

[26] The application was considered by the BAC at its meeting on 10 and 11 March 2004. The BAC resolved to recommend that no new applications for

registration are accepted because, the risk of spreading disease through the movement of buffalo raised in such projects appeared to be unacceptably high. Because of this resolution, the BAC decided not to recommend the plaintiff's application for registration as a project.

[27] Despite this development, in the 2004 the plaintiff's farm manager requested Dr Mbizeni to test the buffalo in the facility for purposes of moving them to a farm in Lichtenburg which was situated outside the corridor disease control zone. Dr Mbizeni refused this request on the basis that he had no knowledge of the project and that he had not been involved in its establishment or operation.

[28] This resulted in the plaintiff contacting Dr Dave Cooper in early 2005. Dr Cooper was a veterinarian employed by the Kwazulu Natal Parks Board who had assisted the plaintiff with its BTB salvage project at Phinda. He sought his assistance for the reconsideration of the BAC's decision not to register the facility. Dr Cooper persuaded Dr Ron Bengis, the chairperson of the BAC, to place the plaintiff's application before the BAC for reconsideration.

[29] The plaintiff's application was again placed before the BAC's next meeting on 14 April 2005. At that meeting the BAC decided that it could not consider the application without more information about the project regarding *inter alia* the supervision and test results of the buffalo born from the project.

[30] Consequently, Dr Dumisani Mtshali who had taken over from Dr Weaver as the provincial director around this time, instructed Dr Mbizeni to inspect the plaintiff's facilities. Dr Mbizeni carried out an inspection in mid-June 2005, accompanied by Dr Archibald and Dr Cooper.

[31] A further meeting of the BAC was held on 12 October 2005. The full minutes of the meeting of the BAC on 14 April 2005 and 12 October 2005 regarding the plaintiff's application read as follows:

"Owner built facility at Magudu and moved 60 TB and FMD free breeding stock from the Phinda Project to there, but never applied for registration of his Magudu facility. From Magudu batches of disease free buffalo were sold to NW Province (Litchenburg) two years ago.

- *The meeting argued that it is not really a new project, but only the movement of the same breeding stock to another facility.*
- *According to the protocol no new registrations of CD infected projects are allowed since September 2002.*
- *The meeting in principle is prepared to consider the application, but a formal letter from the KZN Veterinary Authorities, supporting the application and containing information on the test results in the calves, any additions to the project and extent of expansions since the decision was made for no new projects, supervision and record keeping is required.*

- *The Buffalo Advisory Committee sympathises with the request and KZN (in the absence of a representative from the Province at the meeting) will be encouraged to liaise with the chairperson of the committee in this regard.*
- *The first five bullets are taken directly as was in the previous minutes.*
- *The formal letter from KZN Veterinary Authorities is still pending and the Committee's decision was that this point will thus stand over until the requirements are met.*
- *Comments and queries:*
 1. *Why did this farm not apply initially to be registered, because these changes were discussed before the moratorium on registrations?*
 2. *Too few activities were done under supervision.*
 3. *The records were inspected by Dr Mtjali and to his meaning are very good and the facilities are excellent.*
 4. *All documentation and records need to comply to the protocol laid down.*

5. *It must be kept in mind that these buffalo were originally translocated from a TB rescue project to a corridor infected project.*
6. *There is currently no market for corridor infected buffalo."*

[32] After many attempts to get some clarity from the first respondent, the plaintiff was notified that its application to register a buffalo breeding project was not granted.

Application of law to the facts

[33] Regulation 20 (of the Regulations promulgated under the Act) restricts the movement of buffalo from the land on which they are kept to any other land *"except under the authority of a permit issued by the responsible state veterinarian and otherwise in accordance with the conditions specified in such permit."*

[34] Regulation 20A deals with the keeping of buffalo and provides *inter alia* that *"no person shall keep buffalo on any land which is not registered by the director for this purpose."*

[35] In his judgment in the "protocol case" Van der Merwe DJP stated as follows:
"In my judgment neither regulation 20 nor regulations 20A deal in any way with the registration of a buffalo breeding project. I am satisfied that the first

and second respondent's requirement that buffalo breeding projects which make use of infected parents to breed progeny which is clear of any of the buffalo diseases is ultra vires the Act read with the regulations promulgated in terms thereof."

[36] It is common cause that subsequent to the BAC meeting of 12 October 2005. it was Dr Mtshali's responsibility to ensure that a formal letter be prepared by the Kwazulu-Natal Provincial Authority in his capacity as Director Veterinary services in the North Region, Kwazulu – Natal. The evidence of Mr Greef establishes the fact that apart from Drs Nel, Cooper, Weaver and Bagnall who were all aware of the breeding project, Dr Mtshali was equally aware and had inspected the facilities at Magudu. It was therefore suprising that Dr Mtshali is the person who refused plaintiff's application to register a buffalo breeding project. He did so without following the applicable procedures. He did so without obtaining the advice or input of the Buffalo Advisory Committee and whilst fully cognisant of the fact that the said Committee was awaiting a formal letter from his province. He took the decision not to register the project in circumstances where it was the prerogative of National and not the provincial authorities to make the said decision.

[37] It would also have been helpful for Dr Mtshali especially in relation to the refusal of plaintiff's application to assist this Court with an explanation of his actions but he was not called as a witness. Instead, his subordinate, Dr

Mbizeni was called to testify. This failure to call Dr Mtshali as a witness on this crucial aspect cannot but weaken defendants' defence to plaintiff's claim.

The Act

[38] Mr Redding S.C, for the defendants, submits that Section 27 expressly excludes liability for acts done or omitted "in good faith" and that it only permits a right of action for acts done or omitted in bad faith i.e. mala fides.

[39] Section 27 provides: "*Limitation of Liability*
Except where otherwise provided in this Act, no person, including the State, shall be liable in respect of anything done or omitted in good faith in the exercise of a power or the performance of a duty under, or by virtue of, this Act, or in the rendering of any service in terms of this Act, or in respect of anything which may result therefrom."

[40] Arguing to the contrary, Mr Stockwell S.C submits that State authorities are required to exercise their powers within the four corners of the enabling legislation and that conduct beyond a State official's authority or conduct which is not authorized, will be invalid and unlawful.

Choice Decision v MEC Development and Planning & Local Government
2003(6) SA 308(w) par [6] and [7] at P301 and 311,

Minister of Safety and Security v Van Duivenboden 2002 (6) SA 43 (SCA)

Van Eeden v Minister of Safety and Security 2001 (4) SA 389 (SCA)

He submits that Section 27 does not afford the defendants a defence and in that regard refers to the case of:

Simonstown Municipality v Dews and Another 1993 (1) SA 191 (A) at 196 J where Corbett C J held that:

"The person sought to be held liable must show he acted within the authority conferred by the power in question. It necessarily follows that if, owing to a failure to exercise due care or to take reasonable precautions, he exceeded the power and acted without authority, he will be unable to establish requirement (b) and his reliance on S87 must fail."

[41] From the evidence before me it is evident that the Department was aware that registration was neither provided for in the Act nor the Regulations. Notwithstanding the aforesaid, the Department proceeded to not only to require registration but also refused to render any of the services they were otherwise required to render and which they had previously rendered by reason of the plaintiff's buffalo breeding projects not being registered.

Dr Mbizeni was quite emphatic that he would not test the buffalo for relocation purposes unless the breeding project was registered. In my judgment this attitude was adopted regardless of the consequences to the plaintiff of the omission by Dr Mbizeni and other officials. This is conduct akin to what Corbett C.J referred to in the **Simon's Town Municipality** decision (supra) when he said: *"It was appellant's general contention in the Court below (and the same contention is advanced on appeal) that this Section created a legal*

immunity in favour of a person who in good faith exercises a power conferred by or under the Act even in cases where the person concerned is 'negligent; in the sense that in exercising the power he fails to take reasonable precautions to eliminate or minimize the risk of injury which his action may cause others. This is far reaching proposition. It would provide a licence to persons exercising, for example, the fairly drastic powers under part VI of the Act to do so carelessly and without proper regard for the interests of others, provided only that they did so in good faith. The potentially devastating consequences of such conduct are manifest. In the circumstances it would, in my opinion, require clear language to establish such a legislative intent."

[42] From a reading of the Act it is quite evident that the defendants owed the owners of breeding projects a statutory duty to test progeny. A fortiori in circumstances where officials of the department had already co-operated with and assisted the plaintiff, by turning their backs on him they failed to exercise the degree of care they were required to exercise in the circumstances.

This omission is stark when one compares the actions of Drs. Weaver and Nel to those of Drs. Mtshali and Mbizeni who were their successors. This much is evident even from the judgment of Van der Merwe DJP (supra). In my view there can be no question that the Department's conduct was not in accordance with the provisions of the Act, thus rendering the defendants liable for the proven damages they had caused.

Premier, Western Cape v Fair Cape Property Developers (Pty) Ltd 2003 (6) SA 13 (SCA) at 37B-C,

Johannesburg City Council v Television Electrical Distributors 1997 (1)
SA 157 (A) at 1641 – 1651

In my judgment therefore, the issue of *bona fides* does not even arise for consideration as any defence premised upon Section 27 fails on the first leg of the enquiry.

[43] Defendants have argued in the alternative that even if the defendants acted *ultra vires* their powers by insisting upon registration, they were not outside their authority when refusing to test the calves born within the breeding project. This defence is premised upon an allegation that the plaintiff failed to comply with the protocol. It is notable that this was never introduced as a defence in the defendants' plea. It is therefore impermissible to raise this defence only at a later stage as this could be tantamount to an ambush on the plaintiff's claim. Lastly it is common cause that the protocol is no more than a mere guideline.

[44] That the facilities at Magudu were excellent is evident even from the minutes of a BAC meeting held in October 2005. It goes without saying that had the Provincial Veterinary Services complied with their statutory obligation and with their own protocol, they would have visited and inspected the buffalo breeding project at Magudu. When so visiting they would have rendered advice regarding the facilities and their perception of the required record keeping. It is quite clear from the evidence before me that plaintiff intended to

comply with the legal prescripts and collaborate with the defendants' officials at all material times.

This is evident from its numerous efforts to knock on defendants' doors to ensure compliance with the legal requirements. Plaintiff invested considerable funds in an effort to produce an excellent environment for the breeding project. This was in line with the National effort to create stability within the buffalo population. Had the department spelt out any further requirements to the plaintiff, those requirements would have been implemented and adhered to. Sadly, he was stonewalled and his applications were rejected with the authorities adopting a supine attitude with regard to the Magudu project.

[45] It is also notable that in terms of its own protocol the Provincial Veterinary Services were required to regularly inspect buffalo breeding projects. They were required to do so on a fortnightly basis. Not only did the department not visit Magudu on a fortnightly basis, but they also failed to balance buffalo registers with the parent stock in the project. Needless to say, had a buffalo register been called for at their first or one of their earlier visits and had it been found to be absent or non-compliant, a register, as required, would have been introduced. Thereafter there would have been compliance with the requirements of the protocol.

[46] Plaintiff submits, and I accept, that the defendants are clutching at straws in

their attempt to rely on alleged non-compliance by the plaintiff with the provisions of the protocol. This is particularly the case where the defendants themselves failed dismally to comply with their own requirements as set out in the protocol. The bio-security document prepared by Dr Mbizeni after his visit in 2004 was never forwarded to plaintiff. Further, I find it quite disingenuous for Dr Mtshali to have refused to register the buffalo breeding project having previously opined that the recording keeping was “very good” and the facilities “excellent”.

The law of delict

[47] Conduct will be seen as negligent when the reasonable man or bonus paterfamilias, in the position of the person whose conduct is under consideration, would in the circumstances of the case have foreseen that an omission would cause damage to the plaintiff, would have taken steps to guard against such damage or loss from occurring and the person in question having failed to take such steps.

Kruger v Coetzee 1966(2) SA 428 (A) at 430 E, Mkhatswa v Minister of

Defence 2000(1) SA 1004 (SCA) par [19] to [22] at 1111 to 1112,

Minister of Safety and Security v Van Duivenboden 2002 (6) SA 431

(SCA) par[2] at 441 and par[23] at 448,

Minister of Safety and Security v Carmichele 2004 (3) SA 305 (SCA) par

[45] at 325

The test to be applied is a subjective test and should be distinguished from the objective test which is applied when determining wrongfulness

Nkumbi v Minister of Law and Order 1991(3) SA 29 (E) at 35E

[48] Applying the aforesaid to the facts of this case, it is evident that a positive duty is imposed in terms of regulation 20 upon the defendants to register buffalo farms and to test all progeny born from the buffalo introduced. Testing is necessary for purposes of moving the animals from one farm to another farm under the authority of the responsible State Veterinarian. Failure to test the animals increased the risk of disease escalating in a buffalo farm resulting in loss or harm to the owner. This ought to be foreseeable to any reasonable person and the reasonable man would have guarded against conduct causing the plaintiff to suffer damages.

[49] It is apposite to refer to the enunciation of the law in this regard in **Olitzki Property Holdings v. State Tender Board and Another 2001 (8) BCLR 779 (SCA) 2001 (3) SA 1247 (SCA)** par 12 where Cameron JA (as he then was) pronounced: *"The conduct is wrongful, not because of the statutory duty per se, but because it is reasonable in the circumstances to compensate the plaintiff for the infringement of his legal right. The determination of reasonableness here in turn depends on whether affording the plaintiff a remedy is congruent with the court's appreciation of the sense of justice of the community. This appreciation must unavoidably include the application of*

broad considerations of public policy also determined in the light of the Constitution"

[50]

The same proposition is stated differently in Steenkamp No v Provincial Tender Board, Eastern Cape 2007 (3) BCLR 300 (CC) par 41 where Moseneke DCJ stated: *"Therefore shortly Stated, the enquiry into wrongfulness, is an after the fact, objective assessment of whether conduct which may not be prima facie wrongful should be regarded as attracting legal sanction. In Knop v Johannesburg City Council; the test for wrongfulness was said to involve objective reasonableness and whether the boni mores required that "the conduct be regarded as wrongful." The boni mores is a value judgment that embraces all the relevant facts, the sense of justice of the community and considerations of legal policy. Both of which now derive from the values of the Constitution."*

[51]

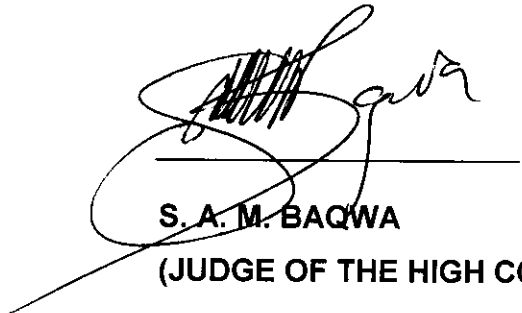
In casu, even if it could be suggested that the plaintiff established the breeding project in pursuit of economic interests, it is an established fact that the control of diseases such as Corridor disease and FMD have a direct impact from an economic point of view in regard to the livestock industry including the maintaining exports of animals products and other agricultural products. Maintaining a healthy buffalo population is therefore in the national interest. It is in this context that the *boni mores* come into play in considering the manner in which plaintiff was unfairly thwarted by officialdom. It ought to be compensated even in the delictual sense.

[52] In my judgment the defendants ought to have foreseen the harm that would befall the plaintiff and taken steps to avoid that eventually. They did not.

[53] In the result, I grant an order in the following terms:

[54] It is declared that the defendants are jointly and severally liable for such damages as the plaintiff may be able to prove it has suffered, as claimed in paragraph 7.3 and 12 of the plea, arising from the defendant's failure to test the calves born from the buffalo breeding project conducted on the farm Magudu.

[55] The Defendants are directed to pay the plaintiff's costs of the proceedings, such cost to include the cost consequent upon the employment of Senior Counsel.



S. A. M. BAQWA
(JUDGE OF THE HIGH COURT)

Counsel for the Plaintiff:

Adv R Stockwell S.C

Instructed by:

Messrs Harvey Nossel & Turnbull

Counsel for the Defendant:

Adv A Redding S.C

Adv M Wesley