

REFLECTIONS ON THE CONCURRENCE OF THE REMEDIES IN TERMS OF THE REFORMED POUND LEGISLATION AND THE *ACTIO DE PASTU*

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1 Introduction

Under both the *actio de pastu*¹ and the administrative procedure catered for in the Provincial Pound Ordinances² or Regional Pound Acts,³ compensation can be claimed by a landowner for damage caused by grazing and collateral damage to crops. A landowner who finds animals trespassing on his land has the following alternatives: he can chase the animals off the land,⁴ impound the animals and can be eventually compensated for any loss when the animals are sold in execution by the poundkeeper. Alternatively he may institute the *actio de pastu* for monetary compensation for damage caused to his land by grazing and certain other forms of damage.

Liability under both the *actio de pastu* and the pound legislation to pay compensation is strict. Fault need not be proved on the part of the owner of the animal that caused the damage.⁵ A stray animal found on land may, without further ado, be impounded. However, in the past the landowner who followed the administrative procedure available under the pound ordinances had certain advantages. Compensation under the pound ordinances could be obtained without proof of the identity of the owner of the trespassing animals.⁶ The kind of damages which could be claimed under certain of the pound ordinances was not limited to compensation for damage caused by grazing, but extended to damage for the spread of infectious diseases⁷

¹ See in general CG van der Merwe & M Blackbeard "Animals" in WA Joubert & JA Faris (eds) *LAWSA I* 2 ed (2003) paras 470-474

² Cape Pounds Ordinance 18 of 1938; Natal Pound Ordinance 32 of 1947; OFS Pound Ordinance 18 of 1952; Transvaal Pounds Ordinance 13 of 1972

³ Pounds Act (Ciskei) 43 of 1984; Limpopo Pounds Act 3 of 2002; KwaZulu-Natal Pound Act 3 of 2006; North West Animal Pounds Act 7 of 2010

⁴ The landowner is not entitled to impound animals in a private camp on his or her land. See *Trystam v Knight* 1922 NPD 186; Pounds Act (Ciskei) ss 5(4) and 14(d); Limpopo Pounds Act s 23; North West Animal Pounds Act s 5(6)

⁵ See *dicta* in *Kock v Klein* 1933 CPD 194 197; *Constant v Louw* 1951 4 SA 143 (C) 148

⁶ *Murray v Behr* (1906) 2 BAC 302

⁷ Cape Pounds Ordinance ss 37-39

and the premature covering of mares, cows and ewes.⁸ Under the pound ordinances the landowner could have the extent of the damage suffered determined by extra-judicial proceedings in the form of two “disinterested persons” nominated by him and the stockowner,⁹ or by the nearest justice of the peace,¹⁰ as umpire, and two landowners as arbitrators.¹¹ The main advantage of the administrative proceedings under the pound ordinances was, however, that such proceedings were ultimately cheaper and speedier than commencing judicial proceedings under the *actio de pastu*. After the stray animals have been impounded, the poundkeeper has the authority to sell the animals, without giving notice to the owners, and to compensate the landowner for damage from the proceeds of sale.¹²

The constitutional validity of certain of the above provisions taken over in the Natal Pound Ordinance 32 of 1947 was successfully challenged in the High Court of KwaZulu-Natal. Thereafter the Constitutional Court was approached to confirm the invalidity of these provisions. In the High Court judgment Kondile J made the following statement:

“It has been asserted by the applicant that the apparent purpose of the offending provisions of the ordinance is to facilitate, for no good reason, the deprivation of stockowners’ private property in an environment of self-help to enrich landowners and poundkeepers. Further there is no evidence before the Court to show that it is in practice impossible or unduly burdensome for the landowners to recover damages from the stockowner. The common law action resulting from consumption of pasture (*actio de pastu*) affords landowners and stockowners equal protection and benefit of the law. It makes the owner of an animal which has caused damage by grazing strictly liable. In the circumstances there is no necessity nor justification for the oppressive and arbitrary decisions authorised by the ordinance which inflict immense and disproportionate hardship on the socially vulnerable landless rural stockowners and impoverish them.”¹³

The aim of this contribution is to indicate which pound provisions the Constitutional Court found to be invalid, and to determine whether it will still be worthwhile for a landowner who finds stray animals on his farm to pursue the stockowner under the pound ordinances, instead of instituting the *actio de pastu* to recover compensation for damage caused by grazing. By way of conclusion the effect of *Zondi v MEC for Traditional and Local Government Affairs* (“*Zondi*”) on similar provisions in pound ordinances of the other regions will be considered.

⁸ Under Natal Pound Ordinance s 28 a landowner who finds a stallion, bull or ram trespassing on land reserved for his breeding stock of the same species is entitled (without being required to prove damage) to additional trespass fees as prescribed. Under Cape Pounds Ordinance s 41, the landowner is entitled to a fixed penalty for every stallion, bull or ram so found. The OFS Pound Ordinance s 45 provides for a special penalty to be paid to the landowner for the trespass of any stallion, bull, ram or goat-ram amongst his or her breeding stock. See also Pounds Act (Ciskei) s 9(2)(b).

⁹ Natal Pound Ordinance s 29(1).

¹⁰ Under sch 1 of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963, magistrates, additional magistrates and assistant magistrates can act as justices of the peace.

¹¹ Cape Pounds Ordinance ss 34(1) and 39.

¹² See the Cape Pounds Ordinance s 70; Natal Pound Ordinance s 38.

¹³ *Zondi v MEC for Traditional and Local Government Affairs* 2005 3 SA 25 (N) 37A-C.

2 The Zondi judgment

In *Zondi v MEC for Traditional and Local Government Affairs*,¹⁴ the Constitutional Court considered the validity of certain provisions of the Natal Pound Ordinance. The case was brought to the KwaZulu-Natal High Court by an unemployed 53-year-old widow who had resided on a farm with her husband for more than 25 years. Her only asset was her livestock, consisting of 28 head of cattle and eighteen goats which she inherited from her husband after he died. She was dependent on this livestock; she converted it into cash when needed and used it as a source of food from time to time. She had no land and had resided on the farm since the death of her husband. What gave rise to the present litigation was a letter of demand by the landowner calling upon her to remove her livestock from the farm within a month and stating that her livestock would be impounded if she failed to do so. In response to the letter the applicant launched a two-part urgent application to the High Court of Natal¹⁵ for an order blocking the threatened impoundment on the ground that there was no trespass, and for an order that nine provisions of the Natal Pound Ordinance were inconsistent with the Constitution of the Republic of South Africa, 1996 (“the Constitution”). The High Court granted the first part of her application by interdicting the pending impoundment,¹⁶ and the second part challenging the constitutionality of certain sections of the Natal Pound Ordinance. The applicant then approached the Constitutional Court to confirm the KwaZulu-Natal High Court order of unconstitutionality.

As a prelude to considering the challenged provisions of the Natal Pound Ordinance, Ngcobo J pointed out that the ordinance operated in a complex social context of black people struggling for land, which they had been deprived of, and the need of white farmers to be protected against trespassing livestock. The ordinance was enacted under the old legal order which denied franchise and land rights to African people, restricting the African population to 13% of the total land in the country while the remainder belonged to white people. African people were confined to small, overcrowded and often desolate areas. They had insufficient grazing land for the small number of livestock that they were allowed to keep. By contrast, white farmers owned vast areas of land which were adequate for farming, grazing and irrigation. African people were forcibly removed into relocation sites in Natal, sometimes situated next to their former homes and grazing land. Livestock strayed back onto their old grazing spots on white farms that were historically theirs. Therefore people regarded livestock impounding as illegitimate, while the white farmers saw livestock impounding as their only peaceful recourse to discourage the poaching of grazing areas or trespass by livestock. The impounding scheme of the Natal Pound Ordinance operated in this historical context.¹⁷

¹⁴ 2005 3 SA 589 (CC)

¹⁵ *Zondi v MEC for Traditional and Local Government Affairs* 2005 3 SA 25 (N)

¹⁶ 28H The High Court granted an interim order that pending the final determination of the proceedings in the second part of the notice of motion, the farmer is interdicted from employing the provisions of the Pound Ordinance to remove, or cause to be removed, any livestock presently in the possession of the widow on the farm

¹⁷ 605A-606C

The ordinance was promulgated in 1948 by the Provincial Council of the Province of Natal. In terms of Proclamation 107 of 1994,¹⁸ the administration of the whole of the ordinance was assigned to KwaZulu-Natal with effect from 17 June 1994.¹⁹

The Constitutional Court found that the impugned provisions of the ordinance put in place a scheme which provided for the immediate impoundment of trespassing animals and their disposal. Section 16(1) permitted the immediate seizure and impoundment of trespassing animals by a landowner without giving notice to the livestock owner, unless the latter was the owner of land immediately adjacent and the livestock was marked with the registered brand of that owner. In such a case the stockowner was entitled to at least twelve hours written or verbal notice of the trespass before impoundment. Other stockowners were not expressly entitled to such notice, even if they were known or could, with reasonable diligence, be identified.²⁰

In terms of the ordinance, cattle seized may be driven to the nearest pound. The poundkeeper is obliged, without delay, to receive into the pound all animals tendered to him.²¹ The landowner is not required to inform the poundkeeper who the stockowner is, but must furnish him with details about the number and the description of the animals impounded, the land upon which they were trespassing, the distance between such land and the pound, and the trespass fees or damages claimed.²²

The poundkeeper is obliged to inform the stockowner only if his identity is known.²³ If not, he need not take any steps to establish who the owner is, even if the animals are branded or marked or the stockowner could, with reasonable diligence, be ascertained. Trespassing donkeys or pigs may be destroyed, unless they are distinctly marked or the landowner knows or can with reasonable diligence identify and locate the owner.²⁴ Impounded animals can only be released upon the payment of driving fees, trespass fees or damages and the entire pound, herding and tending fees and expenses incurred by the poundkeeper.²⁵ In the event that the landowner suffers damage in excess of the trespass fee,²⁶ he may within a period of 96 hours of the discovery of such trespass, have the damage monetarily assessed by “two disinterested persons”.²⁷ An identified stockowner must be informed of the trespass but only for the purposes of enabling the livestock owner to nominate one of the

¹⁸ GG 15813 of 17-06-1994

¹⁹ *Zondi v MEC for Traditional and Local Government Affairs* 2005 3 SA 589 (CC) 606H

²⁰ 608A-B

²¹ Natal Pound Ordinance s 7

²² *Zondi v MEC for Traditional and Local Government Affairs* 2005 3 SA 589 (CC) 608C-D. See Natal Pound Ordinance s 25

²³ S 8

²⁴ S 18

²⁵ S 32

²⁶ See s 27

²⁷ S 29(b) stipulates that if the “disinterested persons” cannot reach an agreement as to the extent of the damage they may appoint an umpire to perform the task and if they cannot agree on an umpire, the Administrator of Natal must determine the extent

“two disinterested persons”.²⁸ The latter must either be a landowner or a voter as defined in section 1 of the Electoral Act 45 of 1979.²⁹

Unclaimed impounded animals may be sold,³⁰ not necessarily at market value, but at least at a price sufficient to recover all the amounts due under the ordinance.³¹ The poundkeeper must inform the local magistrate if any animal remains unsold whereupon the latter may give instructions as to whether the animal must be re-offered for sale, destroyed or otherwise disposed of. The poundkeeper may destroy unsold donkeys or pigs.³² Any balance, remaining after the proceeds of the sale have been applied to the said fees and the expenses must be paid to the livestock owner if known; otherwise it is forfeited to the provincial government.³³ There is no obligation on any party to inform the stockowner of the sale. The mostly illiterate and otherwise socially disadvantaged livestock owners are expected to find out about the sale of their livestock by going through the *Provincial Gazettes* or local newspapers.³⁴

In the event that an animal is too wild, vicious or intractable to be driven to the pound, a police officer has the authority to issue instructions regarding its destruction or other disposal provided that notice is given to the owner, if known.³⁵ If on the other hand the animal’s viciousness only manifests itself after the animal is in the pound, the authority to give such instructions rests with the magistrate. Again, notice must be given to the stockowner if they can be identified.³⁶ The poundkeeper is required to record any injury to or death of the impounded animal as well as the cause of its death or injury,³⁷ but there is no obligation to pass this information to the stockowner.³⁸

The Constitutional Court identified the constitutional challenge to sections 16(1), 33, 34 and 37 as the seizure and impoundment of trespassing livestock and their subsequent sale in execution without judicial intervention, and without notice to the stockowner where the latter is not known. This was categorised as a violation of the right of access to courts. The assessment of damage provision, section 29(1), was challenged on the ground that it had a discriminatory effect on African people and thus violated the constitutional right to equality. The landownership and franchise requirements, arguably, excluded African people from assessing damages for trespass.³⁹

The constitutional complaint against sections 37 and 41(4) was that they do not make adequate provision for notice to the stockowner. This was argued to be a violation of the right to just administrative action guaranteed in section 33 of the Constitution. The MEC contended that the impugned provisions do

²⁸ S 29(1)(a)

²⁹ *Zondi v MEC for Traditional and Local Government Affairs* 2005 3 SA 589 (CC) 608F-609C

³⁰ Natal Pound Ordinance ss 33 and 34

³¹ S 34(3)

³² S 37

³³ S 40

³⁴ *Zondi v MEC for Traditional and Local Government Affairs* 2005 3 SA 589 (CC) 609D-610B

³⁵ Natal Pound Ordinance s 41(4)

³⁶ S 10(2)

³⁷ S 12

³⁸ *Zondi v MEC for Traditional and Local Government Affairs* 2005 3 SA 589 (CC) 610C-D

³⁹ 610G-I

not prevent the owner of the impounded animals from approaching the court at any stage in the process to secure the release of unlawfully impounded animals.⁴⁰ Furthermore they argued that if the impugned provisions limit any of the applicant's constitutional rights, the limitation is justifiable under section 36(1) of the Constitution because the impugned provisions are necessary to deal with the problem of trespassing animals.⁴¹

The Constitutional Court pointed out that section 34 of the Constitution, which guarantees the right of access to courts, expressly recognises that especially intensely divisive social conflicts must not be resolved by resort to self-help, but equitably by impartial and independent tribunals.⁴² The Constitutional Court recognised the need to take immediate action against trespassing animals, but emphasised that such action must be limited in view of the nature of the right, and the existence of less restrictive means to achieve the purpose concerned. A balance must be struck between the rights of landowners and the rights of livestock owners. Once the animals have been impounded, the judicial process must be allowed to supervise the execution, to avoid any further need for immediate action.⁴³

In considering the constitutionality of sections 16(1), 33, 34 and 37 of the ordinance the Constitutional Court found that these provisions established an unconstitutional impounding scheme, triggered by section 16(1), which authorised the landowner to seize and impound trespassing livestock. The further sections permitted the poundkeeper to sell the impounded livestock in order to recover impoundment fees and other charges. The Constitutional Court therefore concluded that due to the fact that the impoundment system did not engage the judicial process at any stage, these sections were inconsistent with section 34 of the Constitution.⁴⁴

With regard to section 29(1), which provides that only landowners and persons with the right to vote under the Electoral Act 45 of 1979 are competent to assess damage, the Constitutional Court held that this provision was manifestly and fundamentally racist in its purpose and effect, and thus irreconcilable with the right to equality enshrined in section 9(3) of the Constitution. The Constitutional Court ordered that this provision be struck down with immediate effect on the ground that the limitation concerned was not reasonable or justifiable in terms of section 36 of the Constitution.⁴⁵

With regard to the constitutionality of sections 8, 12, 10(2), 37 and 41(4), the Constitutional Court reasoned that section 33 of the Constitution guaranteed everyone "the right to administrative action that is lawful, reasonable and procedurally fair". Therefore, the Constitutional Court had to consider first whether the provisions in question could be read in a manner consistent with the Constitution.⁴⁶ The Constitutional Court pointed out that section 8, dealing

⁴⁰ Natal Pound Ordinance s 43(b) and (c)

⁴¹ *Zondi v MEC for Traditional and Local Government Affairs* 2005 3 SA 589 (CC) 611A-C

⁴² 611E, 612E and 613D

⁴³ 617C, 617E-F and I

⁴⁴ 627F-H read with 615C, 616E-617A and 627H

⁴⁵ 619F/G-621F and 631C

⁴⁶ 621I/J-622B and 622G

with the public decision to impound animals, and section 12, concerning the decision to dispose of injured or dead animals, relate to the exercise of a public power. The magistrate performs a public duty when he issues instructions regarding the destruction or the disposal of vicious animals (section 10(2)) or when he re-offers or destroys unsold animals after an auction (section 37). The same can be said of the police officer who issues instructions to destroy or dispose of animals that are too vicious to be driven to the pound (section 41(4)). Consequently, the Constitutional Court concluded that the exercise of the powers conferred by the impugned provisions constituted administrative action which had to be monitored.⁴⁷

The Constitutional Court further found that the question as to whether the impugned provisions could be read so as to require steps to be taken to ascertain the identity of the stockowner where this could be done with the exercise of reasonable diligence, was a matter of construction. It reasoned that there was nothing in the language of these provisions that excluded such steps from being taken. The impugned provisions could thus be construed consistently with the Constitution to require notice to the stockowner where the stockowner could, with the exercise of reasonable diligence, be established. Consequently the Constitutional Court held that sections 8, 10(2) and 41(4) had to be construed consistently with the Constitution to require notice to stockowners where the stockowners could, with the exercise of reasonable diligence, be ascertained.⁴⁸

Similarly, in addressing the question of whether the lack of an obligation in sections 12 and 37 to give notice to the stockowner constituted an exclusion of constitutional rights, the Constitutional Court decided that this was also a matter of construction. It pointed out that both sections were capable of being read so as to require prior notice where the stockowner was known or could be ascertained with the exercise of reasonable diligence. The Constitutional Court held that if these provisions are construed in such a manner, they are not inconsistent with section 33 of the Constitution and thus passed constitutional muster. Consequently, it was held that sections 12 and 37 had to be construed as requiring prior notice to stockowners, who are known or reasonably ascertainable with the exercise of reasonable diligence.⁴⁹ The Constitutional Court concluded that all persons who were required to implement the provisions of sections 8, 10(2), 12, 37 and 41(4) had to do so in a manner consistent with the Constitution as set out above.⁵⁰

The Constitutional Court suspended the order of invalidity in respect of sections 16(1), 33, 34 and 37 for a period of twelve months in order to allow the Provincial Legislature of KwaZulu-Natal to correct the constitutional defects in the Natal Pound Ordinance. Pending the enactment of the relevant legislation, magistrates' courts were empowered to authorise impoundment sales. This was authorised on the following conditions: the poundkeeper, on

⁴⁷ 624B/C-D/E

⁴⁸ 626H, 627B-C and 631C-D

⁴⁹ 624H/I-625D and 631D-E

⁵⁰ 631E

notice to stockowners who were known or could be located with reasonable diligence, lodged with the magistrate's court a statement setting forth all the amounts due; the stockowner does not dispute the amounts within seven days of such notice; and the magistrate is satisfied that notice had been given to the stockowner or the stockowner cannot be ascertained with the exercise of reasonable diligence.⁵¹ In a sequel to *Zondi* the Constitutional Court reluctantly granted a further suspension of the invalidity order on the ground that the public will suffer considerable prejudice if the order of suspension were not extended in the absence of a mechanism for dealing immediately and effectively with trespassing and straying animals. The Court concluded that it was just and equitable to extend the period of suspension of the declaration of invalidity by a further twelve months to 15 October 2006.⁵²

3 Consequences of *Zondi*

At this point it is convenient to summarise the consequences of *Zondi* for our purpose. In the first place the Constitutional Court in *Zondi* directed that the scheme created by the combination of section 16(1) and sections 33, 34 and 37 must be replaced with a scheme which allows for judicial supervision. The scheme permits the landowner to seize the livestock and cause it to be detained and sold by the poundkeeper on conditions stipulated by the poundkeeper. This system denies the livestock owner the protection of the judicial process for the assessment of the damage suffered and supervision over the process of attachment and sale in execution. Instead of employing the ordinary civil process of execution, the landowner is permitted to bypass the courts and recover damages assessed by private persons through an execution process carried out by a private businessperson or an official of a municipality, without any court intervention. The impounding scheme effectively removes judicial intervention from sharp conflicts which will often underlie the process of impoundment. It also undermines and restricts the right against self-help guaranteed in section 34 of the Constitution.⁵³ The Constitutional Court therefore decided that once the animals have been impounded, supervision should be exercised by the courts through their rules over the process of execution, denied by the above sections of the ordinance.⁵⁴ This means that the administrative procedure under the pound ordinance may no longer necessarily be cheaper and speedier than the procedure under the *actio de pastu*.

A further consequence of *Zondi* is that the assessment of damages caused by stray stock can no longer be performed by private persons nominated by the landowner and the stockowner.⁵⁵ The assessment must now be incorporated in the judicial process established for supervising the executory process of impoundment.

⁵¹ 631G-632E

⁵² *Zondi v MEC for Traditional and Local Government Affairs* 2006 3 SA 1 (CC) paras 43-46 and 53-66

⁵³ *Zondi v MEC for Traditional and Local Government Affairs* 2005 3 SA 589 (CC) 616B-617A

⁵⁴ 617I-618A

⁵⁵ 620A/B and 621D

The third consequence of *Zondi* is that the landowner and the poundkeeper will henceforth be required to exercise great care to identify the stockowner and to notify him or her at all stages of the execution process of what is happening to his or her stock.⁵⁶ This means that sale of impounded animals would now seldom take place without the identity of the stockowner being known. This justifiably places an additional burden on the landowner.⁵⁷

4 KwaZulu-Natal Pound Act 3 of 2006

The MEC took cognisance of the judgment in *Zondi* and presented a constitutionally acceptable draft Bill to the provincial Legislature of KwaZulu-Natal. The latter body assented to the Pound Bill on 4 October 2006 and the KwaZulu-Natal Pound Act came into operation on 10 October 2006.⁵⁸ The Act repealed the Natal Pound Ordinance 32 of 1947 as amended.⁵⁹ The most important changes introduced by the new Ordinance are the following:

Section 5 tightens up the duties of the landowner with regard to stray animals found on his land. He may seize animals for impounding, but may not remove them unless he has notified the stockowner in writing no less than 72 hours prior to such removal. No stray animal may be kept for a period longer than six hours without being supplied with adequate food and water and the landowner must comply strictly with the provisions of the Code of Practice on the Handling and Transportation of Impounded Animals.⁶⁰

If a veterinarian or a member of the Police Service considers that the animal is too vicious, intractable or wild to be impounded, he or she may authorise the humane destruction or other disposal of the animal after notifying the stockowner and supplying him with reasons for the destruction.⁶¹ In the event that the stockowner requests the release of the animal prior to the removal to the pound, the landowner may release the animal forthwith or in the alternative apply to court for authority to impound the animal or to claim any damages caused. The court may then make any order that it deems fit.⁶²

Animals must be taken to the nearest pound and animals of different species must be separated at all times.⁶³ The landowner must supply the poundkeeper with written information about the number and description of the animals in question, the land concerned and the distance in kilometres to the nearest pound as well as a copy of the notice that he or she was obliged to send to the stockowner 72 hours before impounding the animal.⁶⁴

The poundkeeper must immediately release an impounded animal on proof of ownership by the stockowner and on payment of the fees and costs

⁵⁶ 624F-H, 625C-J, 626B and 627B-C

⁵⁷ For a different perspective on *Zondi v MEC for Traditional and Local Government Affairs* 2005 3 SA 589 (CC), see N Olivier & A Reddy "A Constitutional Perspective on the Validity of the KwaZulu-Natal Pounds Legislation: *Zondi v Member of the Executive Council* 73/03" (2005) 26 *Obiter* 783

⁵⁸ *Provincial Gazette* 6513 of 10-10-2006

⁵⁹ KwaZulu-Natal Pound Act Sch 4

⁶⁰ S 5(3) and (4) and Sch 1 In terms of s 8 the landowner may not work, use or ill-treat the animal

⁶¹ S 6

⁶² S 7

⁶³ S 9

⁶⁴ S 10

concerned.⁶⁵ It is notable that no mention is made of the damages alleged by the landowner.

With regard to the sale of impounded animals, section 21 prescribes that the poundkeeper must within fourteen days of impounding *apply to court* for authority to sell the animal. This application must be accompanied by proof that the poundkeeper had lodged a statement with the stockowner in which he sets out the fees and costs incurred by him and the damage that the landowner has suffered. Then, irrespective of whether the amounts in question are disputed, the court must summarily enquire into the matter⁶⁶ (which includes an enquiry as to whether the stockowner has been notified) and make such an order as it considers just and equitable. The order may include an order as to costs as well as an order dealing with the *process* that the poundkeeper must follow in the sale of the animal.

An application to court for the impoundment of an animal in terms of section 7(2)(b) must comply with the procedure referred to in rule 55 of the Rules of Court.⁶⁷ Section 7(2)(b) provides that in the event that the landowner refuses to hand over animals which strayed onto his land at the request of the stockowner, he may apply to the magistrate's court for authority to impound the animals or to claim any damages he or she may have suffered. Such an application must then comply with the procedure referred to in rule 55 of the Rules of Court. The application must thus be brought on notice of motion supported by an affidavit as to the facts upon which the applicant relies for relief. The court may then make any order including an order as to costs that the court deems just and equitable.

An application to court for the sale of an impounded animal must comply with the procedure in terms of section 66 of the Magistrates' Court Act 32 of 1944 and Rule 41 of the Rules of Court, read with the necessary changes.⁶⁸

In the event that an impounded animal is sold at a price in excess of the cumulative total of the fees and costs incurred by the poundkeeper and the damage alleged by the landowner, such excess must be paid to the stockowner within 30 days of the sale and, if the owner cannot be identified, into the municipal revenue fund.⁶⁹ If animals are unsuccessfully offered for sale, section 23 stipulates that the poundkeeper must immediately advise the court and the stockowner of the animal's estimated value and the fees and costs incurred. The court may then make such order as it deems just and equitable.

Finally, section 27(d) stipulates that a person who contravenes any provision of the Act is guilty of an offence and is liable on conviction to a fine, or to imprisonment for a period not exceeding six months.

In conclusion it may be noted that in line with *Zondi*, the Act contains express provisions to notify stockowners of every step in the process of impounding: no animal seized for impounding may be removed to a pound

⁶⁵ S 20 Besides pound fees, the stockowner must pay the cost of any dipping, inoculation, medical care and other treatment necessary or required in terms of the Act or any other law, in accordance with Sch 3 (s 19)

⁶⁶ This includes an enquiry as to whether the stockowner has been notified

⁶⁷ S 26(a)

⁶⁸ S 26(b) Rule 41 of the Rules of Court deals with the execution against movable property

⁶⁹ KwaZulu-Natal Pound Act s 24

without 72 hours prior notice being given to the stockowner;⁷⁰ in the event of the humane destruction or other disposal of animals found to be too vicious, intractable or wild to be impounded, written justification and notice must be given to the stockowner;⁷¹ the poundkeeper must always immediately give written notice of the impoundment to the stockowner;⁷² where on application by the poundkeeper, the court authorises destruction or other disposal of impounded animals, the poundkeeper must immediately notify the stockowner accordingly;⁷³ the poundkeeper must immediately notify the stockowner in writing if the animal is infected with certain diseases⁷⁴ or when the animal dies or is injured;⁷⁵ in the event that animals are unsuccessfully offered for sale, the poundkeeper must immediately inform the stockowner of its estimated value and the fees and costs incurred.⁷⁶

5 KwaZulu-Natal Pound Act versus *actio de pastu*

A landowner who finds trespassing animals on his farm in KwaZulu-Natal must consider carefully whether it is worthwhile impounding stray animals instead of instituting the *actio de pastu* for damages suffered.

As a preliminary point it should be noted that the impounding landowner is saddled with a number of duties without adequate remuneration,⁷⁷ and may be guilty of an offence in case of non-compliance.⁷⁸ Fees for mere trespass may no longer be claimed. This compels the landowner to prove his loss in court for the smallest loss suffered. As is the case under the replaced Natal Pound Ordinance,⁷⁹ a poundkeeper who is of the opinion that an impounded animal is vicious, permanently disabled or terminally ill, may apply to the magistrate's court which may authorise the destruction or disposal of such animal.⁸⁰ Similarly, if an impounded animal is injured or dies, this fact must be recorded in the pound register and the stockowner must be notified.⁸¹ It stands to reason that no damage will be recoverable in the case of death and much less than usual if the animal is ill. In addition, the landowner who does not know the identity of the owner of donkeys or pigs found trespassing, or who cannot identify them with the exercise of reasonable care, may no longer destroy any of these animals if unmarked.⁸² Similarly, poultry or pigeons

⁷⁰ S 5(1)

⁷¹ S 6

⁷² S 13

⁷³ S 14(2)(b)

⁷⁴ S 15(c)

⁷⁵ S 17(b)

⁷⁶ S 23(a)

⁷⁷ He must notify the stockowner in writing prior to removal to the pound (s 5(1)); he may not keep the animal for more than six hours without providing adequate food and water (s 5(3)) and he must comply with the provisions of the code of good Practice on the Handling of impounded Animals contained in Sch 1 (s 5(4))

⁷⁸ S 27(d)

⁷⁹ Natal Pound Ordinance s 10(2)

⁸⁰ KwaZulu-Natal Pound Act s 14(2)

⁸¹ Ss 12, 17

⁸² Natal Pound Ordinance s 18

trespassing on land and doing damage to crops or garden produce may no longer be summarily destroyed.⁸³

The process of impounding is no longer such a cheap and speedy alternative. At almost every stage of the proceedings, a court order must be sought and many hurdles must be overcome before the landowner will be satisfied from the proceeds of a sale in execution of the impounded animal. In terms of section 5 the straying animal may not be removed to the nearest pound unless the landowner has given written notice to the stockowner no less than 72 hours prior to the removal. During this 72 hour period, the stockowner may request that the landowner releases the animal prior to its removal to the pound.⁸⁴ If the owner refuses to release the animal, he may apply to court for authority to impound the animal or to claim damages for loss suffered.

Section 26(a) provides that impoundment in terms of the Act must comply with the procedure laid down in rule 55 of the Rules of Court. This rule stipulates that the application must be brought on notice of motion supported by an affidavit as to the facts upon which the applicant (landowner) relies for impounding the animal.⁸⁵ The notice must be addressed to the stockowner and to the clerk of the court.⁸⁶ In the notice of motion the landowner must *inter alia* set forth a date not less than five days after service of the motion before which the stockowner is to notify the applicant whether he opposes the application. If no such notification is given, the application will be heard on a stated date not less than ten days after service of the notice on the stockowner.⁸⁷ If the matter is opposed the process will take longer in view of answering affidavits and possible affidavits in reply.⁸⁸ It may be possible to satisfy the court that the matter is urgent in which case the court may dispose of the matter at such time and place and in accordance with such procedure as the court deems appropriate.⁸⁹

If the stockowner does not request the release of the stock which had trespassed on the land within the 72 hour period, the animals may be impounded to be eventually sold by the poundkeeper. The stockowner is, however, entitled in terms of section 20 to request the release of the impounded animals on providing proof of ownership of the animal and on payment of any fee and costs due to the poundkeeper. If the owner is not able to pay the fees and costs concerned, the poundkeeper may retain such animal to recover such fees and costs.⁹⁰ As highlighted above, there is no provision for payment of the damage suffered by the landowner. This means that the landowner would have to institute an action in court to claim compensation for damage suffered.⁹¹

⁸³ S 31 The KwaZulu-Natal Pound Act does not include poultry and pigeons in their definition of animals

⁸⁴ KwaZulu-Natal Pound Act s 7(1)

⁸⁵ Rule 55(1)(a) of the Rules of Court

⁸⁶ Rule 55(1)(b)

⁸⁷ Rule 55(1)(e)(iii)

⁸⁸ Rule 55(1)(g)

⁸⁹ Rule 55(5)(a)

⁹⁰ KwaZulu-Natal Pound Act s 20(2)

⁹¹ See s 25

The sale of impounded animals is also placed under the supervision of the court. The poundkeeper must within fourteen days of the impounding of the animal apply to court for authority to sell the animal. In the application which is brought on notice of motion, the poundkeeper must provide the court with proof that he has lodged a statement with the stockowner indicating all the amounts, including fees, costs and damages due in terms of the Act.⁹² It is expressly provided that the statement must include the fees and costs incurred by the poundkeeper and the amount of any damages suffered by the landowner through the trespass.⁹³ Irrespective of whether or not the damages claimed are disputed, the court must then summarily enquire into the matter, enquire whether the poundkeeper notified the stockowner and make such order as it considers just and equitable including an order as to cost and on the process to be followed by the poundkeeper in the sale of the animal.⁹⁴ If the sums in question are disputed, the stockowner must normally produce an affidavit as to the facts on which he relies. However, on these facts the magistrate must summarily base his order as to damages to be paid by the stockowner. The fact that this can be decided on motion means that if the process reached this stage, it would still be speedier than an action procedure under the *actio de pastu* for damages.

The sale of the impounded animal must comply with the procedure prescribed in section 66 of the Magistrates' Court Act and Rule 41 of the Rules of Court, read with the necessary changes. We have seen that one of the outcomes of an application by the poundkeeper to the court for authority to sell the animal would be an order for the payment of money for damage suffered by the landowner. Section 66 of the KwaZulu-Natal Pound Act provides that whenever a court gives judgment for the payment of money, failure to pay such money forthwith shall be executable by sale in execution of the movable property of the judgment debtor, or if insufficient, his immovable property.⁹⁵ Execution must then occur in accordance with Rule 41 with the necessary changes. On receipt of a warrant to levy execution on movable property, the sheriff would presumably indicate the impounded animal as executable and draw up an inventory and valuation of the animal.⁹⁶ The result would be that the animal's inventoried value shall be deemed to be judicially attached.⁹⁷ The sheriff must then hand a copy of the inventory and the attachment to the stockowner.⁹⁸ Since the animal is safely impounded, it need not be removed to a place of security.⁹⁹ We have seen that the court, in the application for authority to sell the impounded animal, can make an order as to the process to be followed by the poundkeeper in the sale of the animal. If this has been

⁹² S 21(1)

⁹³ S 21(2)

⁹⁴ S 21(3)

⁹⁵ S 66(1)(a)

⁹⁶ Rule 41(1)(a) of the Rules of Court. Since Rule 41 must be read with the necessary changes, it does not seem competent for the sheriff to make an inventory of the other movable property at the residence of the stockowner. The land owner is thus restricted to the proceeds on sale of the impounded animal.

⁹⁷ Rule 41(4)

⁹⁸ Rule 41(5)

⁹⁹ Rule 41(7)

done, this order must be implemented. If no such order has been made, the poundkeeper must follow Rule 41 which states that the property must be sold publicly for cash with the approval of the magistrate by an auctioneer to the highest bidder.¹⁰⁰ Certain requirements as to notice of the sale and advertisement in the local or other newspaper must also be complied with.¹⁰¹ The day appointed for the sale in execution must not be less than fifteen days after attachment.¹⁰²

If the proceeds of the sale are sufficient to cover the fees, costs and damages awarded for loss suffered by the landowner, the recovery of the damage in terms of the KwaZulu-Natal Pound Act would prove to be speedier than the recovery of damages in action proceedings under the *actio de pastu*. The reason for this is that proceedings for the recovery of damages under the KwaZulu-Natal Pound Act are motion proceedings and not action proceedings.

In the final analysis, the landowner is in a very difficult position if the owner of the stray animals cannot be located or if the owner does not swiftly collect the strays. Due to the fact that the animals have come under his control, the landowner may be sued in negligence for damages caused to motorists colliding with these animals if driven from the farm onto a public road.¹⁰³ The only alternative open to him will be to make use of the provisions of the KwaZulu-Natal Pound Act to remove the animals by impounding them, and thereby preventing further damage or recurrent trespassing on his land.¹⁰⁴

6 Concluding remarks

The Constitutional Court has brought about a radical change in the way in which impoundment of stray animals is regarded by the South African community. By the application of constitutional principles the Court has succeeded in creating a fine balance between the competing rights of stockowners who are traditionally dependent on their cattle, sheep and goats for their livelihood, and the right of farmers to be protected against the nuisance and damage caused by unknown animals trespassing on their farms. We have seen that although the KwaZulu-Natal Pound Act of 2006 has littered the path of the landowner with obstacles, the fact that it allows motion proceedings to found a judgment debt has made it possible for proceedings in terms of the KwaZulu-Natal Pound Act to deliver a speedier resolution than the action procedure under the *actio de pastu*.

In view of *Zondi* it will be incumbent on various regional legislatures to scrutinise their pound legislation to determine whether it will pass constitutional muster. The crucial aspects pertain to notice which must

¹⁰⁰ Rule 41(8)(a)

¹⁰¹ Rule 41(8)(b) and (c)

¹⁰² Rule 41(9)

¹⁰³ *Prinsloo v Girardin* 1962 4 SA 391 (T); *Mkhwanazi v Van der Walt* 1995 4 SA 589 (A); *Enslin v Nhlapo* 2008 5 SA 146 (SCA)

¹⁰⁴ Note that the definition of "animal" in s 1 also includes a dog and a cat. The possibility of impoundment of such animals may prove a stroke of luck for landowners.

be given to stockowners whose animals have strayed onto farms;¹⁰⁵ the way in which the region's power to impound is worded; whether there is judicial supervision of the manner in which the damages of the landowner is determined;¹⁰⁶ and whether the sale in execution of impounded animals is subjected to judicial scrutiny.¹⁰⁷ This is especially pertinent with regard to the various regions in the old Cape Province where all the regions except Ciskei still seem to apply the old Cape Ordinance 18 of 1938. Although the old Transvaal Ordinance 13 of 1972 was repealed,¹⁰⁸ new pound Acts have only been promulgated in Limpopo¹⁰⁹ and North West and except for Gauteng, the old Transvaal Ordinance is apparently still in force in Mpumalanga.

The revision process was already commenced in the Eastern Cape High Court in June 2013 in *Mdodana v Premier EC*.¹¹⁰ Mdodana, whose goats were impounded, successfully instituted judicial proceedings to have certain provisions of the Cape Pounds Ordinance 18 of 1938 declared unconstitutional on more or less the same grounds as in *Zondi*. The Constitutional Court was then approached to confirm the decision of the High Court. The Constitutional Court then made contact with the Grahamstown Bar to help it make submissions as a friend of the court. The Bar argues that the impounding scheme, viewed in its proper context, is justified due to the fact that stray animals are a danger to motorists on public roads and a threat to commercial farmers. Furthermore they argue that any judicial supervision over the sale of impounded livestock will need an expeditious process to minimise the costs of maintaining impounded animals.¹¹¹ It seems unlikely that these arguments will persuade the Constitutional Court to deviate from its judgment in *Zondi*.

SUMMARY

A landowner who finds animals trespassing on his land has the following alternatives: he can chase the animals off the land; impound the animals; or institute the *actio de pastu* for monetary compensation for damage caused to his land. Administrative proceedings under the pound ordinances were cheaper and speedier than action proceedings under the *actio de pastu*. After impoundment, the poundkeeper could sell the animals, without giving notice to the owners, and compensate the landowner for damage from the proceeds of sale. The constitutional validity of certain of the above provisions incorporated in the Natal Pound Ordinance 32 of 1947 was successfully challenged in the High Court of KwaZulu-Natal and confirmed by the Constitutional Court in 2005 in *Zondi v MEC for*

¹⁰⁵ The Limpopo Pounds Act s 8(c) requires that the poundmaster must notify the owner of the impounded stock but only if the owner's name and address are known to the poundmaster. Under s 12(a) a person tendering stock must furnish to the poundmaster the name and address of the stockowner but only if known. See further Pounds Act (Ciskei) s 3(c), (v), (e); North West Animal Pounds Act s 5(1) (notice to be given where possible).

¹⁰⁶ Limpopo Pounds Act s 14(b) provides that the damage and compensation payable to the landowner may be determined by agreement between the stockowner and landowner, or if no agreement is reached, by the Municipal Manager of the area in which the land is situated. See further Cape Pounds Ordinance ss 34-35; OFS Pound Ordinance ss 32-33; Pounds Act (Ciskei) s 9(1); North West Animal Pounds Act s 22.

¹⁰⁷ Cape Pounds Ordinance ss 63-69; OFS Pound Ordinance s 37; Pounds Act (Ciskei) s 11; Limpopo Pounds Act s 16; North West Animal Pounds Act s 18.

¹⁰⁸ Limpopo Pounds Act; Gauteng Local Government Laws Amendment Act 1 of 2006 sch 1.

¹⁰⁹ The sch to the Limpopo Pounds Act repealed the Gazankulu Pounds Act 8 of 1976; the Venda Pounds Act 6 of 1976; and the Lebowa Pounds Act 80 of 1990.

¹¹⁰ (1648/10)2013 ZAECGHC 66 (13 June 2013). *SAFLII* <<http://www.saflii.org/za/cases/ZAECGHC/2013/66.html>> (accessed 03-01-2015).

¹¹¹ See *Cape Argus* (13-11-2013) 17.

Traditional and Local Government Affairs 2005 3 SA 589 (CC). The consequences of *Zondi* were that the administrative proceedings sanctioned by the Natal Pound Ordinance were replaced by judicial proceedings after impoundment through their rules over the process of execution, denied by the Natal Ordinance; assessment of damages caused by stray stock can no longer be made by private persons but must be incorporated in the judicial process established for supervising the process of impoundment; and the landowner and the poundkeeper are henceforth required to exercise care to identify the stockowner and to notify him or her at all stages of the execution process of what is happening to his or her stock. As a result of *Zondi* the KwaZulu-Natal Pound Act 3 of 2006 replaced the Natal Pounds Ordinance of 1947 with new legislation which would satisfy the constitutional dictates of *Zondi*. It is concluded that although the KwaZulu-Natal Pound Act has placed constitutional burdens on the landowner, the fact that it allows motion proceedings to found a judgment debt, means that impoundment proceedings would still be speedier than the action procedure under the *actio de pastu*.