THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 204/2017

In the matter between:

G S VAN DER WESTHUIZEN **APPELLANT**

W J BURGER **RESPONDENT**

Neutral citation: *Van der Westhuizen v Burger* (204/2017) [2017] ZASCA 178 (1 December 2017)

Coram: Ponnan, Majiedt and Swain JJA and Mokgohloa and Mbatha AJJA

Heard: 17 November 2017

Delivered: 1 December 2017

Summary: *Actio de ferris* – defence of provocation – ostrich provoked – owner not liable.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Olivier AJ sitting as court of first instance):

1 The appeal is upheld with costs.

2 The order of the court a quo is set aside and replaced with the following order:

'The claim is dismissed with costs.'

JUDGMENT

Swain JA (Ponnan and Majiedt JJA and Mokgohloa and Mbatha AJJA concurring):

[1] An ostrich owned by the appellant, Mr Gerhard van der Westhuizen, which chased the respondent, Mr Willem Burger, gave rise to an action instituted by the respondent as plaintiff, against the appellant as defendant, in the Gauteng Division of the high court (Pretoria). The respondent alleged that in an attempt to escape from the ostrich he tripped over a piece of wood, tore his Achilles tendon and as a result suffered damages in the amount of R6 750 000.

[2] By agreement between the parties, the court a quo (Olivier AJ), ordered that the merits of the claim be separated from the quantum of damages, in terms of rule 33(4) of the Uniform Rules of Court. After hearing evidence, the court a quo found that the appellant was liable to pay to the respondent such damages as he was able to prove in due course, together with the costs of the action. The appeal is with the leave of the court a quo.

[3] The cause of action pleaded by the respondent was the *actio de ferris* in terms of which the bringing of wild or dangerous animals on or into a public place, or a place to which members of the public have access, was prohibited. The cause of action is based upon ownership and strict liability is imposed upon the owner of the animal, for the consequences of the animal's behavior. The victim is accordingly absolved from alleging and proving negligence on the part of the owner, which is presumed.

[4] The respondent alleged that the incident occurred on a farm owned by the appellant and that the appellant had 'introduced certain wild ostriches which do not naturally occur' onto the farm, alternatively, the appellant 'tamed and domesticated an ostrich who roamed close to the dwelling on the farm, which in attacking the plaintiff. . . acted contrary to animals of its class'.

[5] Save for admitting ownership of the farm and that 'undomesticated ostriches inhabit the farm', which amounted to an admission that the ostriches on the farm were wild, the appellant denied the remaining averments. On the evidence, however, it was common cause that the appellant had invited the respondent to his farm, where the respondent was chased by an ostrich owned and introduced onto the farm, by the appellant.

[6] Only two of the defences raised by the appellant require consideration for the determination of the appeal. First, the appellant raised the defence of provocation, alleging that the respondent 'provoked and harassed the ostrich/ostriches on numerous occasions prior to the alleged incident'. Second, the appellant denied that in an attempt to escape from the ostrich, the respondent ran towards the dwelling on the farm and in doing so, tripped over a piece of wood and tore his Achilles tendon. The respondent therefore had to prove that the behaviour of the ostrich was the cause of his injury.

[7] The court a quo dismissed the defence of provocation on the ground that:

'. . . only if the provocation was the immediate catalyst for the resulting injury, would it qualify as a defence. In my opinion there was no immediate provocation.'

It also held that causation had been proved because, the 'injury would not have occurred had it not been for the plaintiff escaping the ostrich's attack in the first place'.

[8] In order to decide whether the court a quo was correct in dismissing these defences, the evidence of the manner in which the respondent teased the ostrich on previous occasions, as well as the conduct of the respondent immediately prior to being chased by the ostrich, must be examined.

[9] Mr Andre de Lange and Mr Martinus Steyn described how the respondent had teased a male ostrich on the appellant's farm on several occasions. The respondent would entice the ostrich to approach him with mielie pips in his hand. Whilst the ostrich was busy eating out of his hand he would grab it by the neck and push its head down. The ostrich would then, according to these witnesses, flap its wings and perform comical 'dance steps' and when the respondent released its head, the ostrich would stagger backwards, much to the amusement of those watching. Mr Pieter Kotze described an incident where the respondent said that he had worked with ostriches and knew how to catch an ostrich. He took a hat from one of the bystanders, placed it on the head of the ostrich, grabbed it by the neck and said this was how it was done.

[10] Mr Hendrik Gerber gave evidence of a conversation with the respondent concerning the respondent's painful foot, which he had injured in the incident. The respondent described in terms identical to that of the appellant's witnesses, how he had teased the ostrich. He admitted it was his fault that the ostrich chased him. The appellant, when giving evidence, added that he had asked the respondent on numerous occasions to leave the ostrich alone, because he made it angry.

[11] The respondent, however, denied ever grabbing the ostrich by its neck or feeding it from his hand. He maintained he only threw food on the ground for the

ostrich, because he was scared of it. He acknowledged he had owned ostriches, but emphasised he was very scared of them and gave them away. His evidence that he was scared of ostriches, is, however, inconsistent with his description of what he maintained had occurred when he arrived on the farm with the appellant, the night before the incident. He said he saw a male ostrich near the house flapping its wings and snapping its beak. Its beak and knees were red and he realised from his experience with ostriches that it was very angry and dangerous. The ostrich walked towards them so he quickly grabbed the ostrich by its head and pushed it down. After the appellant had gone to the door of the house, he quickly released the ostrich and ran behind a swing to shield himself from the ostrich. He explained this was how an angry ostrich had to be handled. The appellant, however, denied the incident saying it was dark when they arrived on the farm and ostriches do not walk around in the dark.

[12] When it was put to the respondent that witnesses would give evidence that they had seen him teasing the ostrich, he queried what ostrich they were talking about. He maintained that the ostrich that injured him was not yet on the appellant's farm at the time of the incident. In similar vein, the only substantive challenge by respondent's counsel to the evidence that the respondent had teased the ostrich, was to put the proposition to the appellant’s witnesses, that they were unable to distinguish between the male ostriches on the farm. They were accordingly unable to say that the ostrich which the respondent had allegedly teased, was the ostrich which chased him.

[13] This proposition was, however, inconsistent with the respondent’s pleaded cause of action. It was alleged that the appellant, ‘tamed and domesticated an ostrich who roamed close to the dwelling on the farm, which in attacking the plaintiff. . . acted contrary to animals of its class’. In other words, the male ostrich which roamed close to the house and was tame, had attacked him. When giving evidence, he conceded that this ostrich was familiar with people and moved around the camp. In my view, when due regard is had to the respondent's own evidence as to how he dealt with the ostrich when it was aggressive, the evidence of the

appellant's witnesses, established on a balance of probabilities that the respondent had previously teased this ostrich which came near the house on a regular basis, and that this was the ostrich that chased him.

[14] It is against this background that the evidence of the respondent as to how the incident occurred, as well as the evidence of Mr Pieter Kotze who witnessed it, must be examined. The respondent said he was assisting the appellant to load blue wildebeest into a trailer when he suddenly noticed the ostrich standing on the other side of the bakkie. At this stage he was standing near the back of the trailer and the ostrich walked towards the front of the bakkie. The ostrich was watching him whilst it approached and when asked to describe its demeanour he said that '. . . hy het net gewoonweg geloop'. However, in cross-examination he maintained that the ostrich was snapping its beak, and was in a dangerous mood. It was not flapping its wings, but was warning him. He then moved to the front of the bakkie to scare it away, but was unsuccessful and it continued approaching him. He then ran for the door of the house because the ostrich was close to him. Near to the door of the house was a slight incline where he slipped and fell. Whilst lying on his stomach he saw the ostrich nearby watching him and it took two steps. He then jumped up, started running and accidentally stepped on a small wooden paling situated between the plants at the door, which caused the injury to his Achilles tendon.

[15] The respondent denied that anybody was present when the ostrich chased him or that Mr Kotze was in the vicinity. He was emphatic that he was alone and maintained that Mr Kotze could not have been there. It was put to him that Mr Kotze would testify that the ostrich was there all the time, eating out of a food trough between the bakkie and the house, which he denied. It was then put to him that Mr Kotze would state that the respondent walked from the bakkie towards the house, which meant that he had to walk past the ostrich. He then saw the respondent bend down and pick up something which he threw at the ostrich. The respondent then admitted that he had thrown a small stone towards the ostrich.

[16] Mr Kotze gave evidence that he was in the camp, sitting by the fire, drinking coffee and waiting for the farm workers to arrive. He saw the respondent walking from the bakkie towards the house, whilst the ostrich was feeding at the trough. When the respondent saw the ostrich he threw something at it and the ostrich then chased him. The respondent ran towards the front door of the house and fell. When he stood up he looked around, saw the ostrich looking at him and quickly ran into the house. The ostrich did not peck or kick the respondent and he was not aware that the respondent had been injured.

[17] There are two important aspects in the evidence of the respondent which illustrate the improbability of his version of the incident. When giving evidence in chief he stated that the ostrich was behaving normally, whereas in cross-examination he described its behaviour as dangerous, adding that it was snapping its beak. More importantly he failed to disclose he had thrown a stone at the ostrich, and it was only after he was confronted with the evidence of Mr Kotze, that he admitted this. His denial that anybody else was present, is also refuted by this evidence.

[18] The inherent improbability of the respondent's version of the incident is revealed when the evidence that he teased the ostrich on numerous occasions, is considered. Obviously, this evidence cannot be used to infer that the ostrich harboured a grievance against the respondent. This would constitute the impermissible attribution of human emotions to the ostrich, whereas its significance lies in revealing the attitude of the respondent to the ostrich. He was not fearful of the ostrich and had mercilessly teased it. On his evidence when it had approached the previous night in a far more aggressive manner, he confidently dealt with it, repulsing any threatened attack. It is therefore improbable that having initially described the behaviour of the ostrich as normal, he would be frightened simply because it looked at and walked towards him. Seen in this context it is probable that the respondent admitted to Mr Gerber, that it was his fault that the ostrich chased him. The court a quo accordingly erred in rejecting the evidence of Mr Gerber on the basis that it '. . . was sketchy and lacking in convincing detail'.

[19] The appellant accordingly discharged the onus of proving on a balance of probabilities that the respondent's conduct in throwing a stone at the ostrich, provoked its behaviour in chasing him. The court a quo therefore erred in dismissing the defence of provocation on the basis that there was no immediate provocation of the ostrich by the respondent. In dealing with this defence, the court a quo, however, noted that although provocation was not listed as a specific defence to strict liability arising from the attack of a wild animal in the case law, it was a defence to the *actio de pauperie*, and it would therefore be considered for the sake of completeness.

[20] In *Bristow v Lycett* 1971 (4) SA 223 (RA) at 234, the defences to a claim for damage caused by a wild animal were said to include where 'the plaintiff's contributory negligence contributed to his injury'. Provocation of the wild animal by the plaintiff was not expressly included as a defence. However, there can be no basis in principle or logic to recognise as a defence the case where the negligent conduct of the victim contributed to his or her injury, but not where the victim's intentional conduct provoked the attack. The defence was recognised in *Klem v Boshoff* 1931 CPD 188 and *Hanger v Regal & another* [2014] ZAFSHC 236; 2015 (3) SA 115 (FB) para 5.

[21] This conclusion renders it unnecessary to examine the issue of causation. This is because the appellant cannot be liable for an injury sustained by the respondent in attempting to escape from the ostrich, where the respondent provoked the chase. I will do so, however, for the sake of completeness. The evidence of the respondent and Mr Kotze was that after the respondent had fallen and was at the mercy of the ostrich, it did not attack him. They both described how the ostrich stood looking at him whilst he was lying on the ground and when he stood up to run into the house. The ostrich therefore did not display any aggressive behaviour towards the respondent after he had fallen, and his injury was not caused by the pursuit. I accordingly disagree with the conclusion of the court a quo that '. . . it was one continuous event; the fall did not interrupt the flight, and the resulting injury would not have occurred had it not been for the plaintiff escaping the ostrich's attack in the first place'.

[22] In the result the following order is made:

1 The appeal is upheld with costs.

2 The order of the court a quo is set aside and replaced with the following order:

'The claim is dismissed with costs.'

K G B Swain
Judge of Appeal

Ponnan JA

[23] I have had the benefit of reading the judgment of Swain JA. I agree with his conclusion that the appeal must succeed with costs. It has been said that there 'can be few branches of the law which are more complex and confusing than the liability for damages caused by animals'.[1] I am thus rather more trepidatious as to the reasons for my concurrence in the outcome of the appeal.

[24] The complexity centres largely around the liability for *pauperies,* meaning damage 'done without legal wrong on the part of the doer'.[2] As long ago as 1930, De Villiers CJ observed in *South African Railways & Harbours v Edwards*[3] 'that South African decisions had not been harmonious, which is not to be wondered at seeing that hardly two commentators agree on the interpretation to be placed upon the law'.[4] The Chief Justice, was there referring to the *actio de pauperie*, which had been

[1] *Bristow v Lycett* 1971 (4) SA 223 (RAD) at 227A.

[2] *Bristow* at 227B.

[3] *South African Railways & Harbours v Edwards 1930 AD 3 at 9.*

[4] Ibid.

carefully considered some three years earlier in *O'Callaghan NO v Chaplin.*[5] He thought it useful to lay down the relevant principles in relation to that remedy, which he summarised thus:

'(1) The *actio de pauperie* is in full force in South Africa. But the right to surrender the offending animal in lieu of paying damages --- *noxae deditio* --- is obsolete with us. (2) The action is based upon ownership. The English doctrine of *scienter* is "not a portion of our law. (3) The action lies against the owner in respect of harm *(paeperies)* done by domesticated animals, such for instance as horses, mules, cattle, dogs, acting from inward excitement *(sponte feritate commota) i*f the animal does damage from inward excitement or, as it is also called, from vice, it is said to act *contra naturam sui generis*; its behaviour is not considered such as is usual with a well-behaved animal of the kind. (4) On the other hand, if the act was not due to vice on the part of the animal but was provoked-in other words if there has been *concitatio,* the action does not lie. (5) Dating back as this form of remedy does to the most primitive times, the idea underlying the *actio de pauperie,* an idea which is still at the root of the action, was to render the owner liable only in cases where so to speak the fault lay with the animal. In other words for the owner to be liable, there must be something equivalent to *culpa* in the conduct of the animal. (6) Hence if the fault lies with the injured person himself he cannot recover, as he would have only himself to blame. If for instance he has provoked the animal, or has acted in such a way that the outburst could reasonably have been foreseen. (7) But stroking or petting a horse is not considered to be provocation *(concitatio).* If a horse kicks when petted, its behaviour is due to vice. The fault lies with the horse, not with the man who petted it, unless he had reason to know that the horse might kick. The learned Judge in the present case is of opinion that if the attentions of a person who stroked or petted a mule were met with a kick, such person would only have himself to blame for doing such a foolish thing. The kick, in the case of a mule, could have been foreseen. (8) Alfenus gives the following instance. A groom was leading a horse into a stable. The horse sniffed at a mare which thereupon kicked the groom on the leg. The jurist holds that the action lies against the owner of the mare. In other words the incitement did not justify the mare in kicking. This case has been much debated. But whether Alfenus was right or wrong,

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[5] *O'Callaghan NO v Chaplin* 1927 AD 310.

in his view the solicitations of the horse were not considered to excuse the behaviour of the mare. She was said to have acted from innate perverseness. (9) The action does not lie if the animal was provoked by a third party, if for instance the animal was struck by a goad and kicks out. (10) Nor does the action lie if the injury was due to pure accident *(casus);* here nobody is considered to blame . . .'[6]

[25] The *actio de pauperie* is available against the owner of a domestic animal that has caused damage. Liability is based purely on ownership of the animal. Some academic writers have argued against the notion of liability based purely on ownership and advocated for a shift to the risk principle.[7] In terms of the risk principle a person who keeps or controls an animal in his own interest is liable without fault because he creates an increased risk of harm.[8] In *Loriza Brahman v Dippenaar,*[9] this court refused to declare the remedy obsolete, holding that the action *de pauperie* still served its purpose and that it was neither *contra bonos mores*, nor unconstitutional. Since the action is based on the principle that the owner of a domestic animal is liable for damage only when it caused damage whilst acting *contra naturam sui generis*, the remedy is traditionally restricted to domestic animals. The *contra naturam* requirement requires some kind of attack or unpredictable action from the animal, actions that are to be expected as part of the animals' natural behaviour do not qualify.[10]

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[6] *South African Railways* supra fn 3 at 9-10.

[7] According to J Neethling et al *Law of Delict* 5ed (2006) at 330, the risk or danger theory means that 'where a person's activities create a considerable increase in the risk or danger of causing damage, that is, an increased potential for harm, there is sufficient for holding him liable for damage even in the absence of fault. Whether an increase in risk is "considerable" enough in a specific case, is difficult to ascertain. For this reason the danger theory has been subject to much criticism'.

[8] Neethling supra fn 7 para 2.1.1.4.

[9] *Loriza Brahman en 'n ander v Dippenaar* 2002 (2) SA 477 (SCA).

[10] A J Van der Walt, The Law of Neighbours *Dangers and threats posed by neighbours* 1st ed (2010), Chapter 7 at 333.

[26] According to *Le Roux and others v Fick*[11] '[i]n the course of time the action *de pauperie* was extended by means of the *actio utilis* to all animals, and for a long time it appears to have been the only law applicable to cases of damage from animals. When a wild animal inflicted damage there appears to have been no other remedy till the *lex Aquilia* and the edict [the *edictum de feris*] were promulgated. .. . The result . . . seems to have been that an *actio de pauperie* lay in all cases of damage caused by animals when the damage was brought about through the fault of the party using the animal or of some third party. The owner could free himself from all pecuniary liability by delivering the animal where there had been no fault on his part, and when the damage done was contrary to the natural disposition of the animal. If a man allowed his dog or wild animal to be in a public place he was liable to be sued for a penalty equal to double the amount of damage he might cause, and also to have an action *de pauperi* brought against him. If damage was caused by a wild animal in any other than a public place, the owner could apparently free himself from liability upon abandoning the animal, and would incur no further liability unless he had been in fault, as in not having fastened the animal up properly.'

[27] The *edictum de feris* has its genesis in Republican Rome, when many individuals kept wild animals.[12] On account of the risk posed by these animals, the edict was enacted, which prohibited the bringing of wild or dangerous animals on or into a public place.[13] According to Ashton-Cross, to admit of an action under the edict, 'the animal must have been owned at the time it caused the damage; must itself have been either on a place of public passage or near enough to injure a person or property in such passage; and the damage must have been done *qua*

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[11] *Le Roux & others v Fick* (1879) 9 Buch 29 at 36.

[12] *Lawsa* 3ed para 424.

[13] Neethling supra fn 7 at 334 para 2.1.1.3.

vulgo iter fit, *on* the public way'.[14] The language of the edict is wide, and includes any animal of a vicious propensity calculated to do harm.[15] The mere breach of the edict rendered the owner responsible. Negligence was presumed; the rationale being that the owner of an animal, who allowed it to stray onto a public street contrary to the principle of the edict, was considered to be guilty of negligence.[16] The *actio de pauperie* and that under that edict were concurrent remedies.[17] Liability in these actions resulted from the ownership of the animal, apart from any *dolus* or *culpa* on the part of the owner. Thus both in the Roman Law and that of Holland, the responsibility for damage done by one's animal is founded on ownership and not on negligence.[18]

[28] It will entirely depend on the circumstances of each particular instance, whether an action *de pauperie* or one under the edict is the suitable remedy.[19] The distinction in principle between these two remedies have not always been kept in mind. In *O'Callahan's case* Kotze JA stated that the 'action *de pauperie* will be available against the owner of a dog biting an innocent person, that is a person who was lawfully at the place where he was bitten, is beyond doubt, both in the law of Holland and of South Africa.'[20] Although Innes CJ said that he would guard against being taken to imply that the edict is not part of our law, one finds no positive statement in respect of the *actio de feris* in the course of the judgment.[21] Uncertainty has accordingly been expressed as to whether the *actio de feris* is still recognised in

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[14]DIC Ashton-Cross *Liability in Roman Law for damage caused by animals* (1951-1953) Cambridge Law Journal II at 396-397.

[15] *O'Callaghan* supra fn 5 at 346.

[16] Ibid at 368.

[17] Ibid at 340.

[18] Ibid supra fn 5 at 344.

[19] Ibid supra fn 5 at *366.*

[20] Ibid at 366-367.

[21] At 330.

modern South African law.[22] Barry Nicholas describes the provision in the Edict as 'ostensibly a police regulation forbidding the keeping of certain animals in certain places and imposing liability for the consequences of any breach of the regulation'.[23] In that regard, Wessels JA made the point in *O'Callaghan* that: '[i]n fact we know very little indeed about this Edict and we have no idea exactly what the conditions were in Rome when the Edict was proclaimed nor the mischief which was aimed at. It seems likely that the Edict was intended as a general provision against bringing any ferocious animal on to the market place or in places where people were in the habit of walking and that the words dog, boar, lion were only added by way of explanation to point out the kind of animals that were not to be brought there.'[24]

[29] In *Parker v Reed*,[25] De Villiers CJ said:

'The presumption is that the law relating to *pauperies* is still in force, but this presumption cannot prevail in the absence of any recognition, judicial or otherwise, of the existence of such a law, and in the face of repeated decisions which require proof of some degree of *culpa* in order to attach liability to the ownership, custody or use of property.'

It is true that *Parker's* case has been overruled. But, as Beadle CJ observed in *Bristow v Lycett*,[26] 'this passage from the "Old Chief's" judgment seems sound enough'.

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[22] See Visser (2006) 697 THRHR 304 – 306, who cites several South African academics who express uncertainty with regard to the existence of the *edictum de feris* in modern South African law. See also J C Van der Walt & J R Midgley *Principles of Delict* 4ed (2016) at 49 par 34; Neethling supra fn 7 para 2.1.1.3. See also *Hanger v Regal & another* [2015] ZAFSHC 63; 2015 (3) SA 115 at 334.

[23] Nicholas 'Liability for Animals in Roman Law' 1958 *Acta Juridica* at 185.

[24] *O'Callaghan* supra fn 5 at 371.

[25] *Parker v Reed* 21 SC 496.

[26] *Bristow* supra fn 1 at 230A.

[30] The 'judicial recognition', such as it is, seems to have come from the then Rhodesian Appellate Division. In *Bristow v Lycett*, Beadle CJ framed the rule in the following terms (at 234-5):

'1. In the case of damage by a wild animal kept in captivity negligence on the part of the owner is presumed, and it is unnecessary for the plaintiff to plead or prove it.

2. The defendant can, however, escape liability by proving either –

> *(a)* the plaintiff was a trespasser or the plaintiff's contributory negligence contributed to his injury; or
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> *(b)* the damage was caused by the unlawful act of a third party or the third party's animal; or
>
> *(c)* The damage was caused by *casus fortuitus* or *vis major*.

3.The above principles are not affected by the fact that the wild animal concerned may have been reduced to a state of semi-domesticity or that it did not act with any ferocious intent.'

[31] Beadle CJ observed (at 232G-233B):

'I have stressed the history of the disappearance of the *actio utilis de pauperie* at some length because its disappearance helps to determine the precise liability for *pauperies* committed by a wild animal under the *lex Aquilia* as we know it today. This liability is, as I have attempted to show, coincident with that under the old *actio utilis de pauperie.* The history of the disappearance of the *actio utilis de pauperie* is therefore more than a matter of antiquarian interest because, by understanding the ambit of this old action and the reasons for its disappearance, it is possible to arrive at a reasonably precise definition of the liability of an owner for damage done by his wild animal under the modern law. For how long the *actio utilis* under the *lex Aquilia* has existed in its present form, and precisely when the *actio utilis de pauperie* became a legal antiquity is, however, now purely a matter of antiquarian interest. If, however, I am wrong in assuming that the *actio utilis de pauperie* has been absorbed by the *actio utilis* under the *lex Aquilia*, then the *actio utilis de pauperie* must still survive today, as there is no ground for holding that the legal principles

which it enforced have become obsolete. Whether the action under the *lex Aquilia* now provides the same remedy as that formerly provided by the *actio utilis de pauperie*, or whether the two actions still exist side by side, is really only a matter of academic interest, because in either event the liability of an owner for *pauperies* committed by his wild animal will be the same, and, as I will show later, as a matter of procedure, provided the relevant facts are pleaded, it is unnecessary to plead whether the case is brought under one action or the other.'

[32] The judgment of Beadle CJ has not escaped criticism (see Carey Miller 1972 *SALJ* 176).[27] Miller, who criticises the judgment both for certain historical limitations and theoretical shortcomings, suggests that the learned Chief Justice erred in the formulation of the rule.[28] To be fair to Beadle CJ, he did acknowledge that little is said in the books about *pauperies* committed by a wild animal. Most modern day writers, so observed the Chief Justice, have little to say on this subject, confining themselves to the injured party's remedy to the *actio utilis* under the *lex Aquilia*. He observed that he could find no reported case in South Africa in which the *actio utilis de pauperie* was invoked when the owner of a wild animal was sued for *pauperies* committed by his wild animal. The case nearest in point, so he said, was the case of *Le Roux and Others* v *Fick*. In that case a dog, apparently acting *secundum naturam sui generis*, killed an ostrich in a public street. It was held that there was no *culpa* on the part of the owner, but that he was liable for the *pauperies* committed by his dog under the old Aedilitian action, which made the owner of a fierce dog or wild animal liable for *pauperies* committed by that animal in any public place. Accordingly, so held Beadle CJ, '[t]he old Aedilitian action must therefore be considered as having been imported into the Cape and . . . it would seem, therefore, that the Aedilitian action is still part of our law'. He added: '[i]f an old Roman action which made the owner of a wild animal liable *qua* owner for that

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[27] D L Carey Miller *Damage by Wild Animals – Choice of Touchstone* (1972) 175 SALJ at 176.

[28] See also Nicholas supra fn 23 at 185 and Ashton Cross supra fn 14 at 396-397.

animal's *pauperies* committed in a public place is still part of our law, it can be argued with some force that logically a similar old action which made him liable *qua* owner for *pauperies* committed by his animal in other places should also be still in force.' Van der Merwe observes that aside from *Le Roux v Fick* there is no other decision directly on the point.[29]

[33] It may be, as Miller notes, that it is probably not a matter of great practical importance to discover the true basis of the Roman-Dutch law rule. But, he does rightly opine 'conceivably, it could be argued that if the basis is solely Aedilitian then the remedy, with the edict, *has fallen into desuetude*'. Indeed, support for his view is to be found in the judgment of Wessels JA in *O'Callaghan*, who expressed very grave doubt as to whether 'this police regulation of the Romans', 'can be said to have force under our present conditions'.[30] He added: '[t]he whole liability is based on the transgression of a public measure.' Those observations are undoubtedly cogent.

[34] It has been suggested that the edict could be replaced by the Aquilian action as supplemented by the *actio de pauperie* in the case of damage by ferocious dogs.[31] But, this view, so it has been asserted, 'overlooks the fact that the *edictum de feris* lies for a breach of the edict and that consequently the defences of contributory negligence, provocation, negligence of a third party or *vis maior* will not apply once the animal has been taken to the public place by the defendant'. Here, as well, there appears to be no consensus by our academics. The defence that the plaintiff was unlawfully on the premises has however been mentioned by the courts

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[29] C/f Visser supra fn 22 at 304.

[30] *O'Callaghan* at 377. Innes CJ did describe the edict as something more than a mere municipal bye-law.

[31] *Lawsa* 3ed para 308.

and it has been suggested that the other defences to the *action de pauperie* should also be regarded as applicable to the edict.'

[35] In concluding this part of the judgment, I must say that it would probably require someone with a more profound knowledge of this area of the law to pronounce on the possible obsolescence of the remedy. Importantly, Innes CJ did remind us though (*O'Callaghan* at 327) that '[i]t is the duty of a Court – especially of an appellate tribunal – so as to administer a living system of law as to ensure – without the sacrifice of fundamental principles – that it shall adapt itself to the changing conditions of the time. And it may be necessary sometimes to modify, or even discard doctrines which have become outworn'. On my reading, everything appears to point to an action based on the edict being unsuited to modern conditions. Happily though, for present purposes it is unnecessary for me to resolve this problem. Miller wonders whether the time has not come for a comprehensive modern statute to replace 'the rules which are largely historical in origin and sometimes difficult to apply'. There is much to recommend such a course, which he suggests, has been followed in England.

[36] Against that backdrop, I turn to the present appeal. As was repeatedly pointed out by Innes CJ in his judgment in the *O'Callaghan's* case, the owner of an animal is not liable to another when that other person is himself the cause of his injury. The learned Chief Justice referred to *Storey v Stanner* 1 HCG 40, where Laurence J is reported to have said: '[b]y the ancient and modern civil law, and by the present law of this Colony, the owner of a dog, or other dangerous animal, is responsible for injuries or *pauperies* committed by that animal . . . provided there is no negligence or improvidence on the part of the person injured, or other impropriety of conduct on his part which directly caused or mainly contributed to cause the

injury'.[32] The Chief Justice added (at 329): 'I also agree with Laurence J, in thinking that there must have been no "substantial negligence or imprudence" on the part of the person injured --- by which I understand no unreasonable conduct contributing to the injury. The basis of that limitation of the owner's liability is to be found in the *Digest*. If the injury were due to provocation by the injured person no compensation could be claimed *de pauperie*. . . . So that there is direct authority for the application in *pauperien* actions of the fundamental principle that no man can recover damages for an injury for which he has himself to thank.'[33]

[37] As more fully set out in the judgment of my colleague Swain JA, when the respondent first saw the ostrich that morning it was ambling along, minding its own business. In its direct path to him lay the bakkie and trailer. For reasons that remain unexplained, he moved from the relative safety of that position to the front of the bakkie. In so doing he also brought himself closer to the ostrich. Nor, was the respondent able to explain why he did not simply climb onto the trailer or seek refuge within the confines of the bakkie, thereby removing himself from what he then subjectively perceived to have been harm's way. What is more, he then armed himself with and threw an object at the ostrich. Until that point, there was nothing in the conduct of the ostrich that, objectively viewed, constituted a danger to him. Only then, did the ostrich direct its attention to the respondent. That, it would seem, prompted him to run toward the house. Even when he lost his footing and fell on the first occasion, he was still not attacked by the ostrich. Instead, it stopped and looked at him. The respondent then picked himself up and once again attempted to make his way into the house. That is when he stepped awkwardly and snapped his Achilles tendon. Even then, he was still not attacked by the ostrich, which eventually turned and simply walked away. Thus, even on an acceptance that the *actio de feris*

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[32] *O'Callaghan* supra fn 5 at 326.

[33] *Harmse v Hoffman* 1928 TPD 572 at 574-575.

availed him, the respondent, to borrow from Innes CJ has himself to thank for his injury. It follows that that the appeal must succeed as his claim ought to have been dismissed with costs by the trial court.

V M Ponnan
Judge of Appeal

Appearances:

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