

Actio de Feris and the defence of provocation: Van der Westhuizen v Burger

The facts, which led to the claim in this case, were very simple. The Respondent, Mr. Burger, visited the Appellant, Mr Van der Westhuizen, on the latter's farm. One of the Appellant's ostriches chased the Respondent. The Respondent alleged that, in an attempt to escape from the ostrich, he tripped over a piece of wood, tore his Achilles Tendon and as a result suffered damages in the amount of R6,75 million.

The cause of action pleaded by the Respondent was the *actio de feris* in terms of which the bringing of wild or dangerous animals on or into a public place, or a place, which members of the public have access to, was prohibited. The cause of action is based on ownership. Strict liability is imposed on the owner of the animal for the consequences of the animal's behaviour. The victim is accordingly absolved from alleging and proving negligence on the part of the owner.

The Appellant argued that the Respondent teased and provoked the ostrich, *inter alia* by grabbing it at the neck and throwing a stone at it. The High Court dismissed the Appellant's 's defence of provocation. The Appellant also argued that the Respondent tore his Achilles tendon in an attempt to escape from the ostrich. The High Court also dismissed this argument stating that the injury would not have occurred, had it not been for the Respondent escaping the ostrich's attack.

The Respondent argued that he was afraid of the ostrich. He denied ever teasing it, alleging that he was fearful of it.

On appeal to the Supreme Court of Appeal, the Court was asked to decide on the following three questions. *Firstly*, whether provocation should be recognised as a defence to the *actio de feris*. *Secondly*, whether the Respondent had provoked the ostrich into chasing him. *Thirdly*, whether the pursuit of the ostrich was the cause of the injury.

The court found that the evidence, which was led on behalf of the Appellant, showed that the Respondent was not afraid of the ostrich. He in fact engaged in teasing the ostrich over a period of time. The Court held that provocation is indeed a defence and that the Respondent had provoked the animal by throwing a

stone at it. Finally, the court held that the pursuit was not the cause of the action. The Respondent's flight had been interrupted by him falling to the ground. After the Respondent had fallen and was at the mercy of the ostrich, it did not attack him. The ostrich merely stood looking at him while he was lying on the ground. When he stood up to run into the house, he stepped awkwardly and injured his tendon.

The appeal was thus granted with costs.

Lerato Mokuu, Van Velden-Duffey Inc.