

PANHOWE FARM (PVT) LTD
versus
J MANN & COMPANY

HIGH COURT OF ZIMBABWE
KARWI J
HARARE, 4 July 2002 and 26 April 2004 and 9 June, 2004

Civil Trial

BMM Mujeyi, for plaintiff
A.M. Gijima, for the plaintiff

KARWI J: Plaintiff instituted legal action in this court claiming from the defendant.

- a) Payment in the sum of \$143 864.57.
- b) Interest thereon at the prescribed rate from the date of demand to date of full payment.
- c) Cost of suit.

In his declaration, the plaintiff claimed that on 13th September 1997, five hundred heads of cattle belonging to the defendant had strayed onto plaintiff's farm. The parties own neighbouring farms. In doing so, the plaintiff alleged that the defendant's cattle caused damage to three hectares of green mealies and half a hectare of cabbage. He further alleged that the total damage to both the maize and the cabbage was \$143 864.57. Dr I. Mandaza, a Director of the plaintiff's company, gave evidence in court to that effect and gave a breakdown of the damage to the crop.

Defendant called three witnesses who gave evidence. Mr Bester, who was at the material time defendant's manager told the court that on the 13th September 1997 he went to the scene and found his cattle herdsman rounding up his cattle and attempting to separate plaintiff's brahman bull from the witness's sussex cows. He stated that the plaintiff's bull had been a source of problems on several occasions prior to the incident in question and that he had repeatedly told plaintiff's staff to pen the bull at night as the bull had continuously broken through the boundary fence and trespassed onto the defendant's farm to access defendant's cows.

Mr Bester further stated in his evidence that on that occasion plaintiff's

brahman bull had broken through the fence to the defendant's sussex cows and bull. The bulls had fought resulting in plaintiff's bull returning to plaintiff's farm through the broken fence through which a limited number of defendant's cows strayed through the broken fence. He also stated that a small number of his cows had strayed to the plaintiff's maize and cabbage patches which were 10% damaged. He was of the view that the damage was minimal and did not agree with the extent of damage alleged by the plaintiff. The witness further said that plaintiff's bull had caused damage to defendant's fence and had it not been for his attempts to maintain the fence in proper order, more damage would have been caused to plaintiff's maize and cabbage patch.

The defendant also called Kabson Kanengoni who was the defendant's foreman at the time. He said in his evidence that he had physically gone over to plaintiff's premises to inspect the damage. He noted that the plaintiff's cabbage patch was very small and had few thriving cabbage plants and a small plot of maize. He said that from his observation, only a few cabbages were trampled on. There was not much harm on both the maize and cabbage, suggesting that defendant's cattle had only been there for a limited time. He noted that the maize patch was barely interfered with as very few plants had been broken. He also said he observed that the boundary fence separating the plaintiff and defendant's farm and the surrounding bushes were broken badly, suggesting that a fight had taken place between the plaintiff and defendant's bulls. Defendant also called a Mr Paul Falkenberg who is a claims assessor in Agricultural Insurance Claims. He obtained evidence from defendant's employees before compiling his report. In his report, *inter alia*, he stated that 25% of the maize crop was damaged according to information he had obtained from defendant's employees as the cattle had been in plaintiff's field for about one hour. He added that the maize field could have been completely destroyed if the cattle had been in the field for about four hours. He added that there was little damage to the cabbages. It is important to note that Mr Falkenberg did not inspect the damaged fields but relied on information obtained from defendant's employees before he compiled his report. In his evidence, Mr Falkenberg said from his information there were at least 79 heard of cattle which strayed onto plaintiff's maize and cabbage fields and that the number of cattle involved could have easily wiped out a whole maize field.

This matter falls under the delictual claim of *actio de pastu*. This action allows one to recover in respect of harm done to land by domesticated animals

trespassing therein and through the destruction of crops. Liability is strict and is based on ownership, the rationale being that the person gets the benefits of another's grazing. The requirements for liability are:

- a) damage to plants, crops or pastures
- b) a domesticated animal trespassing onto plaintiff's property
- c) a casual link between the harm and the trespassing
- d) the defendant must be the owner of the cattle
- e) harm must be caused through the eating of plants
- f) the animal must have acted on its own volition.

There is no doubt, in my view, that there was damage to the crops despite defendant's protestations. The damage to the crops was clearly narrated by Dr Mandaza for the plaintiff and to that extent defendant admits that damage was caused.

Defendants admit that 10% or 25% damage was caused. The issue to be decided is how much damage was caused. It is agreed that some damage was caused. It is also common cause that it was defendant's cattle which caused the damage and the damage was to the maize and cabbage crops. It is also common cause that the damage was caused through the eating and trampling upon the plaintiff's plants. What is also an issue is whether or not the cattle acted on their own volition.

The following defences are available to a party facing this action:

- a) that the plaintiff was to blame for the animal's action;
- b) that there was negligence on the part of the controller of the animals;
- c) that someone else or something else provoked the animals thus it did not behave from inside vice or excitement;
- d) that the plaintiff was not lawfully on the premises;
- e) *volenti non fit injuria*

The defendant appears to be raising two conflicting defences. The first one is the one told to F & M Associates Adjusters (Pvt) Ltd, for whom Mr FaLkenberg works. According to that version of events, contained in a letter dated 25th June 1998 to the plaintiff's legal practitioners, the defendant's cattle broke out of their paddock because of the plaintiff's Braham bull which jumped the fence and fought with the defendant's bulls. In the ensuing melee, the common boundary fence between the plaintiff's property and that of the

defendant was broken. This allowed the defendant's cattle to then move onto the plaintiff's farm. The conclusion reached by the Loss Adjuster is that the proximate cause of the plaintiff's loss was the result of the plaintiff's bull jumping the fence and the ensuing confrontation with the bulls from Brock Park Farm, which were defending their territory thus the fence, was broken.

The second defence is the one held by the defendant in its plea. According to this version of events, the plaintiff was at fault because its bull caused damage to the common boundary fence, which allowed the defendant's cattle access to plaintiff's farm.

From the above defences and the plaintiff's version of events, it is clear that defendant's cattle damaged the plaintiff's crops. It would appear clear to me that acting on their own accord and volition, the defendant's cattle strayed into the plaintiff's field and destroyed the maize crop as well as seriously damaging the cabbage crop. Liability in this type of action is strict and is based on the ownership of the cattle. See *Vanzyl v Van Biljon* 1987(2)SA372. In the case of *Bwanya v Matanda*, SMITH J discussed a number of case authorities which included, *Heren v Skinner*, 1970(2) RLR 105, *Pieters v Betha*, 1989(3) SA1007(1), *Potgieter v Smit*, 1985(2) SA4909(D), *Vanzyl v Kotse* 1961(4) SA214(1) and had this to say at p. 551:-

"The principle of casualty was still part of the *actio de pastu* and was the basis of the strict liability that adhered to the owner of the animals in other words, the action is applicable where an animal gains access to another person's pastures or crops without the intentional involvement of its owner or of anybody else and it therefore acts from its own volition."

In *Pieters vs Betha* supra, KIRK-COHEN J said that fault on the part of the injured party may validly be raised as a defence to the *actio de pastu*. That does not, however, affect the principle that the basis of the liability of the cattle owner is his ownership of the cattle which caused the damage.

In this case, I do not find any fault on the part of the plaintiff. Even if one were to accept that plaintiff's bull broke the boundary fence, defendant's cattle, on their own volition strayed onto plaintiff's pastures and crops and damaged them. Defendant owed the plaintiff a duty of care.

I therefore find the defendant to be liable for the damage to the plaintiff's crops.

The next issue to be decided is the quantum of damages. In his declaration, the plaintiff set out damages which he claims as follows:-

“Plant population per hectare	\$ 37 037.00
Cost per cabbage	\$ 1.50
Expected outcome per hectare	\$ 55 555.50
Hectares destroyed	
3	
Total expected outcome	\$ 166 666.50

Damage to cabbage crop

Plant population	22 000
Cost per cabbage	<u>\$ 2.00</u>
Total expected both crops	<u>\$ 210</u>
<u>666.50</u>	

Less expected expenditure

Maize

Fertilizer a bag	12	
Cost per bag	<u>\$129.50</u>	
Total cost		\$ 23 400.00
Labour cost		<u>\$ 11 111.10</u>
Transport to market		<u>\$ 36</u>
<u>005.10</u>		

(It must be noted there is a figure missing above)

Cabbages

Fertilizer bags AN 6	\$747.00	
Pesticide 10kg DITH	\$814.00	
Labour	\$12 864.00	
Transport to market	\$ 8 800.00	
\$ 23 225.00		
Expected expenditure for both crops		\$ 59
230.10		
Total loss (A-B)		\$ 151 434.40
Less error allowance at 5%		<u>\$ 7</u>
<u>571.83</u>		
Total loss		<u>\$ 143 864.57</u>

The defendant queried the issue of 3 acres that was written under “labour cost for 3 acres” for maize instead of 3 hectares which appeared in the same list. Dr Mandaza explained that it was a typographical error to refer to 3 acres. I accept Dr Mandaza’s explanation. It is a simple matter of a mistake in typing. One would understand this in view of the fact that on the top of the same list, there appears a figure of 3 hectares.

Dr Mandaza was a clear witness who gave his evidence well and I find that a man of Dr Mandaza’s integrity and standing would not misrepresent facts to this court. I therefore accept his explanation as a typographical error in his declaration which referred to acres instead of hectares.

In his submissions, the plaintiff states that the amount that the plaintiff

claimed is reasonable for the amount of damage that was occasioned by the defendant's cattle. He further submits that at very least the plaintiff must be awarded at least 90% of what it is claiming. This is a fair assessment, taking into account the claim by the defendant that the damage was only 10% of the whole crop. This, plaintiff submits, would also address any error on the part of the plaintiff in the manner that the claim as a whole was set out.

The defendant in his submissions states that Mr Falkenberg's oral evidence disclosed that 25% of the maize crop could have been damaged in terms of information given to him, if the defendant's cattle had been the plaintiff's field for one hour, but it was possible for it to be completely damaged, if they had been there for up to four hours. Defendant further submitted that Mr Falkenberg's estimate of 25% damage to the maize crop should be preferred, because the one-hour time estimate was supported by Kanengoni. On the damage to the cabbages, defendant says that the crop was half an acre but had very little damage. Defendant submitted that the claim for the cabbage crop must therefore be reduced considerably as most witnesses had agreed that the damage was very little.

Plaintiff says he is entitled to 90% of the claim and defendant says he is prepared to accept 25% damage to the maize crop and little damage to the cabbage crop. The plaintiff did not state the basis upon which it is satisfied with 90% of its claim. I also note that obviously not all the maize crop was damaged. This was conceded by the plaintiff, yet the claim is based on total damage. Plaintiff however submitted that there was considerable damage to his maize crop and that the cabbages were not eaten up but trampled upon. It is clear there was no total damage to both crops. I am prepared to accept that there was more damage to the maize crop than the cabbages. It must also be noted that there was no eyewitness to the incident. Nobody knows for how long precisely the 79 odd cattle were in plaintiff's fields. Defendant conceded that total damage would have been caused to the maize crop if the cattle stayed in the field for about four hours. It is however clear from the evidence of most witnesses that there was substantial damage to the maize crop. I am of the opinion that 75% damage to both crops would be an accurate and appropriate figure as the quantum of damages suffered by the plaintiff.

It is therefore ordered as follows:

- 1) Defendant pays the plaintiff in the total sum of \$107 343.42.
- 2) Interest thereon at the prescribed rate from the date of demand to date

- of payment in full.
- 3) Costs of suit.