REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG PROVINCIAL DIVISION, PRETORIA

CASE NO: 60668/2015

(1) REPORTABLE: YES / **NO**
(2) OF INTEREST TO OTHER JUDGES: YES / **NO**
(3) REVISED.

7/12/2016 .....

7/12/2016

NOT REPORTABLE
NOT OF INTEREST TO OTHER JUDGES

In the matter between:

W J BURGER **PLAINTIFF**

AND

G VAN DER WESTHUIZEN **DEFENDANT**

J U D G M E N T

OLIVIER AJ:

I. INTRODUCTION

[1] This claim is based on an injury which the plaintiff incurred on the farm of the defendant in the Marble Hall district ("the farm"), on 4 August 2012, between 6 am and 6.30 am, when the plaintiff was attacked by an ostrich ("the incident").

[2] The court ordered that the merits be separated from quantum, in terms of Rule 33(4) of the Uniform Rules of Court, at the commencement of the trial. The trial proceeded on the merits only.

II. EVIDENCE

[3] The following facts are common cause:

(a) that undomesticated ostriches inhabit the farm of the defendant (this amounts to an admission that the ostriches on the farm are wild)

(b) That the plaintiff was on the farm during the weekend in question, at the invitation of the defendant

[4] The witnesses testified in Afrikaans, but I shall summarise and discuss their testimonies in English,

PLAINTIFF

[5] Mr Burger (the plaintiff) testified that he had been on the farm on several occasions prior to the incident. There was a wide variety of wild animals on the farm, including ostriches, giraffes, buck and so on. He was on the farm over the weekend of the incident following a request from the defendant to assist in the capture of wildebeest.

[6] The plaintiff and the defendant had left Witbank on the Friday afternoon, prior to the incident. Both had had beer to drink. When they arrived at the house, the plaintiff saw an ostrich near the house. When they got out of the car, it walked towards them, flapping its wings. It appeared to be agitated, its legs were red and it opened and closed its beak. The plaintiff grabbed the ostrich's head and pushed it down, before releasing the ostrich and running behind the bakkie to avoid danger. He testified that he had told the defendant to remove the ostrich, as it would hurt someone.

[7] The plaintiff arose at 5.30 am the following morning. He made coffee and went outside, but first checked whether the ostrich was nearby, but could not see it. Had he spotted the ostrich, he testified, he would not have left the house.

[8] He fetched the bakkie and brought it around, and then saw the ostrich coming towards the bakkie. The ostrich appeared agitated as it was flapping its wings. He went from the back of trailer, where he was standing, to the front of the bakkie, to frighten off the ostrich, but the ostrich came towards him. He then ran towards the house, to escape the ostrich.

[9] There was an incline close to house and he fell. He lay on his stomach, before getting up again and running towards the house. In so doing, he stepped on a wooden pole with his front foot, incurring an injury.

[10] His only escape route was towards the house – getting in the bakkie or jumping on the trailer was not an option, because of the position of the ostrich.

[11] According to the plaintiff, the defendant did not witness the incident, nor did anyone else. This was challenged by defendant's counsel during cross-examination, as Kotze would testify that he witnessed the incident.

[12] During cross-examination, the plaintiff denied that the ostrich had been there all the time, between the bakkie and house. He further denied that he had ever taunted the ostrich or fed it. He had never been chased by it. The plaintiff denied that he had had brandy to drink that morning, or that he had drunk excessively the night before.

[13] The plaintiff was further asked whether he had been on the farm since the incident? He answered in the affirmative, citing two occasions. Defendant's counsel put it to him that in examination-in-chief he had said that he had not been on the farm for the past four years.

[14] No further witnesses were called for the plaintiff.

DEFENDANT'S WITNESSES

[15] Five witnesses testified, including the defendant.

Mr André de Lange

[16] De Lange knows the plaintiff as Boera. He did not witness the incident. He testified that the plaintiff had on occasion lured an ostrich with mielies, then grab and push down its head. Upon releasing the head, the ostrich would stagger backwards.

[17] He said that the ostrich never came near him or others, and that he had never seen it chase anyone.

[18] He commented on the plaintiff's alcohol intake, describing his drinking on occasion as excessive. He was challenged on his comments regarding the alcohol intake of the plaintiff, during cross-examination. He described average intake as maybe 3-4 brandies and 2 beers. Excessive drinking would be two to three times more.

[19] Plaintiff's counsel asked whether he could distinguish between the various ostriches on the farm and whether they had been marked. The answer to both questions was no.

Mr Hendrik Gerber

[20] He and the defendant are work friends, not house friends. They both work for a mining company. Gerber has known the plaintiff for several years.

[21] He and the plaintiff had had a discussion at the end of 2013 or beginning of 2014, at the workshop, where they spoke about incident. The witness testified that the plaintiff had told him that the incident had been his own fault. The plaintiff told him that he had stepped into a hole,

and had run towards the deck, not the house. This version was denied by the plaintiff when put to him during cross-examination.

[22] He testified that he was aware of the ostriches on the farm and at the house, but never saw any interaction or anyone being chased by an ostrich. He could not distinguish between them and does not know whether they were marked.

Mr Martin Steyn

[23] He has known the plaintiff for several years. He had been on the farm before with his kids. They had fed the ostrich mielies at or near the house.

[24] He had witnessed interaction between an ostrich and the plaintiff. He reiterated what De Lange had said about the plaintiff taunting the ostrich.

[25] Under cross-examination Steyn could not confirm that the ostrich which had chased the plaintiff was the same one which he had allegedly taunted.

Mr Pieter Kotze

[26] The witness is a neighbour of the defendant and works as his farm manager. He testified that there were two females and two males on the farm at the time. One moved around near the homestead, would feed there and then move back into the veld. Three stayed in the veld and did not often come near the house. They had no interaction with people.

[27] Mr Kotze, who was in a boma on the yard at the time, was a direct witness to the incident. He testified that he had seen the plaintiff come from the side of the bakkie, move around the bakkie, and throw something at the ostrich, before running towards the house, falling down, getting up, and then running towards the house again. When he fell, the ostrich had looked at him. Mr Kotze then left and saw nothing further. He was unaware at the time that the plaintiff had been injured.

[28] Under cross-examination, the witness explained that he had not observed the plaintiff specifically, as he was waiting for the others, and that he had seen the ostrich walking in the direction of the house before the plaintiff had thrown something at it.

[29] He had seen previous interactions between the plaintiff and the ostrich. At the abattoir, the plaintiff said that he had worked with ostriches before. The plaintiff would put a hat on the ostrich's head, then grab it around its neck. He was told to let the ostrich be, as someone was bound to be injured. Under cross-examination, the witness conceded that he could not remember when this occurred.

[30] He never saw the ostrich chase someone, or be aggressive. But during cross-examination he conceded that he had been cautious of the ostrich, as a wild animal remains wild. He could not remember whether the ostrich had been on heat, but could not say that it wasn't.

Mr Gert van der Westhuizen (the defendant)

[31] The defendant testified that he and the plaintiff, who would come to his farm often, had arrived on farm on Friday, when it was already dark. He

did not see the alleged altercation with the ostrich that night upon arrival, as testified by the plaintiff.

[32] He had never had any problem with any of the ostriches on the farm. No one had been attacked by an ostrich before. One of the ostriches walked around the homestead. The ostriches have since been sold.

[33] He had witnessed several earlier interactions between the plaintiff and an ostrich. He had told the plaintiff to leave the ostriches alone, as he would make them wild.

[34] He was not a witness to the incident, but said that the plaintiff had not only had coffee to drink that morning, but alcohol also.

III. THE APPLICABLE LAW

[35] Plaintiff's counsel contends that strict liability applies, as the injury was caused by a wild animal which had been brought onto the farm by the defendant. Thus, the plaintiff is required to show only an injury; thereafter, the onus shifts to the defendant. This is strict liability. Counsel submits further that an injury caused directly by a wild animal, and an injury resulting from an attempt to escape a wild animal, is equally actionable.

[36] It seems clear to me from the evidence that the animal in question was wild, as conceded by the defendant. It would make no difference to the liability of the defendant had it become semi-domesticated or even domesticated. See *Bristow infra*.

[37] I shall briefly give an overview of the recourse available to a person injured by an animal, including a wild animal, before outlining three cases of relevance to this case.

[38] It is a clear principle of law that "a duty is imposed on the owner of animals to keep them with due care, so that they shall not cause injury to others." See *Spires v Scheepers* (1883-1884) 3 EDC 173 at 176. This applies to both domestic and wild animals.

[39] In the instance where an animal causes damage or injury, three options, all from common law, are available to a plaintiff, all of which impose strict liability.[1] They are the *actio de pauperie*, the *actio de feris* and the *actio de pastu*. If one of these three is not applicable, the injured party can still sue using the *actio legis aquiliae*.

[40] Strict liability is liability without fault. Although controversial, strict liability is satisfactorily justified by the risk or danger theory, which provides that where a person's conduct or activities causes a considerable increase in the risk of causing harm or damage, the person can be held liable for damage ensuing even in the absence of fault.[2] Determining whether an increase of potential risk is 'considerable' will depend on the legal convictions of the community.[3]

[41] The *actio de pauperie* is available to a party against the owner of a domestic animal which has caused damage. Not only must the animal be domestic, but it must also act against its nature (*contra naturam sui generis*). See *Coetzee and Sons v Smit and another* 1955 (2) SA 553 (A) at 558. This is inapplicable in the present case.

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[1] For a general discussion of forms of liability without fault involving animals, see Neethling, Potgieter & Visser *Law of Delict* (2014) 7ed 381—386.
[2] Ibid 380.
[3] Ibid, referring to Van der Walt 1968 *CILSA* 55.

[42] The *actio de pastu* is available where a wild animal causes damage or loss by eating plants. The animal acts of its own volition when causing the damage. This is inapplicable in the present case.

[43] The *actio de feris*: the *aediles curules* prohibited wild or dangerous animals being brought into or onto a public place. If this rule was ignored and the animal or animals caused damage to someone, the offender would be held liable for the damage, whether he be the owner or not.

[44] Both the *actio de pastu* and *actio de pauperie* are regarded as still part of our law, but doubts exists about the *actio de feris*. See *Zietsman v Van Tonder* 1989 2 SA 484 (T) at 493, in which the plaintiff was attacked by a blue wildebeest on a game farm. The basis for the injury claim was the aquilian action. The court considered the *Bristow* judgment and concluded as follows: "Die vorm van skuldlose aanspreeklikheid waarvan hier sprake is, dink ek is nie meer geldig in ons reg nie' The court referenced one academic work, but without giving any further explanation for its view.

[45] Three cases are of relevance. In *Bristow v Lycett* 1971 (4) SA 223 (RA) the court dealt with an instance where the plaintiff was attacked by a wild animal, in this case an elephant. The court succinctly summarised the legal position at the time as follows, both in respect of strict liability and the defences available to the defendant to escape such liability (at 234):

> "It is now possible to sum up the law applicable to the question posed in this case, thus:

(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, however, can escape liability by proving either

a. The plaintiff was a trespasser or the plaintiff's contributory negligence contributed to his injury; or

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.

[46] Therefore, trespassing, contributory negligence, an unlawful act by a third party or his animal, or casus fortuitous or vis major, would be defences available to the defendant to escape liability.

[47] In *Hanger v Regal and Another* 2015 (3) SA 115 (FB), the most recent South African case to deal with an attack by a wild animal, the plaintiff sued for damages for injuries sustained on the farm of the defendant, which were caused by a caged Himalayan bear. The plaintiff relied on the *actio* or *edictum de feris*, which would impose strict liability on the defendant. The court, with reference to case law and academic authorities, expressed doubt whether this action still formed part of South African law, and if it did, whether negligence forms part of this cause of action.[4] The court granted absolution of the instance and did not engage with the legal question any further. There was a concession of contributory negligence, on the part of the plaintiff.

[4] Ibid 385, particularly note 76.

[48] The court observed the following about the onus shift and the defences available to the defendant (at par 6):

> "Normally the onus to prove that the plaintiff negligently contributed to her own injury or voluntarily accepted the risk of injury, as a defence, would shift to the defendant. But on the plaintiff's own version in casu, it is clear that she was negligent and by her own negligence either caused or contributed to her injuries, and/or that she voluntarily accepted the risk of injury, as fully set out below. And once that is the case, the plaintiff cannot rely on strict liability, but needs to rely on the lex Aquilia and prove the grounds for negligence averred in its particulars of claim."

[49] The court, on the one hand, expresses doubt about the existence of the action in South African law; yet it seems to me that on the other, it acknowledges and applies the defences to strict liability

[50] The facts in *Spires supra* are similar, although not quite on all fours, with the present case. It involved an ostrich attacking the plaintiff, but in *Spires* the plaintiff was an employee of the defendant who made bricks on the farm. The plaintiff was warned that he would need to carry a branch or the like with which to protect himself against the ostrich. The court found that he had voluntarily accepted the risk, as he had had specific knowledge and express notice of the risk. His claim for damages for injuries sustained and medical expenses incurred, was dismissed.

[51] The court made clear that contributory negligence would be a good defence (at 178):

"The defendant has pleaded that the plaintiff contributed to the injury suffered by his having needlessly and carelessly exposed himself to attack. If proved, this plea doubtlessly would afford a good defence. *Quod quis ex culpa sua damnum sentit non intelligiter damnum sentire* (Dig., 50, 17, 203)."

[52] And a bit later in the judgment, the court explained the circumstances under which the plaintiff in this case had voluntarily assumed the risk (at 180):

"The plaintiff in this suit had knowledge and express notice that there was a risk of his being attacked by the bird, and moreover expressly agreed to undertake that risk in consideration of employment on defendant's farm. By his own contract, therefore, he has precluded himself from recovering damages for any injury resulting from the very danger he agreed to encounter ..."

[53] The defendant accepts that it has the onus to prove the available defences, but only if there is causality. Defendant's counsel argues that the plaintiff had failed to establish causality between the attack and the injury, and that injury was not caused by the wild animal.

[54] The defendant claims that there is no evidence to suggest that the ostrich chased the plaintiff during the second sprint towards the house, and that the first chase was unconnected to the resulting injury. There is no causal link between the initial attack and the eventual outcome.

[55] Plaintiff's counsel pointed to the evidence of Kotze to show that the danger had not yet passed when the plaintiff had jumped up. In my view 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.

IV. ASSESSMENT OF THE EVIDENCE & THE DEFENCES

[56] I accept the plaintiff's version of the incident. There was only one other witness to the incident, Mr Kotze, whose testimony corroborated to a sufficient degree that of plaintiff's. Kotze witnessed the incident, but only from the time when the plaintiff had thrown something (a small stone, according to the plaintiff) at the ostrich. From this point on, Kotze corroborates the version of the plaintiff. I have no reason to doubt the plaintiff's version, considering this confirmation.

[57] In his evidence in chief, the plaintiff denied that anyone had witnessed the incident. I do not consider this to be problematic, as it is entirely conceivable that the plaintiff was not aware that Mr Kotze was witnessing the event, as his focus would have been on escaping the ostrich. Kotze testified that he left after witnessing the plaintiff fall, and did not come to the aid of the plaintiff.

[58] The evidence of Mr Gerber that the plaintiff told him that he had been responsible for the injury himself, was sketchy and lacking in convincing detail.

[59] The other witnesses testified mostly regarding the alleged prior provocation, which I deal with in the next section.

[60] The defendant made an application to the court at the close of the plaintiff's case for leave to amend his plea, in terms of Rule 28(1), so as to plead more specifically and in greater detail to the claim of the

plaintiff, based on strict liability. I denied the application, on the basis that it would cause prejudice to the plaintiff, and would likely require the plaintiff and several other witnesses to be recalled.

[61] In his original plea, the defendant did plea as defences provocation, voluntary assumption of risk and that the animals had acted in accordance with their class at the time that the alleged incident occurred. Contributory negligence was not specifically pleaded.

[62] I shall deal with each in turn, even contributory negligence for the sake of completeness.

Provocation

[63] Although provocation is not listed as a specific defence to strict liability arising from the attack of a wild animal in the case law above, it is a defence to the *actio de pauperie* and I shall nonetheless consider it for sake of completeness. Plaintiff's counsel argued that the defence of provocation was never put to the plaintiff during cross-examination. In any event, as will be seen below, my consideration of it makes no difference to the ultimate outcome of the case.

[64] Defendant's counsel argues that there was prior provocation on the part of the plaintiff. The attack should not have come as a surprise, considering the taunting of the ostrich by the plaintiff on several occasions before the incident. The plaintiff was therefore the architect of his own misfortune.

[65] This provocation on past occasions should be sufficient to meet the requirements for the defence, and immediate provocation is not required, says defendant's counsel. It would unrealistic, narrow and

untenable to suggest that provocation could only occur immediately prior to the act causing injury. Plaintiff's counsel on the other hand says that it is only when provocation occurs immediately prior to the act causing injury, that it can be regarded as provocation for purposes of a defence.

[66] On the facts, even if there was previous provocation, it is unknown when this occurred. Plaintiff's counsel correctly pointed out that there is no evidence of provocation by the plaintiff on the day of the incident.

[67] No evidence, expert or otherwise, was presented by the plaintiff that the attack of 4 August was the result of earlier provocation. I take the view 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.

Voluntary assumption of risk

[68] Defendant's counsel argued that the plaintiff was fully aware of the presence of the ostriches on the farm, as he had visited the farm on many previous occasions. The plaintiff knew the risk posed by the ostrich, and accepted it. The plaintiff was fully aware that the ostrich would be in an aggressive state of mind on the morning, as he had recognised the signs the evening before. Yet he made the conscious decision to go outside, well knowing that ostrich was out there. It is insufficient for him to say that he had looked for the ostrich while or before walking to the bakkie. His tacit consent cannot be invalidated by this. He must have foreseen the risk and the associated danger.

[69] Plaintiff's counsel submitted that the defendant is required to prove knowledge of the risk, ambit of the risk, and consent to the risk, which it

failed to do. He pointed out further, correctly in my view, that knowledge is not the same as assumption of risk. See *Lever v Pundy* 1993 (3) SA 17 (A).

[70] In my view, it cannot be said that simply because the plaintiff was on the farm, he had voluntarily assumed the risk of attack or injury. By this reasoning, every single visitor to the farm, including the witnesses, would have voluntarily accepted the risk. This was a private visit. There was no notice board or something similar indicating that the plaintiff would bear the risk of entry. An awareness of the presence of a wild animal, or even previous contact with such animal, is insufficient to constitute assent to undergo the relevant risk. Also, by checking whether the ostrich was there before he left the house, the plaintiff acted reasonably. It cannot be said that simply because he left the house to go outside despite not seeing the ostrich, that he had voluntarily accepted any risk.

Contributory negligence

[71] The defendant alleges that the plaintiff had contributed to the injury suffered, by his having needlessly and carelessly exposing himself to attack. By opting to run towards the house, he had increased the risk of injury. It would have been more reasonable for him to have jumped on the trailer, or get in the car.

[72] The evidence of the plaintiff was clearly that the only escape route available to him, considering the position of the ostrich, was towards the house. The evidence of Kotze did not contradict this. In my opinion, there is no evidence of contributory negligence.

The animal had acted in accordance with its class at the time that the incident occurred

[73] I fail to see how this could possibly be a defence to liability.

V. CONCLUSION

[74] The plaintiff succeeds. The defendant has failed to prove any of the defences.

VI. ORDER

[75] I make the following order:

(a) The defendant is liable to pay the plaintiff such damages as he can prove in due course.

(b) The defendant is liable to pay the costs of this action up to the date of this order, including the costs associated with the employment of senior counsel.

M OLIVIER

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA, GAUTENG PROVINCIAL DIVISION, PRETORIA

Date of judgment: 7 December 2016

Appearance on behalf of the Plaintiff: Adv T P Kruger SC

Appearance on behalf of Defendant: Adv J L Myburgh