THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

CASE NO:393/05
Reportable

In the matter between

HOWARD WALKER **Appellant**

and

SANDRA REDHOUSE **Respondent**

CORAM: MTHIYANE and LEWIS JJA and MALAN AJA

HEARD: ***22 August 2006***

DELIVERED: 31 August 2006

Summary: Pauperian liability for injuries sustained while horse riding excluded by indemnity signed by rider.

Neutral citation: This case may be cited as *Walker v Redhouse* [2006] SCA 95 (RSA).

JUDGMENT

LEWIS JA

[1] Horses will be horses. That is why their owners, on permitting others to ride them, generally try to avoid the risk of liability should accidents happen and the riders are injured. This is such a case. The appellant, Mr Howard Walker, owns a guest farm at Walkersons Estate in Mpumalanga. One of the leisure activities offered to guests is horse riding. The respondent, Ms Sandra Redhouse, an English visitor to South Africa, went with her partner, Mr Allan Winkelman, to stay at the lodge. She and Winkelman were invited to go horse riding with a member of staff, Ms Karlien Malan. They accepted the offer, as did two other guests, Mr and Mrs Naudé. Redhouse and Winkelman met Malan at the stables. Before mounting a horse Redhouse was asked to sign an indemnity form. She did so. In the course of the ride the horse bolted, and Redhouse fell off and was dragged on the ground by the horse because her one foot was caught in the stirrup.

[2] When Redhouse sued Walker for damages resulting from injuries sustained when she fell off the horse, named Maverick, and was dragged along the ground, he raised as a defence the terms of the indemnity. It is this that forms the kernel of the appeal before us, which lies with the leave of the court below (the Pretoria High Court, per Bosielo J). Bosielo J found that Walker was liable under the *actio de pauperie* for the damages suffered. The quantum of damages was not determined, the issues of liability and quantum having been separated by the court at the request of the parties.

[3] The pauperian action lies against the owner of a domestic or domesticated animal which has caused damage. Liability is strict – based

simply on the ownership of the animal.[1] But the owner will be liable only if the animal has acted *contra naturam sui generis* – contrary to the nature of the class of animals.[2] The indemnity signed by Redhouse was pleaded as a defence to the action. And it was argued in the court below that the indemnity excluded liability under the pauperian action (as well as under alternative claims based on negligence or contractual beach). Yet it did not feature in the judgment of Bosielo J save for a cursory mention. The court concluded that Walker was liable under the pauperian action because Maverick had acted *contra naturam*, and did not discuss the effect of the indemnity at all. Walker argues on appeal that the court below erred in failing to consider the effect of the indemnity. The appeal thus turns on the meaning and effect of the indemnity, for if it does exclude liability under the pauperian action then there is no need to determine whether such liability was correctly found to have been present.

[4] The indemnity reads:

'Walkersons Stables

Terms and Conditions

I hereby confirm that neither Walkersons or Critchley Hackle, or any member of their staff shall be liable to me, my estate or dependants for any loss or damage sustained as a result of my death or injury to my person or property in the course of my horse riding about the property of Walkersons.

I acknowledge that I am aware of the risks involved in horse riding and accept such risks.'

It is signed and dated (6 January 2001) by Redhouse. The terms of the indemnity are not in dispute. It is only their interpretation that is placed in issue.

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[1] See 1 Lawsa 2 ed para 464.
[2] See *Loriza Brahman v Dippenaar* 2002 (2) SA 477 (SCA).

[5] Walker contends that the indemnity excludes his liability, as owner of the horse, for the injuries sustained by Redhouse. Redhouse, on the other hand, argues that the indemnity does not cover any risks other than those which normally arise in the course of horse riding: Maverick had acted *contra naturam sui generis*, and thus Redhouse had not assumed the risk that befell her. Before considering the respective interpretations of the indemnity contended for by the parties it is useful to consider in brief the evidence led at the trial. Redhouse testified as did Winkelman. Malan and Mr Naudé gave evidence for Walker. I shall not deal with the evidence in any detail since I consider it unnecessary for the decision of the matter.

[6] The lodge arranged for Malan, who was in charge of leisure activities, and who is an experienced rider, to take the four guests for what was called an ‘outride’ on Walker’s property. They went to the stables at the appointed time, and were required to sign indemnities before being given helmets and allowed to mount the horses allocated. Malan testified that she had given the guests a briefing on how to ride, bearing in mind that they were novices. (Redhouse claimed to have ridden as a child, but that she had told Malan that she had not been on a horse for 15 years prior to the incident. Naudé had also ridden as a child, but regarded himself as inexperienced.) Naudé confirmed that she had told them various things about riding. Redhouse and Winkelman, on the other hand, denied that Malan had given them any instructions.

[7] The guests all rode on their mounts in a paddock and then went off on the ride. Malan herself led the ride, Redhouse following and Winkelman bringing up the rear. The horses walked for about 30 minutes before Malan stopped on a dam wall to see that all the guests proceeded safely through a dip. Redhouse stopped next to Malan. Just before Redhouse stopped, according to Malan and to Naudé, Maverick stumbled but then regained his footing and came to a stop next to her. Malan thought he might have been frightened by a small animal. Redhouse denied that Maverick had been frightened or had lost his footing.

[8] Malan and Naudé gave similar accounts of what followed. Redhouse stood up in the stirrups, leaning forward and clinging to Maverick's neck. She had let go of the reins. The horse ran off – bolted – cantering at first and then galloping. Both heard Redhouse scream as Maverick took off. Naudé had heard her shriek even before she stood up and let go of the reins. Winkelman, who was behind Malan and Redhouse when Maverick took off, said that while he had not seen Maverick bolt, he had seen the horse galloping with Redhouse in the stirrups, leaning forward. He had thought at the time that she was 'showing off'.

[9] According to Redhouse she had fallen off Maverick, but one foot had been stuck in the stirrup and she had thus been dragged for a while before she managed to free the foot, hence the extent of the injuries alleged. She was assisted by men fishing nearby, who took her back to the lodge, from where she was taken to a local clinic.

[10] The essential point of dispute is whether Maverick bolted for no reason, or whether he was startled and instinctively ran off. The evidence of Malan and Naudé, who was an independent witness, being a guest at the lodge at the same time as Redhouse, shows that Maverick was startled by something; that Redhouse reacted, that she stood up in the stirrups and placed her arms around the horse's neck, losing control by letting go of the reigns. Winkelman's evidence supports the version that she had leaned forward, standing in the stirrups. Redhouse's denial that the horse was startled, that she stood up and that she held on to Maverick's neck, is thus in direct contrast with that of the three witnesses to the events. It is true that there are differences between them on various aspects and on the sequence of events. But the scene was a moving one and they were in different positions. The inherent probability is that Maverick lost his footing, Redhouse was startled, cried out, stood up, lost hold of the reins, and frightened the horse into bolting.

[11] If so, Maverick cannot be said to have acted *contra naturam*. He reacted as horses do when startled or frightened. This was indeed the evidence of an expert witness called for Walker. But even if Maverick had acted *contra naturam*, argues Walker, he had contracted out of pauperian liability. Redhouse contends, on the other hand, that the indemnity does not exclude liability for loss or injury caused by a horse which has not behaved as horses typically do. The argument of Redhouse is, in summary, that the phrase in the indemnity 'in the course of my horse riding' relates to the activity for which she contracted – to ride under supervision on a suitable horse. If this is so, the argument goes, then Redhouse's injuries were not sustained in the course of horse riding.

[12] Counsel for both parties agreed that the indemnity is to be interpreted in the light of the background circumstances.[3] These included, argued counsel for Walker, the fact that Walker wished to protect himself from liability for any loss or damage; that the activity of horse riding was purely for entertainment and thus 'elective'; that horses are potentially dangerous animals, and not machines; and that riders are individuals with different temperaments and abilities. The mix of horses and riders is thus risk-laden, and yet the owner faces strict liability should a horse act *contra naturam*. The very purpose of the indemnity is thus to protect the owner from liability in such a risky situation.

[13] While conceding that indemnity provisions should be construed restrictively,[4] Walker contends that the provision in question is couched in unambiguous language and has a wide import. It embraces 'any loss or damage . . . sustained as a result of . . . injury to my person . . . in the course of my horse-riding about the property of Walkersons'. There is no restriction, on the wording, in respect of the cause of the injuries for which liability is excluded. Any injury which results from horse riding is covered. And while an exemption clause will be construed against the person in favour of whom it has been made (*contra proferentem*) when ambiguous, one should not strain the meaning of the language to find the ambiguity.

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[3] Reliance was placed in this regard on *Van der Westhuizen v Arnold* 2002 (6) SA 453 (SCA), paras 13 and 23.

[4] See *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA); *Durban's Water Wonderland (Pty) Ltd v Botha* 1999 (1) SA 982 (SCA); *First National Bank of SA Ltd v Rosenblum* 2001 (4) SA 189 (SCA) and *Johannesburg Country Club v Stott* 2004 (5) SA 511 (SCA).

[14] Dealing with the proper approach to the interpretation of indemnity clauses, this court said in *Durban's Water Wonderland (Pty) Ltd v Botha*:[5]

'The correct approach is well established. If the language of the disclaimer or exemption clause is such that it exempts the *proferens* from liability in express and unambiguous terms, effect must be given to that meaning. If there is ambiguity the language must be construed against the *proferens*. (See *Government of the Republic of South Africa v Fibre Spinners & Weavers (Pty) Ltd* 1978 (2) SA 794 (A) at 804C.) But the alternative meaning upon which reliance is placed to demonstrate the ambiguity must be one to which the language is fairly susceptible; it must not be "fanciful" or "remote" (cf *Canada Steamship lines Ltd v Regem* [1952] 1 All ER 305 (PC) at 310C-D [1952 AC 192]).'

[15] The ambiguity for which Redhouse argues is that the word 'any' qualifies 'loss or damage'. It does not cover injuries sustained where a horse has acted *contra naturam* because the provision is silent on the question of what causes the injury. Thus one must have regard to the surrounding circumstances: these include the fact that the guests who participate in organized horse riding do not have specialist knowledge of horses and their behaviour. Guests would not be aware that horses act untypically. They would foresee only ordinary risks.

[16] Counsel for Redhouse placed great reliance for this argument on *Lawrence v Kondotel Inns (Pty) Ltd*[6] in which Findlay AJ found that an exemption clause did not exclude liability under the pauperian action where a horse had bolted, thus acting, in his view, *contra naturam*. In construing the clause in question (which simply stated that 'all riders ride at their own risk: if

[5] Above at 989G-J.
[6] 1989 (1) SA 44 (D). *Lawrence* was approved in *Visagie v Transsun (Pty) Ltd* [1996] 4 All SA 702 (Tk) at 719c-720d.

any accident should occur' the defendant hotel would not be held responsible) Findlay AJ said:[7]

'It seems to me that what was here envisaged were the normal or usual occurrences which might occur such as a horse stumbling if it caught its foot in a pothole or shying suddenly or being startled by some sudden event. It is possible that this type of risk could also have extended to incidents during the ride such as inexperienced riders unintentionally jostling one another. Had a rider been injured by brushing against a fence post or tree in the course of the ride or been unseated by the horse stumbling or being jostled in the circumstances in which I have described, it seems to me that those were the sort of events contemplated by the parties. I do not think that the clause is intended to cover misconduct on the part of the animal had it, for example, turned and bitten the rider or bolted as it did. I would have expected language in the clause warning the rider more expressly that the horses had a tendency to be frisky or to bolt on an intermediate ride and that riders should therefore not undertake these rides unless they were capable of controlling their horses.'

[17] Whether a horse (or any other animal) can be considered guilty of misconduct is a matter that need not now be decided. The court in *Lawrence* held that when a horse ridden by a young child, who could not control it, had bolted, and the child had fallen, been dragged, and seriously injured, the hotel was liable because the risk of bolting had not been contemplated by the parents of the child: the horse had broken out of line and acted *contra naturam*. The exemption clause did not therefore constitute a defence to the claim.

[18] Findlay AJ found support for his decision that the bolting of a horse is *contra naturam* in texts of the Roman Dutch jurists Voet *Commentarius ad Pandectas* 9.1.5 and Grotius *Introduction to Dutch Jurisprudence* 3.8.12

[7] At 54E-G.

which commented on pauperian liability arising when horses were harnessed and supposed to be under the control of a driver. There could be no distinction, he said, between a horse harnessed to a cart and one being ridden. Again, whether this is correct need not be decided. *Lawrence* is distinguishable from this case because the wording of the exemption provision was quite different, as were the circumstances. And whether an animal has acted unnaturally must in each case be a question of fact. There is no exhaustive or closed list of circumstances in which it can be said that an animal has acted either *secundam* or *contra naturam*. A horse may well bolt quite naturally when frightened by a rider, or for some other reason.

[19] Redhouse nonetheless contends that the wording of the indemnity in issue in this case does not cover liability for injury caused in abnormal circumstances not contemplated by the parties: it is not injury from 'any cause whatsoever'. In my view, this interpretation strains the wording of the indemnity. It requires words to be read in which limit the causes of injury. There is nothing to suggest that that was the intention of either of the parties. The indemnity provides that Walkerson's stables shall not be liable for loss sustained 'as a result of my injury . . . in the course of my horse riding . . .'. The language clearly covers all liability resulting from, or caused by, the activity of riding a horse, whether or not the injury is caused by a horse acting out of character. This interpretation is consistent with the second sentence of the indemnity in which Redhouse acknowledged that she was aware of the risks involved in horse riding and accepted them. The extent to which such a provision may be enforceable (for example where the person indemnified has

contracted out of liability for the negligent performance of a contract[8]) does not arise here. There was certainly no evidence of negligence or any wrongdoing on the part of Walker or his staff.

[20] Accordingly I consider that even if Walker were liable to Redhouse on the pauperian action he has effectively contracted out of such liability. The indemnity is a complete defence to the claim.

[21] The appeal is upheld with costs including the costs occasioned by the employment of two counsel. The order of the court below is set aside and replaced with the following:

'The Plaintiff's claim is dismissed with costs.'

C H Lewis
Judge of Apeal

CONCUR:

Mthiyane JA

Malan AJA

[8] See in this regard the judgment of Harms JA commenting on *Afrox Healthcare* above, in *Johannesburg Country Club v Stott* above, para 12, and contra Marais JA paras 14-16.