

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GQEBERHA)

Case No.: 2926/2019

In the matter between:

GIDEON GERBER

Plaintiff

and

EVRILOLIVIA ADAMS-AUGUST

Defendant

JUDGMENT

EKSTEEN J:

[1] On 21 October 2016 the plaintiff, Mr Gideon Gerber, was attacked and savagely mauled, for no reason and without any warning, by a large dog described as a Pitbull Terrier, while he was standing in the driveway of his property at [...] Street, Mosel, Kariega. In and as a result of the attack he sustained severe bodily injury and suffered damages. He contended that the defendant, Mrs Adams-August, was the owner of the dog and he sought to recover damages in the amount of R2 433 875,65 from her.

[2] Mr Gerber's claim was pleaded under the *actio de pauperie*, and in the alternative, in negligence. In her plea Mrs Adams-August denied that she was the owner of the Pitbull Terrier that attacked Mr Gerber, or any other dog. It was pleaded that her son, who was temporarily absent to seek employment in Gauteng at the time of

the incident, owned a brown Pitbull Terrier (Gustav) that he had left in the care of herself and her daughter, Mikayla, while he was away. She proceeded to explain in her plea that she had been away from home and at work at the time of the incident. Gustav, it was alleged, was securely tied to a pole on a leash behind the house on her property at [...] Street which had been appropriately secured so that he could not escape. Accordingly, she denied that it was Gustav that had attacked Mr Gerber.

[3] By agreement between the parties a separation of issues was ordered. The separated issues in dispute that call for decision in this trial are whether:

- (a) It was Gustav that had attacked Mr Gerber;
- (b) Mrs Adams-August was the owner of Gustav; and
- (c) if Gustav was not her dog, she as owner of the property, had been negligent in failing to take reasonable and necessary steps to prevent the risk of injury to Mr Gerber.

[4] At the commencement of the proceedings there was considerable confusion relating to the scene where the events occurred and the street numbers of the various properties in [...] Street. An inspection-in-loco was held during the course of the plaintiff's case which clarified these issues and resolved a number of disputes which arose during the course of the cross-examination of the first witnesses on behalf of the plaintiff. It is instructive at this stage to sketch briefly the scene which existed at the time. As I have said, Mr Gerber resided at 1 [...] Street. [...] Street is a short street which runs from south to north linking [...] Street, at the southern end, and [...] Street, at its northern end, with a T-junction on either end. Mr Gerber's property is situated on the western corner of [...] Street and [...] Street with the driveway leading to his garage facing onto [...] Street. There are two metal gates which open manually at the entrance to the driveway. On the opposite corner, on the eastern side of [...] Street, is a large property, number 2 [...] Street, which apparently stretches over two erven so that there is no number 4 in [...] Street. Mr Japie Nel was Mr Gerber's next door neighbour on the western side of the street and he lived at number 3 [...] Street.

[5] The home of Mrs Adams-August, number 8 [...] Street, is situated on the eastern side of the street and, because there is no number 4, is the third home from the corner of [...] Street. The homestead on her property is situated approximately in the middle of the erf with an enclosed front garden and an open driveway entrance on either side. The front garden is enclosed by a face brick wall which varies in height as [...] Street proceeds down a hill. On top of the wall there is palisade fencing interspersed between various brick pillars. Of significance to the evidence is the pillar on the extreme northern side of the garden enclosure which was measured at the inspection-*in-loco* to a height of 1,4m. Approximately in the middle of the garden wall is a metal palisade garden gate which opens onto a pathway that leads directly to the front door of the home. The ground floor of the home is raised with an enclosed verandah three steps higher than the garden level. There is a security gate across the entrance to the verandah as one approaches the front door.

[6] As I have said, there is an open driveway entrance on either side of the property. On the northern side, set back from the street, there is a large, corrugated iron sheet fixed into a concrete frame which extends from the edge of the house all the way across the driveway onto the boundary of the property, thus preventing entry into the back yard. The uncontradicted evidence is that the corrugated iron barrier is a fixture, but there is a small pedestrian gate in the corrugated iron which is permanently locked.

[7] On the southern side of the property there is a garage which extends from the edge of the house in a westerly direction towards [...] Street. It has a large white double garage door built into the concrete frame at the entrance of the garage and extending across the entire width of the driveway onto the verge of the property, thus again preventing entry into the back yard, save through the garage door. At the southern corner of the house, where the garage wall extends in a westerly direction, there is a small wooden door leading into the garage and the evidence of Mrs Adams-August was that it, too, is locked with a padlock on the inside.

[8] The southern boundary of the property consists of a vibracrete wall of substantial height¹ extending from the garage all the way to the eastern boundary at the back of the property. Ms Adams-August said that the wall was higher than her head and it has not been suggested by anyone that Gustav could have escaped over that wall. At the rear of the property there are certain out buildings, described as apartments, which were untenanted at the time, and the kitchen door of the main house leading to these apartments has a security door across its width. The vibracrete wall, of similar height, extends across the rear of the property and along the northern boundary to the corrugated iron barrier. Immediately behind the corrugated iron barrier, however, there is a stretch of the vibracrete wall which is substantially lower. Mrs Adams-August said that some considerable time prior to the events in issue Gustav had indeed jumped across the lower portion of the wall into the property of her next door neighbour, one Lobjoint. Mr Lobjoint had reported the incident to her and threatened to shoot the dog should it ever enter his yard again. This prompted Mrs Adams-August to reinforce that portion of the boundary wall by the erection of a barbed wire barrier to the same height as the higher portion of the vibracrete wall. Mrs Adams-August said that Gustav was unable to escape thereafter and it did not happen again.

[9] On 15 October 2016, approximately a week before the attack on Mr Gerber, one Johnny Rossouw was attacked by Gustav in [...] Street. Mrs Adams-August explained that her daughter, Mikayla, had been home on that particular day when her father, Mrs Adams-August's estranged husband, had come to visit her. Gustav had been enclosed behind the house and both the front door and the front gate had been open as her husband was arriving. At this stage Mikayla had briefly opened the back door, thus, accidentally permitting Gustav to rush past her, through the house and out of the front gate. When Mrs Adams-August learnt of the attack on Mr Rossouw she immediately purchased a leash and chain and she said that Gustav remained tied up to a pole in the back yard thereafter to avoid the repetition of such an event.

¹ Ms Adams-August estimated it to be 1,8m.

[10] On the morning of 21 October 2016, she said that she had been at work at her place of employment. She explained that she had left the home, together with her grandson, Connor, at approximately five minutes to seven and had dropped Connor at school. Mikayla, she said, had obtained temporary employment in Port Elizabeth and had left before she did. She said that she had secured all entrances to the yard and the home before departing and that Gustav had been firmly tied up in the back yard, from which he could not escape. When she returned from work in the late afternoon, she found the house as she had left it and Gustav tied up in the back yard. Thus, she denied that it had been Gustav that had attacked Mr Gerber.

[11] As adumbrated earlier, Mr Gerber said that he was attacked by a brown Pitbull Terrier whilst he and a friend, Mr Theuns Blignaut, were standing in the driveway on his property. The attack was entirely unprovoked and he described the behaviour of the dog as vicious. After he had managed to free himself and closed the gates of his driveway, he explained that the dog continued to endeavour to obtain entry by biting at the gates. Thereafter it ran down the hill to the house of Mr Nel who had emerged from his house as a result of the cries of Mr Gerber. There, the dog attempted to gain entry to the property of Mr Nel and he described the dog as apparently vicious. Both described how this dog had proceeded to jump up over the most northerly pillar of the garden wall into the front garden of Mrs Adam-August's home. Neither could see the dog thereafter by virtue of the walls that obscured their views.

[12] As I have said, Mr Gerber sustained severe bodily injury and his friend, Mr Blignaut, proceeded to take him to the Cuyler Clinic in Kariega for medical treatment. They proceeded down [...] Street and drove past the home of Mrs Adams-August. Mr Gerber said that the front door of the house was open although the security gates on the verandah were closed. He did not see any people. Mr Nel, too, confirmed both that the front door was open and the security gate locked.

[13] Mrs Emerentia Gerber said that she had not been home at the time of the incident and proceeded directly to the Cuyler Clinic when she received news of her husband's injury. She returned home later in the morning. When she was at home, there was a further incident where a brown Pitbull Terrier caused a commotion at the gates leading to her driveway and she proceeded outside. She said that she noticed a young lady standing at the entrance to the verandah at 8 [...] Street who called the dog. The dog responded and ran back to number 8 jumping over the most northerly pillar of the garden enclosure and then proceeded up the stairs onto the verandah and into the house where the lady had been standing. Mrs Gerber was uncertain whether it was the same dog that had attacked her husband, but she did call the police and members of the SPCA. She said that when the police were present, and while she was speaking to the policemen, they noted two young ladies walking down the street. One was the same lady who had called the dog. One of the policemen present called the lady by her name, Mikayla. He requested Mikayla 'to come and sort out this nonsense of this dog'. However, Mrs Gerber said that Mikayla declined and the two ladies walked off.

[14] Mr Hein Whitebooi is a municipal official and he accompanied members of the SPCA to [...] Street in response to the call by Mrs Gerber. Mr Whitebooi testified that upon arrival at number 8 [...] Street he found a young lady who identified herself as Mikayla. He confirmed that Mikayla was uncooperative and in reaction to his approaches Mikayla, together with another young lady, got into their car and left.

[15] None of the witnesses who testified were without blemish, however, Mrs Adams-August, Mr Gerber and Mr Whitebooi all made a favourable impression in the witness box. Neither Mr Gerber nor any of the witnesses called on his behalf are able to contradict the evidence of Mrs Adams-August in respect of the issues set out earlier. Mr Gerber did attempt, tentatively, to suggest that the apartments behind the house of Mrs Adams-August had been occupied by tenants at the time, however, he was constrained to acknowledge that he has no knowledge thereof. Both Mr Gerber and Mr Nel asserted that Mrs Adams-August kept two Pitbull Terriers on her property and their evidence finds support from Mr Whitebooi. Mrs Adams-August denied this. However, it

is not necessary to resolve this dispute that can have no bearing on the material issues in the matter. The uncontradicted evidence of Mrs Adams-August in respect of the enclosure of the property, the restriction of Gustav and her securing her house upon her departure that morning must be accepted.

[16] By parity of reasoning Mrs Adams-August is unable to contradict the evidence of Mr and Mrs Gerber, Mr Nel and Mr Whitebooi set out earlier. She was not home during the course of the day. As I have said, Mr Gerber's observation that the dog returned to number 8 [...] Street and that the front door of the house was open upon his departure is corroborated by Mr Nel. Mr Whitebooi and Mrs Gerber's observation of Mikayla's presence at the house is uncontradicted. There are a number of significant contradictions between the evidence of Mrs Gerber and Mr Whitebooi relating to Mikayla's presence in the street, the time of the observation and the manner in which she departed from the scene. However, both confirm that Mikayla was home late in the morning and that she had a lady friend with her. Had these witnesses colluded one would not have expected the obvious contradictions to which I have referred. The evidence of her being home during the morning must be accepted.

[17] The irresistible conclusion to be drawn from these considerations, as was submitted by Mr Van Rooyen, on behalf of Mr Gerber, is that Mikayla had indeed returned home during the course of the morning, after the departure of Mrs Adams-August, that she had freed Gustav from his leash, and that Gustav had escaped through the front door of the house. It also compels the conclusion that Mr Gerber was attacked by Gustav.

The actio de pauperie

[18] That brings me to Mr Gerber's main claim. The *actio de pauperie* has its origins in Ancient Roman Law and was recognised in the Roman Dutch Law. In *O'Callaghan*

*NO v Chaplin*² the Appellate Division confirmed that it still formed a part of our law in South Africa³.

[19] In order to succeed in a claim under the *actio de pauperie* a plaintiff must allege and prove that:

- (a) The defendant was the owner of the animal when the damage was inflicted;⁴
- (b) the animal was a domesticated animal;
- (c) the animal acted contrary to the nature of a domesticated animal generally in causing damage to the plaintiff; and
- (d) the conduct of the animal caused the plaintiff's damage.

The requirements under (b), (c) and (d) have been established and are not in dispute. The matter turns on ownership. In *O'Callaghan NO*⁵ Innes CJ (with whom De Villiers JA concurred) emphasised:

'By our law, therefore, the owner of a dog that attacks a person who was lawfully at the place where he was injured, and who neither provoked the attack nor by his negligence contributed to his own injury, is liable, as owner, to make good the resulting damage. ... It is confined of course to cases where liability is based upon ownership alone. Actions may be founded under appropriate circumstances on *culpa*, and they will be governed by the ordinary rules regulating Aquilian procedure. The conclusion is satisfactory for two reasons especially. In the first place it provides a remedy in cases where otherwise persons injured would be remediless. Instances must occur where a dog, a bull, or other domesticated animal inflicts damage under circumstances which make it impossible to bring home negligence to the owner. Yet of two such persons it is right that the owner, and not the innocent sufferer, should bear the loss. And in the second place the adoption of *culpa* as the sole basis of liability would inevitably lead us towards the *scienter* test . . . which it is common cause is not the test which our law applies in cases of this kind.'

(My underlining)

² 1927 AD 310.

³ See also *Loriza Brahman en 'n ander v Dippenaar* 2002 (2) SA 477 (SCA) 482-485; *Van der Westhuizen v Burger* 2018 (2) SA 87 (SCA) at para 25.

⁴ *O'Callaghan NO* at 330; and *Solomon and Another NNO v De Waal* [1972] 2 All SA 112 (A), 1972 (1) SA 575 (A).

⁵ At 329-330.

[20] In *South African Railways and Harbours v Edwards*⁶ De Villiers CJ⁷ thought it useful to summarise the relevant principles in relation to the remedy in which he again emphasised:

‘(1) The *actio de pauperie* is in full force in South Africa. ... (2) The action is based upon ownership. ... (3) The action lies against the owner in respect of harm done by domesticated animals, ... acting from inward excitement. ... (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. ...’

[21] Thus, both in Roman Law and that of Holland, the responsibility for damage done by one’s animal is founded on ownership.⁸ Possession and control over the animal is insufficient to found a claim under the *actio de pauperie*⁹. Thus, in *Moubray v Syfret*¹⁰ where a plaintiff had been injured on a public road by a bull which had been acquired by the defendant under a hire-purchase agreement, the action failed as the defendant was, under the law of hire-purchase, not yet the owner.

[22] As adumbrated earlier, Mr Gerber, as plaintiff, bore the onus to prove the ownership of Gustav. Mrs Adams-August denied that she was the owner. She said that Gustav had been acquired by her husband, from whom she is now estranged, at a time when they still lived together with their family. He gave Gustav to her son Rivaró, as a gift, when she and the children moved out of the common home to take up residence in [...] Street. She contended that Rivaró, an adult man at the time, accepted the gift and it was at all times his dog. At the time of the incident Rivaró had temporarily gone to Gauteng in order to seek work and had left the dog in the care of his sister, Mikayla.¹¹

⁶ 1930 AD 3.

⁷ At 9-10.

⁸ *O’Callaghan NO* at 344; and *Van der Westhuizen* para 27; *Van der Walt and Midgley: Principles of Delict* (4th ed) 47.

⁹ *Neethling and Potgieter: The Law of Delict* (8th ed) 436; *Maree v Diedericks* 1962 (1) SA 231 (T) at 238H.

¹⁰ *Moubray v Syfret* 1935 AD 199.

¹¹ As adumbrated earlier in the judgment the pleaded case was that the dog had been left in her care and that of Mikayla.

[23] When this proposition was put to Mr Gerber and to Mr Nel they were constrained to concede that they had no knowledge of the ownership of the dog. However, Mr Whitebooi said that he, together with a representative of the SPCA, had returned to the home of Mrs Adams-August on 24 October in order to impound the dog. There Mrs Adams-August was required to sign a document headed 'ADMISSION, ASSESSMENT AND HISTORY RECORD'. This document formed the cornerstone of Mr Gerber's case in respect of ownership.

[24] The upper half of the document contains the particulars of the dog and Mr Whitebooi acknowledged that he had completed that portion of the form there, in the presence of Mrs Adams-August. The middle section of the document contains the particulars of Mrs Adams-August and that was completed in the handwriting of the official from the SPCA. She did not testify, but Mrs Adams-August said that only the top section had been completed when she was asked to sign. Her signature appears at the foot of the page below the section headed 'STATEMENT OF SURRENDER'. The document is a pro forma printed form which provides for various alternatives. In order to emphasise the alternatives chosen certain words had been encircled and having regard to words encircled the material portion reads:

'I do hereby certify that I do ... own the animal described above, that ... it is not a stray and I do ... know where it comes from.'

Mr Whitebooi signed as a witness to her signature.

[25] Mrs Adams-August testified that the form was signed in her home before Mr Whitebooi had impounded Gustav. Mikayla was present and she had resisted the impoundment of Gustav. She was emotional and Mrs Adams-August had endeavoured to console her and to persuade her to permit Gustav to be impounded. She said that her attention had been primarily on consoling Mikayla. In these circumstances the document was placed before her and she was requested to sign it. Upon an enquiry as to what it is that she was signing for they had advised her that her signature was required for them to impound Gustav. She explained that she had told Mr Whitebooi that she was not the owner of Gustav and that it belonged to her son. At the insistence

of the lady from the SPCA she had signed the form, and she said that she had requested them to note on the form that she was not the owner of the dog. The document does not reflect the note and Mrs Adams-August explained that they had not left her a copy of the document when they left. Thus, she was not aware of the omission.

[26] The account given by Mrs Adams-August paints the picture of an emotional scene that prevailed and she said that she did not, in the circumstances, read the document before she signed it. However, she was emphatic that she did not encircle the words, nor did she see any circles on the document when she signed it. She remained adamant that she had told Mr Whitebooi that she did not own Gustav.

[27] The account of Mr Whitebooi lends credence to her evidence. He admitted in cross-examination that Mrs Adams-August had indeed, on this first occasion that he saw her, told him that Gustav was not her dog and that it belonged to her son who was temporarily away. He also acknowledged that she had advised him that Gustav had been left in the care of Mikayla. He confirmed that Mikayla was emotional and had initially resisted the removal of Gustav. When Mikayla ultimately accepted Gustav's fate she went outside with Mr Whitebooi where the dog was found tied to a pole with a leash and a chain. Mikayla freed Gustav and she guided him to their vehicle where she loaded him. Mr Whitebooi was unable to say who had encircled the words on the form nor when it had been done.

[28] Later, on 2 November 2016, when it had been resolved by the municipal authorities to euthanize Gustav, Mr Whitebooi returned to 8 [...] Street to deliver a notice of the intention to euthanize him. Again Mrs Adams-August explained to him that she did not own Gustav and that the owner was not available in the Eastern Cape at the time. On this occasion a note was indeed made on the notice and the communication recorded. Mr Whitebooi again confirmed her evidence in this regard.

[29] In consequence of the attack on Mr Gerber a petition had been drafted, at the initiative of Mrs Gerber, to have Gustav removed. Mr Gerber said that early in November Mrs Adams-August approached him and Mrs Gerber at their home to request that they withdraw the petition because her son was in 'rehab' and she was afraid that he was going to get a shock if he were to hear that Gustav had been removed. The visit to the Gerbers is not in dispute and Mrs Gerber confirmed Mr Gerber's account. Mrs Adams-August denied that she had pleaded for the withdrawal of the petition or that her son had been in rehab at the time. She said that she had just learnt that it had been alleged that it was Gustav that had attacked Mr Gerber and she approached them to confirm this. On a conspectus of the evidence I think that the account of Mr Gerber is to be preferred. However, in the context of the dispute in respect of ownership of Gustav Mr Gerber's evidence of this meeting militates in favour of Mrs Adams-August's contention that Gustav belonged to her son, hence her concern for his reaction.

[30] In cross-examination of Mrs Adams-August she acknowledged that her son, Rivaró, had at all times been unemployed but she said that he did perform odd jobs from time to time and earned small amounts. She admitted that Gustav had been resident at number 8 [...] Street from the time that her family had taken up occupation there and that she had contributed to the purchase of dog food from time to time. It was suggested to her that Gustav was in fact a 'family dog', a suggestion which she dismissed. She did, however, acknowledge that she had paid for the enhanced security to apply the barbed wire across the lowered section of the vibracrete wall adjoining the property of Mr Lobjoint.

[31] Accordingly, Mr van Rooyen argued that I should find that in fact Mrs Adams-August was the true owner of Gustav. He suggested that her evidence that Gustav did not belong to her was 'a calculated ploy' to avoid liability in the matter. I am unable to find any foundation to support the conclusion contended for. As adumbrated earlier she had, from the inception, and long before there was any suggestion of litigation, advised Mr Whitebooi that she was not the owner of the dog and that it belonged to her son. It is not a recent fabrication and the support which is found in the plaintiff's own case for

this contention leads ineluctably to the finding that the plaintiff has failed to establish that Gustav was Mrs Adams-August's dog.

[32] Appreciating this difficulty Mr van Rooyen invited me to develop the common law so as to 'extend the concept of ownership of an animal in pauperien claims and deem that Gustav belonged to the Defendant'. I shall accept, for purposes of this judgment, that there may be scope of the development of the principles of pauperien law in an appropriate case.¹² The difficulty for the plaintiff in this matter, as adumbrated earlier, is that the pleaded case in the main claim is founded exclusively on ownership. On numerous occasions during the cross-examination of Mrs Adams-August Ms Ntsepe, on behalf of Ms Adams-August, objected to Mr van Rooyen's cross-examination on the basis that it was not relevant to the question of ownership. She restricted his cross-examination, and her re-examination, to the pleaded case.

[33] In his pleadings Mr Gerber made no reference to the power of the court to develop the common law¹³ nor did he attempt to formulate the development that would be contended for. The first suggestion of a development of the common law arose during the argument of the matter. In *Prokureursorde van Transvaal v Kleynhans*¹⁴ Van Dijkhorst J emphasised that procedural fairness demanded that constitutional points, like any other points of law, should be properly pleaded so that they may be fully explored in evidence.¹⁵ This is not a technical issue. It is essential for the defendant to be advised of the proposed development of the common law that will be contended for to enable the defendant to present evidence which may be relevant thereto and to prepare to cross-examine the plaintiff's witnesses in respect thereof. The failure to raise the issue in the pleadings, or at any stage during the trial, renders it inappropriate for me to rule upon the issue.

¹² See *J Neethling and J M Potgieter: Die hoogste hof van appèl bevestig die bestaansreg van die Actio De Pauperie* 2003 TSR 590; and *Van der Merwe: Skade Veroorsaak deur Diere* 266.

¹³ Section 173 of the Constitution.

¹⁴ 1995 (1) SA 839 (T) at 849A-B.

¹⁵ See also *Le Roux v Direkteur-Generaal van Handel en Nywerheid* 1997 (4) SA 174 (T) at 185B-H.

Negligence

[34] I turn to the alternative claim based on the alleged negligence of Ms Adams-August. I have described the enclosure of the back yard at number 8 [...] Street earlier and, as I have said, Ms Adams-August said that Gustav had been tied up to impede his free movement in the back yard when she left that morning. Mr van Rooyen accepted at the conclusion of the trial, correctly in my view, that Gustav had escaped through the house in consequence of the negligence of Mikayla and that he had accordingly not established negligence on the part of Ms Adams-August which may have contributed to the escape of Gustav.¹⁶ He did not persist in this claim.

[35] In the result, the plaintiff's claim is dismissed with costs.

J W EKSTEEN
JUDGE OF THE HIGH COURT

Appearances:

For Plaintiff: Adv C van Rooyen
Instructed by: Lessing Heyns & Van der Bank Inc, Gqeberha

For Defendant: Adv N Ntsepe
Instructed by: Goldberg & De Villiers Inc, Gqeberha

Date Heard: 6 November 2023

Date Delivered: 14 November 2023

¹⁶ See *Deysel v Karsten* 1994 (1) SA 447 (A) at 457D-H.