Kruger v Coetzee
1966 (2) SA 428 (A)

Citation	1966 (2) SA 428 (A)
Court	Appellate Division
Judge	Beyers ACJ, van Blerk JA, Botha JA, Holmes JA, Wessels JA
Heard	March 4, 1966
Judgment	March 17, 1966

Flynote : Sleutelwoorde

Negligence — Proof of — Necessity for plaintiff to prove not C only that the possibility should have been foreseen but also that there were reasonable steps which should have been taken — Defendant having foreseen the possibility and taken certain steps — Onus on plaintiff to establish further steps he could and should have taken.

Headnote : Kopnota

D In an action for damages alleged to have been caused by the defendant's negligence, for the purposes of liability *culpa* only arises if a *diligens paterfamilias* in the position of the defendant not only would have foreseen the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss, but would also have taken reasonable steps to have guarded against such occurrence; and the defendant failed to take such steps.

Whether a *diligens paterfamilias* in the position of the person concerned E would take any guarding steps at all and, if so, what steps would be reasonable, must always depend upon the particular circumstances of each case.

Where the defendant has foreseen the possibility and taken certain steps, the *onus* is on the plaintiff to prove that there were further steps which he could and should have taken.

The decision in the Eastern Cape Division in *Coetzee v Kruger*, 1965 (3) F S.A. 677, reversed.

Case Information

Appeal from a decision in the Eastern Cape Division (JENNETT, J.P., and CLOETE, J.). The facts appear from the judgment of HOLMES, J.A.

H. J. O. van Heerden, for the appellant: Die benadering van die Hof *a quo* was verkeerd. Nalatigheid volg nie bloot omdat gevaar of skade G redelik voorsienbaar was nie. Nadat vasgestel is dat 'n redelike persoon 'n bepaalde toestand sou voorsien het, moet nog nagegaan word of die toestand vermy kon gewees het, en indien wel, of die bepaalde stappe wat bedoelde vermyding geverg het, deur die redelike persoon geneem sou gewees het. Sien *Farmer v Robinson G.M. Co. Ltd.*, 1917 AD te bl. 501, H 524; *Coetzee and Sons v Smit and Another*, 1952 (2) SA te bl. 553, 559 - 60. Dit is insiggewend dat die Hof *a quo* hom nie uitgelaat het oor bepaalde stappe wat die appellant moes geneem het om te verseker dat sy diere nie deur die hek dwaal nie. Die regte benadering, nadat vasgestel is dat die appellant kon voorsien het dat sy diere sou uitdwaal, sou gewees het om vas te stel dat stap A of B sodanige toestand sou voorgekom het, en om dan te bepaal of dit redelikerwyse van die appellant verwag kon gewees het om stap A of B te neem. Aangesien die betrokke hek deur die Afdelingsraad op 'n openbare pad aangebring is, kan die appellant klaarblyklik nie die hek sluit nie, en die plig, indien

enige, om 'n motorhek op die betrokke plek aan te bring, het op die Afdelingsraad gerus. Art. 137 van Ord. 15 van 1952 (K). Die enigste doeltreffende maatreël wat die appellant dus kon getref het, was om 'n wag by die hek te plaas. Aangesien die ongeluk *in casu* in die vroeë oggendure plaasgevind het, het die perde dus waarskynlik in die nag deur A die hek gedwaal, en sou dit beteken het dat die hek 24 uur per dag bewaak moes gewees het. Om van 'n boer te verwag om konstant 'n hek te laat bewaak gestel dat hy werknemers daarvoor sou kon werf sou onrealisties wees en neerkom op die stel van onredelike hoë gedragseise. Sien *Moubray v Syfret*, 1935 AD te bl. 199, 203; *Klaas v Serfontein*, B 1940 CPD te bl. 616, 622. In die reël word dit nie verwag van 'n redelike persoon om te waak teen die handelinge van persone oor wie hy geen beheer het nie. Sien *S v Smith*, 1965 (3) SA te bl. 545, 549. Nog minder kon sodanige gedrag *in casu* van die appellant verwag gewees het omdat *(a)* hy nie die pad na die tonnel laat bow het nie; *(b)* hy nie die betrokke hek opgerig het nie; *(c)* hy geen effektiewe beheer oor die C hek kon uitgeoefen het nie.

Die respondent is gebonde aan die gronde van nalatigheid uiteengesit in haar pleitstukke. Sien *Coetzee and Sons v Smit and Another*, 1955 (2) SA te bl. 553, 560. Die enigste grond wat ter sprake kan kom, is dié wat by die aanvang van die verhoor bygevoeg is, nl. dat die appellant D sy hek laat oopgelê het. Op sy allerminste was die moontlikhede ewe sterk dat die hek deur 'n derde oop laat lê is as dat dit deur 'n werknemer van die appellant gedoen is, en derhalwe het die respondent haar nie van haar bewyslas gekwyt nie. Sien *Klaas v Serfontein*, 1940 CPD te bl. 616, 623.

S. A. Visser, for the respondent: Die toets vir aanspreeklikheid is neergelê in verskeie beslissings, ondermeer in *Union Government v National Bank of S.A.*, 1921 AD 121 te bl. 128 en 129; *Cape Town Municipality v Paine*, 1923 AD te bl. 216; *Herschel v Mrupe*, 1954 (3) SA 464 te bl. 475; *Coetzee and Sons v Smit and Another*, 1955 (2) SA F 553 te bl. 560. Die appellant kon die redelike moontlikheid van skade vooruitgesien het. Sien *Coetzee and Sons v Smit and Another, supra* te bl. 560. Dit word betoog dat appellant wel voorsorg moes en kon getref het. Hy was in beheer van die vee en, waar die kamp omhein is langs die grootpad, moes, onder andere, toegesien het dat die hek nie ooplê nie. Sien *Coreejes v Carnarvon Munisipaliteit en 'n Ander*, 1964 (2) SA 454 G te bl. 457, 458. Dit word aan die hand gedoen dat die bygevoegde grond van nalatigheid nie net daarop neerkom dat appellant of sy werknemers die hek oopgemaak en nie weer toegemaak het nie, maar ook dat dit veronderstel dat appellant nie sorg gedra het dat die hek toe gehou word nie, afgesien van wie dit oopgemaak het. Appellant het sy vee aangehou H in 'n kamp waar dit kon uitkom tensy die hek toegehou word en waar appellant bewus was en moes besef het dat sy vee by die hek kon uitkom en sodoende skade kon veroorsaak, was dit sy plig om redelike voorsorg te tref ten einde te verseker dat die hek nie oop bly nie. E

van Heerden, in reply.

Cur adv vult.

Postea (March 17th).

Judgment

Holmes, J.A.:

In the early hours before dawn in the month of August the plaintiff's husband was driving her car along the main tarmac road [A] between Norvalspont and Venterstad, which is fenced on both sides. As he came over a rise he saw a horse emerging from the darkness on to the road. He braked hard and managed to avoid the animal. Then a second horse appeared, dark of colour, walking across the road. There was a collision and the car was damaged. This was in the year 1964.

The plaintiff sued the owner of the horse for damages. She averred that [B] the collision was caused by his negligence in allowing his horse to be at large on a public road, unattended or not under proper control. She also averred, as a ground of negligence, that he allowed the gate of a camp in which his horses grazed to remain open, that the gate led on to the main road, and that thereby he could not exercise proper control over his animals.

[C] The plea admitted ownership of the horse but denied any negligence. At the conclusion of the case the magistrate ordered absolution from the instance, upon the ground that it would be unreasonable to expect the defendant to maintain a guard at the gate by day and night.

On appeal, the Eastern Cape Division reversed the magistrate's decision, [D] altering the order to one of judgment in favour of the plaintiff for R494.40 with costs, upon the ground that a reasonable man in the position of the defendant would have realised that his horses might stray through the gate on to the main road, and would have taken steps to prevent this. The Court did not indicate what steps would have been reasonable.

[E] For the purposes of liability *culpa* arises if -

(a) a *diligens paterfamilias* in the position of the defendant -

(i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and

(ii) [F] would take reasonable steps to guard against such occurrence; and

(b) the defendant failed to take such steps.

This has been constantly stated by this Court for some 50 years. Requirement *(a)* (ii) is sometimes overlooked. Whether a *diligens* [G] *paterfamilias* in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend upon the particular circumstances of each case. No hard and fast basis can be laid down. Hence the futility, in general, of seeking guidance from the facts and results of other cases.

[H] The facts in regard to the defendant's position may be summarised as follows:

1. He lives in Venterstad, is 40 years of age, and owns a camp bordering on the main road at an unspecified distance from Venterstad. There he has for many years grazed some horses and cattle. It would seem to follow, although this is not stated in the evidence, that he also owns the farm in which the camp is situated.
2. In August, 1963, the Venterstad Divisional Council wished to build a temporary road leading from the main road to a tunnel

which was being constructed as part of the Orange-Fish River water scheme. This road would go across the defendant's camp, and he consented thereto. The road was proclaimed in January, 1964. About that time the [A] Council put a gate in the fence of the camp bordering on the main road giving access to the new road. The drivers of vehicles using the new road to proceed to the water scheme tunnel often left the gate open, as also did other users. Indeed the gate seems to have been left open more often than it was shut.

3. [B] The defendant was aware of and concerned about this, and twice went to the Council authorities and complained that their workers who drove vehicles to and from the water scheme tunnel were not closing the gate. He also went to those in authority at the tunnel, and complained to them. The defendant did not himself leave the gate open. He had often [C] closed it when he found it open.

In the present case it is common cause that a *diligens paterfamilias* in the position of the defendant would have foreseen the possibility of his horses straying through the open gate on to the main road and causing damage to motor cars which might collide with them. Indeed, the defendant conceded that he was conscious of the possibility.

[D] As to the existence of a duty to take reasonable steps to guard against such an occurrence, these were the defendant's horses and it was he who was grazing them in the camp; and, although the gate was being left open by persons over whom he had not control, he was aware of this [E] fact and continued to graze his horses there, conscious of the potential danger to motorists. In these circumstances a *diligens paterfamilias* in the position of the defendant would not have shrugged his shoulders in unconcern; if there were reasonable precautionary steps which could have been taken, he would have taken them. As to that, the [F] defendant, as indicated above, did take some steps: He went twice to the Council and complained that their employees were leaving the gate open; and he also went to those in authority at the tunnel and made the same complaint. Hence the question is whether the plaintiff, on whom the *onus* rested, proved that there were further steps which he could and should reasonably have taken. The plaintiff would have to establish this [G] in order to prove that the defendant failed in his duty to take care and was thereby negligent.

As to that:

(a) There is no evidence that an alternative grazing camp was available to the defendant. One does not know what the position was in regard to the remainder of the farm, or how many animals grazed in the camp.

(b) [H] There is no evidence as to the possibility or feasibility of the defendant fencing off a new camp or a portion of the existing one, through which the road would not run.

(c) There was no investigation of the possibility or cost of the defendant maintaining a team of herds or of gate-

keepers day and night, to prevent his animals going through this gate which other persons carelessly and continually left open. He himself

Holmes JA

described the suggestion as impracticable, and the evidence leaves it at that.

(d) As to the possibility of constructing a motor by-pass with a cattle grid at the scene of the gate, assuming that the A defendant, as distinct from the Council, could have done this, there was no investigation as to the likely cost; and one is unable to say whether it would have been reasonable to expect the defendant to undertake it.

These were matters for the plaintiff to canvas, either through her witnesses or in cross-examination of the defendant, seeing that the *onus* B of proof was on the plaintiff.

I would add that a road inspector in the service of the Council ventured the opinion during his evidence that the defendant and nobody else was responsible for seeing that the gate was closed. He said that, as soon C as a road is proclaimed, the owners are responsible for the gate. Counsel was unable to refer to any authority for this view.

In the result one is left in doubt as to whether there were other reasonable steps, apart from his having complained to the Council and to those in authority at the tunnel, which the defendant could and should D have taken. This means that negligence on his part was not proved; and the magistrate rightly ordered absolution.

The appeal is allowed, with costs in this Court and in the Court *a quo*. The magistrate's order is restored.

E BEYERS, A.C.J., VAN BLERK, J.A., BOTHA, J.A., and WESSELS, J.A., concurred.

Appellant's Attorneys: *H. J. van der Walt & Co.*, Venterstad; *Whiteside, Smit & Rogers*, Grahamstown; *Fred S. Webber & Son*, Bloemfontein.

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