

VALERIE JANDLES
versus
GEORGE MUDANGA

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 25, 26 January 2016 and 9 March 2016

Civil trial

O. D. Mawadze, for the plaintiff
T. I. Gumbo, for the defendant

TAGU J: The plaintiff (Valerie Jandles) issued out summons against the defendant (George Mudanga) on 3 July 2012 claiming US\$10 233.00 (Ten Thousand Two Hundred and Thirty Three Dollars). The amount claimed by the plaintiff in the summons pertains to damages suffered by her as a result of the defendant's 52 herd of cattle straying from his farm into the plaintiff's farm and thereby grazing, eating and damaging the plaintiff's crops which were at the transplanting, flowering and harvesting stage causing the plaintiff to lose entirely the said crops. The crops damaged included tobacco seedlings, sugar beans, maize and vegetables.

The plaintiff also claimed interest at the prescribed rate as well as costs of suit on a legal practitioner and client scale against the defendant.

The defendant denied liability culminating in the matter being referred to trial.

In his plea to the claim the defendant stated among other things that "in actual fact the plaintiff is the one who borrowed the defendant's bull for purposes of breeding. The defendant accepted this and the bull was in the custody of the plaintiff at her farm in her pens. The defendant leant that the bull is the one which broke the security fence of the defendant and thereby caused other cattle to stray into her crops and destroy it. In the circumstances the damage which was caused by her cattle as a result of the acts of the bull in question cannot be attributed to the defendant and by virtue of having taken in the bull into her custody for purposes of breeding she assumed liability for any damage which would arise as a result of the acts of the bull in question."

The joint pre-trial conference minute by the parties raised two issues for consideration during trial which were:-

- 1) Whether or not it were the defendant's cattle that strayed into Plaintiff's farm and caused damage to her crops?
- 2) If the answer to the above is in the affirmative, what is the quantum thereof?

I would firstly deal with the first point of consideration placed for trial by the parties.

1) Whether or not it were the defendant's cattle that strayed into the plaintiff's farm and caused damage to her crops.

The plaintiff in her evidence- in- chief submitted that the defendant is her neighbour at No. 34 Chicago Farm Corburn Estates. She knew the defendant's 52 herds of cattle and that it was not the first time for the cattle to stray onto her farm. Further, she said that the defendant's cattle have long yellow and green ring tags and some have blue tags depending on where the cattle had been bought from. In addition to that the defendant had a mixed breed (i.e brahmans and hard mashona type/herford). She further said that with cattle if one does not know the owner, you leave them and they lead one to their place.

The plaintiff told the court that one of her workers impounded some of the cattle which had caused the damage to the crops. When she arrived some of the cattle were still in the fields including the defendant's wild bull which had developed the habit of straying and breaking her security fence coming to her place. She went and called an Agricultural Extension Officer from Agritex Department at Chegutu under the Ministry of Lands and Agriculture one Mr Rabson Hove who came and ordered her to release the cattle. The Officer witnessed the cattle being taken back to the defendant's place and later did an assessment of the damage.

It was the plaintiff's evidence that indeed there was damage to her crops and the defendant tried to make good the damage through a settlement. However this failed as the defendant later denied any liability.

The question that has to be dispensed with relates to the question of whether it is the defendant's cattle that strayed into the plaintiff's farm and caused the damage. It is however important to note as shall be seen later that the defendant's cattle had a well -known history of breaking into the plaintiff's farm culminating into out of court settlements. To corroborate her evidence on the identity of the cattle the plaintiff led evidence from Mr Rabson Hove. His evidence corroborated in all material respects the plaintiff's evidence that it were the defendant's cattle that strayed into her farm and caused the crop damages when he said that

when he arrived at plaintiff's farm, he found a big bull and some cows which had been impounded by the plaintiff and he advised her that she had no legal right to do so but should return them to the owner whereupon she drove them to the neighbouring farm in his presence.

The defendant Mr George Mudanga gave evidence. What is important to note about this witness's evidence is that it was tainted with serious misrepresentations. He was not present when the cattle allegedly broke into the plaintiff's farm. He told the court that he received the message of the crop damage while he was in the Republic of South Africa on business when plaintiff send him a text/sms message that his cattle had strayed into her farm again and seriously damaged her crops. He then instructed his farm manager to go to the plaintiff's farm and do the crop damage assessment. All he testified on was clearly hearsay.

It was only the Defendant who testified that his breed was pure Brahman as opposed to the evidence of the manager Farai Jonasi and Trymore Mavhura the herdman who spent the whole day with the cattle. The version of the Defendant's evidence is therefore very difficult to accept given that his own manager Farai Jonasi and Trymore Mavhura said the defendant's herd of cattle had long yellow tags and was indeed a mixed breed.

The defendant in his evidence testified that his beasts indeed have yellow tags and that when he first heard of the damage, he sent his manager one Farai Jonasi to go and assess the extent of damage. He maintained the same under re-examination. Under cross-examination the defendant confirmed that prior to this, and on two occasions his cattle strayed into the plaintiff's farm and the matter was resolved amicably.

The cumulative evidence tendered by Farai Jonasi and Trymore Mavhura is that the defendant's cattle had a known history of causing damage to the plaintiff's crops. The evidence that the defendant's bull broke a pen and further broke into the plaintiff's pen leading to the probability that it might be the plaintiff's own cattle that caused the damage is hard to believe especially if one wonders whether after the bull broke out of defendant's pen other cattle belonging to the defendant had to remain inside the pen after such a break by the so called uncontrollable bull. Such version is very hard to believe especially given the nature of animals. Reference to Mokiyard by the defendant and Farai Jonasi is still hearsay and also hard to believe thereby creating a leeway for the defendant to impute liability on the plaintiff's shoulders.

Farai Jonasi in his capacity as the farm manager of the defendant confirmed that his boss's cattle always strayed into the plaintiff's farm and further disputed the evidence of his

boss that he is always told everything by the defendant relating to their operations. Farai Jonasi openly said that it was indeed the defendant who lied under oath.

Farai Jonasi vividly said that the defendant's bull always strayed into the plaintiff's farm and that the bull would constantly be after females and would break the fence. What then would stop the rest of the defendant's herd to follow the master of the pen after the break-up? Under re-examination Farai Jonasi reported that when he was asked by Mr Mudanga what had happened he answered that "**Our bull strayed to the plaintiff's farm**". Given the continuous transgression of a bull straying and the link relating to tags coupled with Trymore Mavhura's testimony that the defendant's bull had a habit of going to the Plaintiff's farm it is probable that the defendant's cattle are indeed the ones that caused the damage in question.

Trymore Mavhura who was responsible for tendering/herding the defendant's cattle confirmed that there were some incidences when defendant's cattle would stray onto the plaintiff's farm and the defendant would pay. He further said that the breed was indeed a mixed one. Trymore Mavhura spent the whole days with the cattle appeared to be a credible witness especially if his testimony is compounded with the evidence of the plaintiff, Rabson Hove and Farai Jonasi. Evidence of the Defendant in that aspect is incredible as it is tainted with lies only to dispute liability. As a credible witness Trymore Mavhura confirmed that the bull was wild and uncontrollable. Trymore Mavhura also confirmed that the defendant's herd of cattle had long yellow ring tags on the ears and is a mixed breed. He too told the court that the defendant was lying in his evidence.

Given that the first question to be considered related to the identification of cattle, it can safely be concluded that the cattle that destroyed the plaintiff's crops belonged to the defendant due to the following factors:

- (i) The defendant's cattle had a known history of straying into the plaintiff's farm and causing damage to crops;
- (ii) The defendant would settle the damage amicably and did so on two or three occasions;
- (iii) The defendant had a mixed breed (Brahman and Hard Mashona type as evidenced by the plaintiff, Rabson Hove, Farai Jonasi and Trymore Mavhura who was basically his employee who would spend the whole day in charge of the herd;

- (iv) It is also evident that the defendant's cattle had long yellow tags on the ears which was also confirmed by his employees;
- (v) The plaintiff and defendant are neighbours and know each other's cattle very well.

Such evidence leaves no doubt that indeed the defendant's cattle strayed into the plaintiff's farm and caused damage as alluded to in the plaintiff's declaration.

Having dispensed with the first question, I agree with Mr *Mawadze*'s submissions that indeed the identification of the cattle properly matches the defendant's. The next issue to decide is the quantum of damages.

QUANTUM OF DAMAGES

It is settled law that a person who keeps domesticated animals is strictly responsible for their upkeep and if they stray into the property of another and caused damage to his or her pastures/ plants/ crops or another's person the owner should be liable for damages caused thereby. G Feltore in his book *A Guide to the Zimbabwean Law of Delict* 3rd Ed , at pp 73 to 76 stated actions that can be brought when harm has been caused by an animal belonging to or under the control of someone. In a case like this one he said the owner or possessor may be held delictually liable under the *Actio de pastu*.

In the case of *Bwanya v Matanda* 2000 (1) ZLR 546 H at 550 D-E it was held that:

“.... Liability of the cattle owner is his ownership of the cattle which caused the damage”. It was stated further that if one's animals stray onto another person's land and cause damage by grazing or trampling crops, the *actio de pastu* is available to the owner of land against the owner of the animals for the damage caused by them. The only defence available to the owner of the animals being that the injured party was at fault.

In casu, the cumulative evidence above links the cattle to the defendant and is therefore liable to pay damages under *actio de pastu*.

In *Van Zyl v Kotze* 1961 (4) SR 241 (1) the principles of *actio de pastu* were set out by De Wet JP at 216 A-E as follows:

“.... An animal does harm either in accord with or against the nature of its kind. It does so in accord with its nature when if grazes on another's ground. The action is available to the owner of the land against the owner of the animal grazing. It lies for the making good the damage caused at F-G.”

This position was succinctly reiterated by KARWI J (as he then was) in a recent judgment of *Panhewe Farm (Pvt) Ltd v J. Mann and Company* HH122/04 at p 3 of the cyclostyled judgment that:-

"This action allows one to recover in respect of harm done to land/crops/plants 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 benefit of another's grazing. The requirements for the liability are that:-

- a. Damage was caused to plaintiff's crops/ plants or pastures.
- b. By defendant's cattle/ domesticated animals straying into another's farm/property.
- c. There is a causal link between the harm and the trespassing.
- d. The defendant is the owner of such cattle
- e. That harm was caused through the eating/trampling of plants/crops. See *Vermaak v Du Plessis* 1974 (4) SA 353 (O)
- f. That the animal acted on its own volition."

It is therefore my profound findings that the evidence tendered points to a probability that it was indeed the defendant's cattle that strayed into the plaintiff's farm and caused the damage complained of as outlined in the plaintiff's declaration.

Given that the answer to the first question to be considered has been answered in the affirmative it follows that the defendant is liable to pay damages.

The court in making an award as to the damages payable has to be guided by the principles set out in *Bwanya v Matanda (supra)* where it was said:

"In assessing damages, the court *a quo* must bear in mind that not only are damages assessed in respect of plants which are grazed but also caused by trampling and breaking of branches and even the consumption of harvested crops, the measure of damages is the replacement value of plants or the value of the prospective harvest which has been lost" (emphasis is mine).

In her summons the plaintiff claimed a total of US\$10 233.00 being damages suffered by her as a result of the defendant's herd of cattle straying from his farm into the plaintiff's farm and thereby grazing, eating trampling and damaging her crops which were at the transplanting, flowering and harvesting stages. She claimed to have entirely lost the said crops. However, to prove her damages she enlisted the services of an Agricultural Extension Officer for Chegutu District one Rabson Hove. Mr Rabson Hove told the court that he did a physical inspection of the damaged crops. He gathered evidence from the plaintiff and did physical random crop counting and visual assessment and he saw the extent of the damage. He compiled a crop damage assessment report produced as exhibit 1. A perusal of exh 1 shows that Mr Rabson Hove made estimated losses and damages. According to him the maize crop had a 100% damage, meaning that nothing was salvaged. The rape and tobacco seedlings suffered 60% damage. After calculations he estimated the final damage at US\$ 10 233.00 after factoring in other expenses such as inputs and electricity. He concluded his observations by saying that the damaged area was well protected, fenced using both barbed

wire and thatched grass but cattle managed to gain entry by forcefully breaking the fences. This means that the plaintiff was not at fault. Even the evidence of Farai Jonas and Trymore Mavhura confirmed that the defendant's bull was the one that broke out of defendant's farm and broke into plaintiff's farm in search of cows hence at the time of the break in the defendant's bull was not in the custody of the plaintiff. Liability cannot therefore be attributed to the plaintiff.

However the receipts for the inputs were not produced. Be that as it may, the court was satisfied that the Agricultural Extension Officer's report gives a reasonable estimate of the damages suffered. Since receipts for the inputs were not produced a round figure of US\$ 10 000.00 represents the damages suffered by the plaintiff.

In the result I make the following orders-

1. The defendant to pay the sum of US 10 000.00.(TEN THOUSAND UNITED STATES DOLLARS) to the plaintiff being damages suffered by the plaintiff as a result of the defendant's herd of cattle straying into plaintiff's farm thereby grazing, trampling and destroying plaintiff's crops.
2. Interest at the prescribed rate
3. Costs of suit on a legal practitioner and client scale.

Manase & Manase, plaintiff's legal practitioners
Atherstone & Cook, defendant's legal practitioners