REPORTABLE JUDGMENT

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case no. A 41/2007

CHRIS FOURIE Appellant

v

DOMINIQUE NARANJO First Respondent

IRIS NARANJO Second Respondent

JUDGMENT DELIVERED THIS WEDNESDAY, 2 MAY 2007

CLEAVER J

[1] This appeal concerns the application of the *actio de pauperie*, which, notwithstanding academic criticism, remains entrenched as a feature of our law.

[2] The facts are not in dispute. The appellant, Mr Chris Fourie ('Fourie'), was the owner of a rottweiler dog known as Bruno which on the day in question and at the premises of Fourie attacked and savaged Mrs Susanna Swart ('Mrs Swart'), a domestic servant in the employ of Fourie.

[3] The first respondent, Dominique Naranjo ('Naranjo') who was 67 years old at the time, hastened to Mrs Swart's aid. He succeeded in distracting Bruno from her, but sadly for him, he was then attacked and bitten first by Bruno and thereafter by a

second rottweiler that was on the premises, whose name transpired to be Cindy.

[4] Naranjo and his wife sued Fourie as the first defendant and Mr P S Neethling ('Neethling'), the second defendant and owner of Cindy, jointly for damages in the magistrates' court, Malmesbury. Naranjo claimed damages for pain and suffering, medical expenses and the loss of his shirt and jacket, while Mrs Naranjo claimed damages for the emotional shock and distress caused by her witnessing the accident and for medical expenses.

[5] The cause of action against Fourie and Neethling was founded on their ownership of their dogs, alleged to be domesticated, with the necessary allegation for the *actio de pauperie* that the dogs had acted contrary to the nature of their class. In the alternative and in the event of the court holding that Fourie and Neethling were not the owners of the dogs or that the dogs had not acted contrary to their nature, it was alleged that Fourie and Neethling had acted wrongfully and negligently in failing to take reasonable steps to safeguard persons lawfully on the premises of the first defendant when they knew that the animals were at times vicious and likely to bite people who were lawfully on the premises.

[6] In their pleas Fourie and Neethling each denied that his dog had bitten Naranjo, averring that he had been bitten by the other dog. As to Mrs Naranjo's claim, she

was put to the proof thereof and each pleaded that in the event of the court finding that Mrs Naranjo did witness the accident, they were not liable in law for her emotional distress and shock in that the incident could not reasonably have been foreseen by them.

[7] Fourie and Neethling pleaded further that in the event of the court finding that their dogs had bitten Naranjo,

7.1 Naranjo was at all material times aware that Fourie kept a dog on his property and that such dog or other dogs on the property were liable to bite and injure persons who entered on the property. Since both dogs were openly agitated and/or aggressive at the time he entered upon the property, he freely and voluntarily assumed the risk of injuring himself by entering the property in spite of such knowledge.

7.2 Alternatively, Naranjo was negligent in entering the property and any injuries sustained were occasioned by his negligence.
7.3 In the further alternative, Naranjo entered onto the property without any legal right to be there and the dogs which were openly agitated and aggressive at the time, bit Naranjo. Accordingly he had no claim against Fourie and Neethling.
7.4 It was denied that the dogs acted contrary to the nature of their class.

[8] By agreement between the parties, the magistrate who heard the matter was called upon to pronounce only on the merits of the claim as provided for in Rule 29 (6) of the Magistrates' Court Rules of Act 32 of 1944 as amended. At the conclusion of the evidence led on behalf of Mr and Mrs Naranjo, Fourie's attorney formally recorded

that Fourie admitted that his dog had bitten Naranjo, but averred that it was not only his dog which did so, but Neethling's dog also.

[9] The magistrate accepted the evidence of Mr and Mrs Naranjo, found that they had established the merits of their claims in terms of the *actio de pauperie* and awarded them costs, including counsels' fees on a higher scale than that set down by the Magistrates' Court Act. Having found for the Naranjos on this basis, he did not deal with their alternative claims which, as I have said, were based on negligence.

[10] Fourie now appeals against the magistrate's finding. There is no appeal by Neethling.

[11] The *actio de pauperie* imposes strict liability on the owner of a domestic animal which injures another person or property by acting ferociously or contrary to its nature and the owner is liable for any damage which may result. Before us it was submitted on behalf of the appellant that

11.1 Rather than acting contrary to their nature when the dogs bit Naranjo, they did so because of extrinsic factors.

11.2 The presence of Naranjo on the premises of Fourie at the time was unlawful.

11.3 By entering on the premises when Bruno was in the process of attacking Mrs Swart, Naranjo exposed himself to the risk of being attacked himself, had knowledge of the harm which could come to him and consented to such risk when he entered the property. (The defence of *volenti non fit iniuria*.)

[12] In my view, there is no reason to question the magistrate's finding that he could accept the evidence given by Mr and Mrs Naranjo. Briefly, that evidence was the following:-

Naranjo and his wife had been on friendly terms with their neighbours, the Fouries, for a number of years. They knew that Fourie kept the dog known as Bruno and had been aware of this since Bruno was a puppy. Prior to the incident in question, Mrs Naranjo had been very apprehensive about Bruno and had been so for a considerable time. She had decided not to visit the Fouries unless she was met at the gate and accompanied into the house by Mr and Mrs Fourie for she regarded the dog as dangerous. On one occasion it had charged at her from the opposite side of the wire fence which separated the Naranjo's property from that of Fourie's while she was weeding in her garden. Naranjo, on the other hand, had no fear of Bruno. He testified that Bruno had been accustomed to him since Bruno was a puppy and had always obeyed him. On occasions when Bruno had managed to get out of the Fourie's property and had barked at passers by, he had been able to call Bruno and easily put him back onto his property. This was confirmed by Mrs Naranjo. He also testified that on occasion he had fed Bruno while his owners were away. This evidence was initially denied by Fourie, but was later admitted. Mrs Naranjo testified that when her husband had to visit the Fouries, she would often telephone them in advance so that he could be met at the Fourie's gate and be escorted in to the property. Naranjo on the other hand, never personally requested that he should be

met because he did not consider this to be necessary, as a result of his previous experience with Bruno. He also testified that on one occasion at least he had walked his dog together with Mr Fourie who was walking Bruno.

[13] The Naranjos were having breakfast on the fateful day when they heard Mrs Swart's cries as she was being attacked and savaged by Bruno. Naranjo immediately went to her aid, picking up a brick as he made his way to the gate into the neighbour's property. There he found a number of people standing. He could hear Mrs Swart shouting and immediately went into the property to help her. He found her in a sitting position with Bruno on her with his paws on her shoulders. He could see that Bruno was biting her. He called Bruno twice. Bruno momentarily ceased mauling Mrs Swart and stared up angrily at Naranjo. Naranjo then threw the brick at Bruno, but missed him. He faced Bruno for a little while, but Bruno then rushed towards him and leapt at him. He put up his left hand for protection, but the dog, which was said to weigh between 50kg and 60kg, knocked him down. Clutching the dog around the neck, he attempted to strangle it, but Bruno savaged his left arm. While on the ground, Cindy appeared and attacked him also, biting his right hand. Luckily he was able to kick Cindy on the snout causing her to leave off the attack. Bruno left him and he managed to crawl to the gate where he collapsed into the arms of his wife who had witnessed the incident from the gate. Naranjo had had no idea that there was a second dog on the property and when Fourie and Neethling gave

evidence, it transpired that Neethling had brought his dog Cindy, a bitch, to the property in order for her to be covered by Bruno.

[14] Naranjo was adamant that when he ventured into the property he did not anticipate being attacked by Bruno because of his considerable experience of and with Bruno in the past. He believed that Bruno would come to him as soon as he called him and he felt that he had to go in order to save Mrs Swart.

CONTRARY TO THE NATURE OF THE CLASS

[15] I have difficulty in following the submission made on behalf of the appellant, that on the facts the magistrate ought not to have found that the dogs acted contrary to their nature, but that extrinsic factors had caused them to attack Naranjo. In *Du Plessis v Nienaber*[1] it was held that the

> "action will fail if the dog was provoked by some negligent act on the part of the plaintiff or if the dog was moved to behave as it did by some extrinsic cause so that its action was not due to vice or inward excitement. "

In the heads of argument presented on behalf of the appellant, it was submitted that the extrinsic factors which caused Bruno to attack were that Naranjo called Bruno twice while Bruno was savaging Mrs Swart, that a delay ensued before he threw the brick at Bruno whereafter Bruno attacked Naranjo. Precisely what occurred when Naranjo threw the brick is by no means clear. Naranjo says that the brick missed

1 1948 (4) SA 293 (T) at 297

Bruno. He was not asked how far away from the dog he was when he threw it or by how much it missed the dog and I do not consider that merely because Bruno rushed at him after the brick had been thrown the inference can be justified that it was necessarily the throwing of the brick which caused Bruno to attack him. It may well be that Bruno simply turned his attention from Mrs Swart to Naranjo when he saw Naranjo. In *Da Silva v Otto*[2] the court suggested that an objective test of the reasonable dog was to be applied and further that a dog which was properly domesticated could be expected to recognise the authority of man. This is why the court held that even when the dog had been struck with a type of sjambok before it bit the complainant it was held to have acted *contra naturam suam* as it was expected to obey the complainant. On this basis at least throwing the brick at Bruno cannot necessarily or even probably be said to have caused the dog to attack Naranjo.

Furthermore, for what it is worth, Fourie admitted that in attacking Mrs Swart and Naranjo, Bruno had acted contrary to his nature.

I am therefore of the view that the magistrate correctly found that the dogs had acted contrary to the nature of their class.

VOLENTI NON FIT INIURIA

[16] To succeed at this defence, the appellant had to allege and prove that Naranjo:

2 1986 (3) SA 538 at 542

16.1 Had full knowledge of the nature and extent of the possible prejudice to which he was exposing himself[3];

16.2 Realised or appreciated fully what the nature and extent of the harm might be[4]; and

16.3 In fact subjectively consented to the risk[5].

The three requirements mentioned above are neatly encapsulated in the following *dictum* of **Innes** CJ in *Waring and Gillow Ltd v Sherborne* which is often quoted:

> "[I]t must be clearly shown that the risk was known, that it was realized, and that it was voluntarily undertaken. Knowledge, appreciation, consent – these are the essential elements; but knowledge does not invariably imply appreciation, and both together are not necessarily equivalent to consent."[6]

[17] Counsel for the appellant submitted that the following factors were indicative thereof that Naranjo in fact foresaw the danger of venturing into the Fourie's yard:-

* He new that Bruno was more accustomed to Mrs Swart than to him and he must therefore have been alerted to the fact that something untoward had occurred to create a dangerous situation.

* In a statement which he had signed and which was handed into court it was recorded that he and his wife considered Bruno to be dangerous.

* He picked up a brick as he went towards the Fouries' house which indicated that he was aware of a potential danger.

I do not consider the fact that Mrs Swart was attacked to be significant having regard

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3 *Castell v De Greef* 1994 (4) SA 408 (C) at 425
Santam Insurance Co Ltd v Vorster 1973 (4) SA 764 (A) at 781

4 *Castell v De Greef* (*supra*)
Durban City Council v SA Bondmills 1961 (3) SA 397 (A)

5 *Malherbe v Eskom* 2002 (4) SA 497 (O)

6 1904 TS 340 at 344

to the speed at which everything occurred. In any event, Naranjo's evidence was that he was of the view that because of his particular relationship with Bruno, he would be able to handle the dog. I also do not consider that particular emphasis should be placed on the statement which he signed. Naranjo is Spanish speaking and no evidence was led as to who wrote the statement and what role Naranjo had in importing the information which appears in the statement. Judging by the evidence given by Naranjo (through an interpreter) and Mrs Naranjo it is quite probable that much of what appeared in the statement emanated from Mrs Naranjo, who clearly had a different view about Bruno from that of Naranjo. In my view, regard should be had to the evidence given in court and not to what appeared in the statement.

I have already remarked that Naranjo's action in picking up the brick was never properly examined, nor were his reasons for doing so. All that we know is that he testified that he picked up the brick for *"prevention"*, whatever that may mean.

[18] Counsel for the appellant relied heavily on the judgment in *Maartens v Pope*[7] in which it was held that because the plaintiff entered the defendant's property through a gate, the two doors of which bore a sign inscribed with the words *"beware of the dog"*, and the plaintiff admitted in cross-examination that the signs suggested that he might be attacked and bitten if he entered the property, he ran the risk deliberately and assumed it tacitly. The facts in the present case are of course quite different for Naranjo could see that Bruno was already savaging Mrs Swart and the fact that the

7 1999 (2) SA 883 (N)

Fouries' gate bore a sign warning persons to be aware of the dog is not relevant. Furthermore, what distinguishes this case from all the other cases to which we were referred is that Naranjo new Bruno well and had never personally had any trouble with the dog before. Having regard to the obvious danger of accepting the *ipse dixit* of a claimant against whom the defence of *volenti non fit iniuria* is invoked, it was held in *Santam Insurance Co Ltd v Vorster* that the question should be approached on the following basis:-

> "The inherent difficulty that the central factum probandum – *viz. the consent to the particular risk which occasioned the supervening injuries – is basically a subjective enquiry can, I suggest, only be bridged by way of inference from the proved facts. In the nature of things, direct evidence will seldom, if ever, be available; and manifestly the negative* ipse dixit *of the claimant himself can by itself usually carry but little weight. The Court must, in my view, thus perforce resort first to an objective assessment of the relevant facts in order to determine what, in the premises, may fairly be said to have been the inherent risks of the particular hazardous activity under consideration. Thereafter the Court must proceed to make a factual finding upon the vital question as to whether or not the claimant must, despite his probable protestations to the contrary, have foreseen the particular risk which later eventuated and caused his injuries, and is accordingly to be held to have consented thereto. The foregoing appears to me to afford a practical method of dealing with what is admittedly a somewhat difficult problem, to be in general conformity with our decisions in so far as they touch this point (see, e.g.* Mandelbaum's *case,* supra *at p. 377), and, more particularly, to be in accord both with the vital conclusion of SCHREINER, J.A., in* Lampert v. Hefer, N.O., supra *at p. 509E, that the applicant*
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> '*must have known and appreciated the risk and elected to encounter it',*
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> *and with the view of VAN WINSEN, J., at p. 418A-C of* Rosseau v. Viljoen*,* supra*, that an enquiry is,* inter alia*, required regarding—*
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> '*the question of whether – and this is a subjective enquiry – an inference arises from all the evidence that plaintiff must have understood and accepted such risk'." "* [8]

8 1973 (4) SA 764 at 781C-G

In *Lawrence v Kondotel Inns (Pty) Ltd*[9] the court highlighted that the defence had to establish that the plaintiff had the necessary awareness of the degree of danger to which he was exposing himself. Having regard to the subjective nature of the enquiry, it is in my view clear from Naranjo's evidence that he was not afraid and foresaw no risk when he entered the premises because Bruno had always obeyed him and he expected him to do so again. Because of this, the issue of his own safety never came to mind and in the result the defence cannot succeed.

NEGLIGENCE

[19] Since the Apportionment of Damages Act does not apply, negligence on the part of Naranjo would be a complete defence to the action *de pauperie.* The facts relied upon by the appellant to establish this defence are the same facts which were relied upon for the defence of *volenti non fit iniuria.* In my view, this defence must fail for the same reason that the defence of *volenti non fit iniuria* fails. It is common cause that Naranjo did not see Bruno as a danger to himself (this was conceded by Fourie) and that he had no reason to expect that Bruno would not recognise his authority when he entered Fourie's property. Judged as to how a *diligens paterfamilias*, having the knowledge which Naranjo had, would behave in the circumstances, it is my view that Naranjo was not negligent in going to the aid of Mrs Swart.

9 1989 (1) SA 44 at 55B

UNLAWFUL PRESENCE ON THE PROPERTY

[20] On behalf of the appellant it was submitted that Naranjo was not lawfully on the Fourie's property when he was attacked and that therefore he could not succeed with his claim. In amplification the following points were made:

20.1 The incident occurred on Fourie's property.
20.2 Naranjo entered the property without Fourie's permission.
20.3 Throughout their relationship the Naranjos had visited the Fourie's property by arrangement only.

20.4 Naranjo must not merely have had a lawful purpose for being on the premises (which he did not have), but must also have had a legal right to be there and did not have such a right.

Although Mrs Naranjo usually telephoned the Fouries before she or her husband visited them, there had clearly been occasions where Naranjo entered the property without any prior arrangement to do so.

It was held in *Mehnert v Morrison*[10] that being lawfully at the place where harm is inflicted by an animal is not an element which is to be proved by a plaintiff in an *action de pauperie*, but that being on the premises unlawfully or provoking the animal are elements of a defence to the action in respect of which the defendant bears the onus.

[21] As explained by Neethling Potgieter and Visser[11] the courts differ in whether a defendant has to prove that a plaintiff did not have a lawful purpose for being on the

10 1935 TPD 144 at 149
11 Law of Delict Fifth Edition p333

property or a legal right to be there. I agree with counsel for the respondents that it can hardly be argued that Naranjo did not have a *"lawful purpose"* to enter the Fourie's yard. His purpose was clearly to rescue Mrs Swart. Although it has been held that only persons who are on the premises either with consent or by invitation have a legal right and are therefore lawfully on the premises[12], the court recognised as far back as 1931 that there was room for the action to apply if it could be said that there had been a tacit invitation to be present on the property of the owner of the animal[13]. Academic writers speak of a tacit consent. Bearing in mind that the onus in this connection rests on the appellant, there has been no suggestion from the evidence given by him that had he known of the attack on Mrs Swart, he would have refused Naranjo permission to go to her aid. Indeed, in cross-examination, he conceded that there was nothing wrong or unlawful in Naranjo's actions, but suggested that he should have armed himself better. In this case it is clear that Naranjo ventured onto the property in order to save the life of a person who was being attacked. At the very least it must therefore be found that Fourie tacitly consented to him being on the property. I am accordingly of the view that the magistrate was correct in finding that the appellant had failed to prove that Naranjo was not lawfully on the premises when the attacks on him occurred.

THE CLAIM BASED ON EMOTIONAL SHOCK

12 *Veiera v Van Rensburg* 1953 (3) SA 647 (T) at 650-651
13 *Watson v Absche* 1931 TPD 499 at 507

[22] The evidence given by Mrs Naranjo was not challenged in any way. This was to the effect that she was so affected by the sight of her husband being attacked by Bruno that for some time thereafter she could not sleep, being haunted by the picture in her mind of Bruno with blood and pieces of flesh in his mouth. She developed a stutter which lasted for about three weeks and her ability to drive a motor vehicle was also affected. In the result she was obliged to seek professional help from both a psychologist and a medical doctor.

[23] On behalf of the appellant, it was submitted that Mrs Naranjo's claim in terms of the *actio de pauperie* based on emotional shock was not competent since she was not attacked by Bruno. This aspect does not seem to have been canvassed to any great degree in the court *a quo* and was dealt with in a cursory fashion by the magistrate in the judgment in the following manner:-

> "Is the Second Plaintiff entitled to claim damages in terms of the Actio de Pauperie*? Both Mr. Groenewaldt and Mr. Louw were of the opinion that she could not, because she was a mere bystander, and is this remedy only applicable to the person actually and physically injured. I disagree with this contention. It must be accepted that she suffered severe distress and trauma witnessing the savage attack by both dogs on her husband. Surely this must have caused her tremendous pain and suffering. Quite clearly there's a causal link between the pain and suffering and the actions of the dogs."*

As I understand the law, the liability fixed on the owner of an animal which causes damage to a third party stems from the ownership of the animal *per se* and is available to someone who has suffered damage to his/her person or property

caused by the animal. It is trite that an action in delict may lie for patrimonial loss or sentimental damage caused by the intentional or negligent infliction of emotional shock. As far as the *actio de pauperie* is concerned, it has been held that a person bitten by a dog is entitled to damages not only for the direct injury sustained, but also for subsequent physical disorders caused by the nervous shock[14]. Writing in Lawsa[15] Van der Merwe and Blackbeard point out that in some cases there is support for the view that damage may be claimed by a dependant for loss of support if an animal has caused the death of a breadwinner. Neethling Potgieter and Visser[16] are of the view that the extent of the defendant's liability should be limited only in accordance with the flexible criterion for legal causation as explained in *S v Mokgethi*[17].

[24] Although an action *de pauperie* is usually brought by the person physically injured by an animal, I am not aware of any authority which restricts the award of damages brought in such an action to the person actually injured. In view of the development in the law to which I referred, there seems to me to be no objection in principle to the action being extended to the recovery of damage caused by emotional shock.

[25] For the reasons given I would dismiss the appeal with costs.

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14 *Creydt-Ridgeway v Hoppert* 1930 TPD 664
15 Vol I, Second Edition, para 469
16 Law of Delict Fifth Edition p333
17 1990 (1) SA 32 (A)

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R B CLEAVER

THRING J

I agree and it is so ordered.

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W G G THRING