IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case Nr: 2826/2012

In the case of:-

MARIA ELIZABETH HANGER Plaintiff/Respondent

and

JOE REGAL 1st Defendant / 1st Applicant

PETRA REGAL 2nd Defendant / 2nd Applicant

CORAM: MURRAY, AJ

JUDGMENT BY: MURRAY, AJ

HEARD ON: 5 DECEMBER 2014

DELIVERED: 11 DECEMBER 2014

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[1] This is an application for Absolution from the Instance at the close of the Plaintiff's case on the merits where quantum and merits have been

separated. For ease of reference the parties are referred to herein as in the main case.

[2] The Plaintiff sues the Defendants for damages for injuries to her lower right arm and hand and the loss of a finger and part of a second finger sustained during a visit to the Defendants' farm on 5 November 2009. It is common cause that the said injuries were caused by a caged Himalayan bear on the Defendants' premises. In dispute is the Defendants' liability for the Plaintiff's damages.

[3] From the Heads of Argument filed in the application for Absolution and from the argument raised in court on behalf of the Defendants, it appears that the Plaintiff relies on the *actio* or *edictum de feris* to impose strict liability on the Defendants. They aver that they therefore need not allege and prove negligence by the Defendants. It is not clear, however, that the said *actio,* for which ownership of a wild animal in captivity as cause of a plaintiff's injuries must be proved, still exists in the South African Law.[1] It is debatable, furthermore, whether negligence forms part of the cause of action of the *edictum de feris*[2] should such action still subsist in our Law.

[1] Joubert: The Law of South Africa, Vol. 8, para 32, pa 51 and Harms: Amler's Precedents of Pleadings, 7th Ed, p. 403.
[2] Zietsman v Van Tonder 1989 (2) SA 484 (T).

[4] The Rhodesian High Court in **Lycett v Bristow**[3] determined that there was no strict liability on the part of a person who had control of a wild animal in captivity for injuries caused by it, but that such a person would be liable for damages caused if he or she failed to take steps which a reasonable person would have taken to prevent the animal from doing harm. That court therefore indicated that such an action needed to be based on negligence.

[5] On appeal it was held in **Bristow v Lycett**[4] that in such a case negligence on the part of the owner was presumed, making it unnecessary for the plaintiff to plead or prove it. It is on this latter decision that the Plaintiff now relies to attribute strict liability to the Defendants. What is clear from **Bristow v Lycett**[5] and from **Klem v Boshoff**[6] to which the Court was referred in argument for the Plaintiff, however, is that the owner of the wild animal is not liable if the complainant either provoked the attack or by his negligence contributed to his own injury.[7]

[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

[3] 1971 (1) SA 911 (R). See also: Beck, *supra,* at para 13.9.3 at p. 212.
[4] 1971 (4) SA 223 (RA) at p. 212.
[5] *Supra,* at p. 233C.
[6] 1931 CPD 188
[7] Bristow v Lycett, *supra,* at p. 212 and Beck, *supra,* at p. 212.

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[8], but needs to rely on the *lex Aquillia* and prove the grounds for negligence averred in its particulars of claim.

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[7] In order to avert Absolution at the end of its case, a plaintiff has to make out a *prima facie* case for its claim. Although the standard of proof is slightly less than that at the end of the entire case, i.e. not quite on a balance of probabilities[9], a plaintiff must at least show that it has a prospect of succeeding with its claim at the end of the case.

[8] The question a court needs to ask at the end of the Plaintiff's case, therefore, is whether there is such evidence before Court upon which a reasonable Court might or could give judgment for the Plaintiff. (See: **Claude Neon Lights (SA) Ltd v Daniel**[10].) Harms, JA, as he then was in **Gordon Lloyd Page & Associates Rivera**[11] reconfirmed the test for Absolution at the end of the Plaintiff's case as set out in **Gascoyne v Paul & Hunter**[12], namely:

> "whether there was evidence upon which a court applying its mind reasonably to such evidence could or might (not should or ought to) find for the plaintiff."

[8] Lycett v Bristow, *supra*, at p. 235F.
[9] Law of Evidence
[10] 1976 (4) SA 403 (A) at 409 G – H.
[11] 2001 (1) SA 88 (SCA) at 92 – 93.
[12] 1917 TPD at 173.

[9] In order to avert Absolution, therefore, a plaintiff needs to make out a *prima facie* case in the sense that there is evidence relating to all the elements of the claim, since without such evidence, no court could find for the plaintiff. The material facts upon which a plaintiff relies in support of its claim must be set out in its particulars of claim in 'a clear and concise statement'[13]. In other words:

> "The plaintiff must … state clearly and concisely on what facts he bases his claim and he must do so with such exactness that the defendant will know the nature of the facts which are to be proved against him so that he may adequately meet him in court and tender evidence to disprove the plaintiff's allegations."[14]

[10] The purpose of pleading is to define the issues so as to enable the other party to know what case he has to meet.[15] While a pleader's first duty is to allege the facts upon which he relies, his second duty is to plead the conclusions of law which he claims follow from the pleaded facts.[16] The parties are limited to their pleadings.

[11] It is trite that once the pleadings have been filed, the parties are bound by them. If the pleadings raise certain issues and the evidence adduced at the trial does not substantiate them, the action will fail

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[13] Rule 18(4). See also Erasmus, Superior Court Practice, Service 35, 2010, at p. B1-129.
[14] Benson & Simpson v Robinson 1917 WLD 126 and Beck's Theory and Principles of Pleading in Civil Actions, p.45.
[15] Imprefed (Pty) Ltd v National Transport Commission 1993(3) SA 94 (A) at 107 C – E.
[16] Erasmus, Service 35, 2010 at p.B1 – 130A.

unless amendments have been granted[17] and implemented. Since the particulars of claim *in casu* has not been amended regarding the material facts on which the Plaintiff relies for its cause of action, the Plaintiff is bound by them.

[12] Though inconsistent allegations are only permissible in claims provided that they are pleaded in the alternative,[18] such as the Defendants' denial of any liability, alternatively voluntary assumption of the risk, and further alternatively contributory negligence, and though the Plaintiff now purports to rely on strict liability for which she need not allege or prove negligence, she listed in paragraph 11 of the Particulars, without pleading it in the alternative, a long list of factors which she alleged constituted the Defendants' negligence which allegedly caused '*the incident'.* The Defendant was therefore entitled, in the absence of an amendment, to prepare a defence on those material facts which the Plaintiff needs to prove in order to succeed with her claim. And the Plaintiff by the end of her case needs to have provided evidence that shows that she has a possibility of obtaining judgment in her favour at the end of the trial on those facts.

[13] The Plaintiff relies on the grounds of negligence listed in her pleadings. She therefore has the onus to prove that the reasonable person in the

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[17] Ferguson & Timpson Ltd v African Industrial & Technological Services (Pty) Ltd 1949 (4) SA 340 (W).
[18] Kragga Kamma Estates CC v Flanagan 1995 (2) SA 367 (A) at 374.

position of the Defendants must have foreseen the reasonable possibility that their conduct would injure another, should have taken reasonable steps to guard against such event and must have failed to take such steps.

[14] In order to avert Absolution at this stage, the Plaintiff needed to have led evidence on all of these elements and to have at least made out a *prima facie* case regarding each element to show that she has a probability of succeeding in proving all of the said elements. In my view, the three witnesses who testified for the Plaintiff failed to do so.

[15] On the papers her case was that she never touched the jackal-proof wire fencing around the iron bars of the bear cage. The 'incident' on which she bases her claim was averred to be that the bear put his mouth through the wire fencing and bit her hand, pulling her hand and arm through the wire fencing. The negligence ascribed to the Defendants also relied mainly on this scenario: namely that the fencing was not adequate and safe enough to prevent the bear from biting people through the fencing.

[16] The Plaintiff's evidence, in a nutshell, was that she loved animals, but knew that the wild bear was dangerous and that it could hurt her. She

testified, furthermore, that on their way to the bear's cage, the Second Defendant explicitly warned her that the bear was a dangerous animal. She conceded in cross-examination that there was no way in which the bear could push its mouth through the 'jackal-proof' wire fencing ("the wire fence") covering the iron bars of the cage, and consequently no way in which it would have been able to open its mouth should it somehow have succeed in getting it through the wire fence. She therefore conceded that there was no way the bear could have grabbed her fingers with its mouth if they were on the outside of the wire fence. Based upon these concessions, she eventually admitted that her fingers must have protruded through the wire fence for the bear to have been able to get a hold of them.

[17] The Plaintiff also testified that the bear bit her fingers before pulling her hand and arm through the wire fence. The photographs submitted by the Plaintiff confirmed that that was impossible, however.

[18] The Plaintiff mentioned the lack of any warning signs but conceded that the bear was not kept in a zoo which could be visited by the general public, but was kept on private premises in a cage behind the Defendants' home and that the Second Defendant took them to see the bear at the Plaintiff's friend's request. The lack of such signs cannot establish negligence since the Plaintiff on her own version knew of the

danger of her own accord and she conceded that the Second Defendant did warn her that the bear was dangerous.

[19] Although the Plaintiff testified that the Second Defendant allowed her to feed the bear a peach before the incident happened, she admitted in cross-examination that the bear would have been unable to put its mouth through the wire fence to bite her during the said feeding. There is no evidence, in any event, that the said feeding caused the incident.

[20] She testified that the Second Defendant did not repeat her earlier warning and did not tell her to stay away from the bear when she posed for the photograph with her 'flat' hand less than 2cm from the wire enclosure. Since she flatly denied having been on the platform which extended half a metre around the cage, and by implication would not have been immediately 'next to' the cage, however, there is no reason to have expected any reasonable person to foresee that she would allow her fingers to protrude through the fence and to infer that such person was negligent because she did not warn her again.

[21] Ms Holroyd testified that the bear pushed its paws through the wire fence and grabbed the Plaintiff's fingers. This evidence directly

contradicted the allegations in paragraph 9 and 12 of the particulars of claim, namely that the bear bit the Plaintiff's hand through the wire fence and then pulled her arm through the said wire fence as well. It directly contradicts, furthermore, the Plaintiff's testimony by averring that the Plaintiff's fingers at no stage protruded through the enclosure but were merely very close to it. Her evidence was also refuted by the photographs submitted by the Plaintiff which showed that neither the bear's mouth nor its paws could go through the wire fence and pull the Plaintiff's fingers through the fence.

[22] Both the Plaintiff and Ms Holroyd testified that the Second Defendant was present when the incident happened, but neither testified that the latter saw the Plaintiff's hand or fingers being held close to or through the fence. There is no evidence, therefore, that she had been negligent in not warning the Plaintiff shortly before the incident.

[23] The Plaintiff's last witness, Mr Boing, testified that the bear was not kept on premises accessible to the general public. In his evidence in chief he contended that the cage was inadequate to contain a dangerous animal like a bear; that the cage was too small and that the cage lacked a protective railing to keep people at a distance of 1 to 1.5 metres from the cage. In his view, the Defendants were negligent in that respect.

[24] In cross-examination, however, he conceded that there are no statutory prescriptions for the bear's cage and conceded, too, that the Defendants were indeed in possession of the necessary permits to keep the bear. Such permits, he conceded, would not have been issued if the cage had not been maintained in a proper and safe condition.

[25] Counsel for the Defendants pointed out the significance of Mr Boing's concession that he was one of the top officials in the employ of the Department of Nature Conservation in the Free State and that the keeping of animals and the safety of such keeping fell under his jurisdiction as the Control Diversity Officer: Compliance Monitoring and Law Enforcement in the Department of Environmental Affairs. Of special importance is his testimony that he visited with the First Defendant next to the bear's cage on numerous occasions, but that he never once mentioned to the First Defendant that the cage created a dangerous situation, or that the absence of warning signs could create a problem for the Defendant or for the safety of visitors.

[26] I agree with the Defendant's counsel that the only inference one can draw from that, is that this witness who was a top official in his field, either never noticed any danger in the situation, or did not consider it to be of sufficient concern to bring it to the First Defendant's attention.

[27] That begs the question whether the Defendants should then reasonably have known that there was danger in the situation and should have taken steps to rectify the situation. I agree that if an experienced top official like Mr Boing never drew their attention to any dangerous situation, it cannot readily be said that they acted unreasonably in not realising that the situation was dangerous and that they were negligent in not taking any reasonable steps to address such a situation.

[28] In my view, therefore, the Plaintiff failed to put any evidence before court on which a reasonable court could or might find that the Defendants were negligent. There is no evidence that the Defendants did not keep the bear lawfully, or that the cage failed to comply with any statutory or regulatory requirements, or that the incident would have occurred had the Plaintiff, on her own version, not only touched the wire fence, but allowed her fingers to protrude into the cage.

[29] There is no evidence, either, that the bear bit her through the fence or that he was even able to do so, as averred in her particulars of claim. There was no evidence that the cage would not have been safe if she had not allowed her fingers to protrude through the fence. There is no evidence, either, that any warning signs would have prevented her from allowing her fingers to protrude through the fence. There is no evidence, furthermore, that the size of the cage provoked the incident,

that the bear did attempt to tear down the fence, or that the Defendants should reasonably have foreseen a situation where a grown-up person who admits to knowing animals and to having known that the bear was dangerous and could injure her, after being warned that he was dangerous, would allow her fingers to protrude into the bear's cage while, on her own version, he was sitting very close to the fence where her protruding fingers would have been within easy reach of his mouth.

[30] In my view, then, the Plaintiff failed to provide any evidence which could reasonably be seen to indicate that she was not negligent or that she did not voluntarily accept the risk of injury by her conduct and that the Plaintiff should for that reason be allowed to rely on strict liability. I cannot but conclude, either, that the Plaintiff failed to make out a *prima facie* case by putting evidence relating to all the elements of her claim before the Court on which a reasonable court could or might find in her favour.

[31] Consequently the Defendants' application for Absolution from the Instance has to succeed. The party who succeeds with such an application is considered to be the successful party and is entitled to costs.

WHEREFORE THE FOLLOWING ORDER IS MADE:

1. The application for Absolution of the Instance succeeds with costs.

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H MURRAY, AJ

On behalf of the Plaintiff:	Adv F G Janse van Rensburg Instructed by Mr O J van Schalkwyk Lovius Block Attorneys 31 First Avenue Westedene BLOEMFONTEIN
On behalf of the Defendants:	Adv P J Loubser Instructed by Mr JJ Grundlingh Webbers Attorneys 96 Charles Street BLOEMFONTEIN

The 'incident' she relies on in the particulars of claim, first of all, is described in the particulars of claim as the bear *"biting the Plaintiff's hand through the fence"* and the Defendants' negligence to have consisted, *inter alia*, of failing to properly and adequately enclose the cage *"to prevent the bear from putting its mouth through the fence".* On the Plaintiff's own

version in court, that is not what happened. From the photographs she admitted in evidence, and upon her own admission, it is clear that it is impossible for the bear to put its mouth through the 'jakkalsproof' wire enclosure around the steel bars of the cage and even more impossible to open its mouth to bite someone through the wire enclosure. There is no allegation in the particulars of claim that the bear used his nails to pull her fingers through the fence as averred by Ms Holroyd, the friend who accompanied her to the farm, upon whose request the Second Defendant showed them the bear and upon whose request the Plaintiff posed for a photo with the bear when she upon her own admission allowed her fingers to protrude into the bear's cage. From the photos it is evident that the bear's claws cannot go through the wire-enclosure either.

The Plaintiff was warned that the bear was dangerous and on her own version she knew of her own knowledge that it was dangerous. Yet she still allowed her fingers to intrude into the cage through the wire-enclosure.

On the Plaintiff's own version she not only touched the wire-enclosure around the iron bars of the cage, but allowed her fingers to protrude into the cage. On her own version she allowed this to happen despite the 2nd

Defendant's warning that the bear was dangerous and despite the fact that she knew of her own knowledge as well that the bear was dangerous. She even foresaw the possibility that the bear might hurt her. This is evident from her testimony that she did not step onto the platform on which the cage rested because in order to do so, she would have had to hold onto the wire-mesh which she did not want to do because she did not know if the bear would then injure her if she touched the cage. Yet she nevertheless held her hand less than 2 mm from the mesh and allowed her fingers to protrude through the mesh into the cage. Without a doubt that constitutes negligence on the part of the Plaintiff.

[7] That begs the question whether the Plaintiff made out a *prima facie* case regarding the incidences of negligence in the Particulars of Claim alleged to have caused *"the incident"* on which she bases her claim.

upon which she based her claim in paragraph its claim for negligence were all addressed ore, although the Plaintiff in paragraph 6 of the Particulars of Claim did plead the facts that would have been required to establish such liability if the *actio* were still part of our law, it also stated in paragraph 7, without pleading negligence in the alternative, the various grounds for negligence it relied on.

[6]