

SOUTH AFRICA / JUDGMENT

Hanger v Regal and Another (A77/2015) [2022] ZAFSHC 190 (11 March 2022)

[2022] ZAFSHC 190**COURT**

Free State High Court, Bloemfontein

BEFORE

VAN ZYL, OPPERMAN, DANISO

CASE / FILE NUMBER

A77/2015

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****FREE****STATE DIVISION, BLOEMFONTEIN****Appeal**

number: A77/2015

Reportable: YES/NO
Of
interest to other Judges: YES/NO
Circulate
to Magistrate: YES/NO
Inthe appeal between: MARIA
ELIZABETH HANGER
Appellant
and
JOE
REGAL
First
Respondent
PETRA
REGAL Second
Respondent

CORAM: VANZYL,
Jet
OPPERMAN,
Jet
DANISO, J

JUDGMENT

BY: VANZYL, J

HEARD ON: 14 SEPTEMBER 2021

DELIVERED ON: 11 MARCH 2022

[1] This is a Full Court appeal against the judgment and order made by a single (acting) judge on 11 December

2014. At the time when the application for leave to appeal was launched, the acting stint of the said judge had ended, whereupon the application

for leave to appeal was dealt with by Daffue, J in accordance with the provisions of section 17(2) of the Superior Courts Act, 10 of

2013. Daffue, J granted leave to appeal to this court, with costs to be costs in the appeal.

[2] The appellant was the plaintiff in the court a quo. The action emanated from an incident which occurred on 5 November 2009 when the appellant suffered injuries on her right arm and hand as a result of an incident which occurred between the appellant and an encaged bear on the premises of the respondents. The respondents were the defendants in the court a quo.

[3] After the appellant closed her case, the respondents applied for absolution from the instance, which was granted with costs.

[4] This appeal is directed against the last-mentioned order and judgment.

The Second Respondent:

[5] In the respondents' supplementary heads of argument, filed by Mr Hefer, who appeared on behalf of the respondents in the appeal, it is mentioned that "the second respondent has in the meantime passed away ...". We consequently mero motu enquired from Mr Hefer at the commencement of the appeal hearing whether an executor has since been appointed in the estate of the late second respondent. Lengthy discussions followed as a result of our enquiry, whereupon certain correspondence was handed to us by Mr Hefer. After we duly considered the correspondence, we were satisfied that an executor had in fact been appointed and that the executor was well aware of the pending appeal and the date of the hearing of the appeal. Both parties were also ad idem that the appeal can and should proceed in the circumstances. We consequently entertained the hearing of the appeal.

Background

Events:

- [6] I deem it apposite to set out the background events in accordance with the appellant's evidence in chief. This is merely for the sake of providing a contextual basis to the judgment and should not be understood to constitute any finding regarding credibility or the like.
- [7] At the time of the incident the respondents (or the first respondent) conducted a taxidermy business on their premises. The respondents were the legal owners of a Himalayan bear, which they kept in a cage on their premises.
- [8] On 5 November 2009 the appellant's friend, Ms Holroyd, went to the taxidermy business to fetch an animal skin which belonged to her son in law. She invited the appellant to accompany her. Both the respondents were present at the business. Ms Holroyd enquired from the second respondent whether she can show the animals on the farm to the appellant. The second respondent readily agreed. The three ladies walked to an area on the premises where apes and baboons were being held in cages and then approached the cage in which the bear was being held. Whilst they were walking towards the cage, the second respondent remarked that the bear is tame, that his name is Grumpy, but that the appellant should be careful, since he remains a dangerous ("gevaarlike") animal. The bear was seated in the cage against the jackal-proof wire fencing. He did not appear to be aggressive and made no sound.
- [9] From the evidence, read in conjunction with two photographs which were handed in as exhibits, it is evident that the structure of the cage is built with iron bars. The iron bars were covered with the so-called jackal-proof wire fencing, which is a type of wired mesh. The cage was built on a concrete platform. The floor of the cage was consequently not on ground level.
- [10] The appellant enquired from the second respondent what the bear's diet consists of, to which the second respondent replied that it consisted of vegetables and fruit. The second respondent spontaneously indicated that it was time for the bear to have a fruit and said that she was going to fetch an apple from the guesthouse. She left, whilst the appellant and Ms Holroyd remained behind. The second respondent returned with a peach in her hand. She handed the peach to the appellant and told the appellant to feed the peach to the bear. The second respondent told her to hold the fruit in her hand and to give it to the bear. The appellant gave the peach to the bear, without putting her hand through the fence and the bear took the peach with its mouth and ate it. The appellant was standing on the ground when she fed the peach to the bear and the second respondent was standing next to her at the time. According to her evidence she had at no stage climbed onto or stood on the concrete platform.

- [11] Immediately thereafter Ms Holroyd fetched her cell phone from the car. She wanted to take a photo of the appellant standing next to the cage of the bear, since she missed the opportunity to take a photo whilst the appellant fed the peach to the bear. Ms Holroyd requested the appellant to pose next to the cage with her right arm directed towards the fence of the cage, approximately shoulder height, a little to her back and with an open hand. According to the appellant she held her open hand very close to the fence, but not against it. Whilst facing Ms Holroyd for purposes of the photo, she felt that something was pulling on her hand and when she looked backwards at her hand, the bear pulled her arm up to her elbow through the fence of the cage and into the cage.
- [12] The second respondent was present throughout the whole ordeal. The appellant was unable to pull her arm back. The second respondent and Ms Holroyd stood behind the appellant and pulled her away from the cage in an attempt to get her arm removed from the cage, but without success.
- [13] The second respondent then hit the bear from outside the cage with her one shoe, but the bear did not respond. It continued biting the appellant's fingers and hand. Ms Holroyd ran to the taxidermist business and called out to the first respondent for help. The first respondent immediately came with a whip. He entered the cage of the bear and hit the bear with the whip, whereupon the bear released the appellant's hand and arm. The appellant was in extreme shock.
- [14] Towels were used in an attempt to stop the bleeding and the respondents' son rushed the appellant to hospital in his vehicle, accompanied by Ms Holroyd.
- [15] Ms Holroyd, the appellant's friend, was also called as a witness. I do not intend to repeat her evidence herein. In essence it corresponded with the appellant's version, although there were certain contradictions between her evidence and that of the appellant. I will deal with certain aspects of her evidence later in the judgment.
- [16] The appellant also called Mr Being as a witness. At the time he was employed as the Control Bio Diversity Officer in the Department of Environmental Affairs, Sub-Directorate Compliance

Monitoring and Law Enforcement. He testified that he has been employed by the Department for 33 years. At the time of the incident, he was in control of all the legal aspects such as the enforcement of compliance with cage specifications for specific animals, the inspection of such cages, the issuing of permits, etc. At the time he had 12 officers who worked under his supervision. He also had 6 years previous experience of physically working with the animals in the Bloemfontein Zoo. I will deal with further specific aspects of his evidence later in the

judgment.

The pleadings:

[17] In her amended particulars of claim the appellant averred that the bear was kept in a cage on the property of the respondents,

that the respondents were the owners thereof and that the bear was under the control of the respondents. The appellant also made the following averments:

"12. The incident described was caused by the negligence of both the first and second defendants who were negligent in one or more of the following respects:

12.1 The first and second defendants failed to encage the bear adequately in order to control it.

12.2 The first and second defendants failed to properly and adequately enclose the cage for it to be safe for visitors and to prevent the bear from putting its mouth through the fence.

12.3 The cage was not adequately and properly enclosed to prevent the bear biting visitors including the plaintiff.

12.4 The first and second defendants failed to put up a sign, warning the plaintiff and other visitors of the dangers posed by the bear in close proximity to the cage.

12.5 No fence was erected to prevent the plaintiff or other visitors coming too close to the cage and the bear.

12.6 The top part of the cage did not contain adequate fencing to prevent the bear from putting its mouth through the fence.

12.7 The first and second defendants kept the bear in the cage without due care and attention to the safety of visitors including the plaintiff.

12.8 The first and second defendants were in control of the bear, but failed to take adequate precautions for the protection of visitors, including the plaintiff, who they allowed to visit the bear that they kept in the cage.

13. When the incident described above occurred, the first and second defendants knew or ought to have known:

13.1 That the bear is dangerous and can bite any person that stands next to the fence of the cage.

13.2 That allowing the plaintiff to stand next to the cage is dangerous and would result in lying to the defendant. (sic)

13.3 By allowing and/or encouraging the plaintiff to feed the bear is dangerous.

13.4 The bear is a wild animal and dangerous to visitors and the appellant.

13.5 That by not enclosing the cage properly to prevent the bear from putting its mouth through the fence can be dangerous to visitors and the plaintiff.

13.6 That the first and second defendants' failure to secure an adequate distance between the cage and visitors, including the plaintiff, can be dangerous.

13.7 If visitors, including the plaintiff, were bit (sic) by the bear, they could be injured and/or suffer damages."

[18] In their plea the first and second respondents pleaded as follows in response to paragraph 12 of the appellant's particulars of claim:

"7.1 Save to admit that the first and second defendants were in control of the bear, the remaining allegations contained in this paragraph are denied as if traversed separately, and plaintiff is put to the proof thereto.

7.2 Defendants specifically plead that the injuries sustained by the plaintiff were the result of her own negligence in that she:

- (a) must have known that the bear was a wild animal and that it was dangerous to come too close to the cage;
- (b) must have foreseen that she could be injured by the bear if she puts her hand on the fencing of the cage;
- (c) must have foreseen that it could be dangerous to climb onto the elevated area surrounding the cage and to touch the cage in the process and that she had failed to take reasonable steps and/or precautions to avoid such injuries being inflicted by the bear.

7.3 Alternatively, defendants plead that the plaintiff was well aware of the risk of injury in climbing onto the elevated area aforesaid and touching the cage after repeated warnings by the second defendant not to act as such, and she had voluntarily assented to the risk of being injured by ignoring or failing to heed the warnings of second defendant against such conduct.

7.4 Defendants consequently plead that the injuries sustained by the plaintiff was the direct and sole result of the appellant's own negligence, alternatively her voluntarily acceptance of the risk, alternatively defendants plead that the plaintiff was contributory negligent in the causation of the incident."

[19] In response to paragraph 13 of the particulars of claim, the respondents pleaded as follows:

"Save to admit that defendants knew that if visitors were bit by the bear, they could be injured and could suffer damages, the remaining allegations in the paragraph are denied as if traversed separately in so far as they are in conflict with what has already been pleaded by defendants herein, and plaintiff is put to the proof thereof."

Judgment

of the court a quo:

[20] In its

judgment

the court a quo, inter alia, stated as follows at paragraph [3] thereof:

"From the Heads of Argument filled in the application for Absolution and from the argument raised in court on behalf of the defendants (sic), it appears that the plaintiff relies on the actio or edictum de feris to impose strict liability on the defendants. They (sic) aver that they therefore need not allege and prove negligence by the defendants."

[21] The court a quo subsequently found, in my view correctly so, that the appellant's particulars of claim did not support such a cause of action and that the appellant was bound by her pleadings. It, however, seems that the court a quo thereafter in any event made a finding against the appellant regarding the appellant's reliance (in argument) on strict liability. In this regard the court a quo found as follows at paragraph [30] of the judgment:

"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."

[22] In addition to the finding on strict liability, the court a quo also considered the various grounds of negligence of the respondents as pleaded by the appellant in her particulars of claim and as dealt with in the evidence for purposes of the actio legis aquiliae. In this regard the court a quo stated as follows at paragraphs [12], [13] and [14] of its judgment:

"[12] ... and although the plaintiff now purports to rely on strict liability for which it 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 (sic) 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 its 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 a reasonable person in the position of the defendants must have foreseen the 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 these elements and 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."

[23] After having dealt with the evidence, the court a quo found as follows:

"[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 close to the fence where her protruding fingers would have been within easy reach of his mouth.

[30] ... 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."

The appellant's Notice of Appeal:

[24] The appellant duly filed her notice of appeal, setting out the grounds for appeal. I do not intend to repeat same herein. I will refer to some of the grounds when I deal with the merits of the appeal.

Legal principles applicable to applications for absolution from the instance:

[25] The well-known test to be applied when considering an application for absolution from the instance was formulated in *Claude Neon Lights (SA) Ltd v Daniel* 1976

(4) SA 403 (AD) at 409 G - H as follows:

"... when absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should nor ought to) for the plaintiff." (Emphasis added.)

[26] In *Gordon Lloyd Page & Associates v Rivera* 2001 (1) SA 88 (SCA) at para [2] the court dealt with the aforesaid test for absolution as follows:

"This implies that a plaintiff has to make out a prima facie case - in the sense that there is evidence relating to all the elements of the claim - to survive absolution because without such evidence no court could find for the plaintiff. As far as inferences from the evidence are

concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one. ... Having said this, absolution at the end of a plaintiff's case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises a court should order it in the interests of justice." (Emphasis added.)

[27] In *Build-A-Brick BK v Eskom* 1996 (1) SA 115 (0) at 123 A - E, Hattingh J held that the test to be applied in determining the question whether the defendant's application for absolution from the instance should be granted is not whether the adduced evidence requires an answer, but whether such evidence holds the possibility of a finding for the plaintiff, or put differently, whether a reasonable court on the basis of the evidence can find in favour of the plaintiff. At the absolution stage the inference sought by the plaintiff need not be the most probable one like at the end of case, but a reasonable one. Consequently, at the absolution stage the plaintiff's evidence should hold a reasonable possibility of success and should the court be uncertain whether the plaintiff's evidence has satisfied this test, absolution should be refused.

The merits of the appeal:

[28] In my view the appeal is to be considered only on the basis of the *actio legis aquiliae*. It is evident from the appellant's particulars of claim that the appellant relies on the negligence of the respondents and the evidence was presented on that basis. As correctly found by the court *a quo*, the appellant did not rely on the *actio de fetis* in her particulars of claim, nor was the evidence presented in support of a reliance on strict liability.

[29] When considering the merits of the appeal on the basis of the *actio legis aquiliae*, it is crucial to be mindful of the fact that the appeal is directed against the granting of absolution from the instance at the close of the appellant's case. It is therefore not for us, as the Court of Appeal, to make a final determination regarding the question whether the respondents had in fact acted negligently and/or whether the appellant herself (also) acted negligently. We merely have to apply the test for absolution, as already dealt with above, to the evidence.

[30] The court *a quo* correctly pointed out that there were some discrepancies between the averments made in the particulars of claim, the appellant's evidence (including her cross-examination) and Ms Holroyd's evidence pertaining to the issue whether the appellant's hand in fact touched the cage when she posed for a photo and/or whether her fingers protruded through the fence at some stage during that process. However, in my view, it is unnecessary for purposes of this appeal to make a determination regarding this issue. It is common cause that the bear in some or other way in fact got hold of the appellant's hand and arm. Even if it is to be accepted for purposes of this appeal that the appellant had in fact touched the cage and/or that her fingers

protruded through the fence of the cage, which I do not find, and that her conduct in this regard constituted negligence on her side, which I also do not find, it is not the end of the matter. The principles of contributory negligence are to be kept in mind, which are set out as follows in LAWSA, Volume 15 (3ed), at para 217:

"217 Contributory fault The Apportionment of Damages Act [34 of 1956 s 1(1)(a)] provides: 'Where any person suffers damage which is caused partly by his own fault and partly by fault of any other person, a claim in respect of that damage shall not be defeated by reason of the fault of the claimant but the damages recoverable in respect thereof shall be reduced by the court to such extent as the court may deem just and equitable having regard to the degree in which the claimant was at fault in relation to the damage.'

The provisions of section 1 of the Act clearly relate only to cases where a plaintiff has suffered harm partly as a consequence of his or her own fault, and partly as a consequence of the fault of the defendant. The principle requires a comparative evaluation of the parties' respective degrees of fault and a proportionate reduction of the damages recoverable by the plaintiff."

- [31] Therefore, what we have to determine for purposes of this appeal, is whether the court a quo's findings with regard to the alleged negligence of the respondents were correct for purposes of the application of absolution from the instance. I will henceforth deal with the evidence and the court a quo's findings in this regard. When doing so, it is necessary to also apply the principle that in order for a party to succeed in an action based on the *actio legis aquiliae*, it is not required that all the grounds of negligence which the party pleaded, be proven.
- [32] On the appellant's version the second respondent warned them, whilst they approached the bear in the cage, that although the bear was tame, it was a dangerous animal. Despite the second respondent herself voiced and therefore knew that the bear was a dangerous animal, she, on the appellant's version, never warned or prevented the appellant from standing close to the cage and/or not to touch the fence of the cage and/or not to stick her finger(s) through the fence. To the contrary, it was not disputed that the second respondent even left the appellant and Ms Holroyd to remain on their own next to the cage whilst she went to fetch a peach. Thereafter, again instead of warning the appellant not to bring her hand in close proximity to the fence, she gave the peach to the appellant and invited her to feed it to the bear through the fence.
- [33] In addition to the aforesaid, both the appellant and Ms Holroyd testified that the second respondent was present when the photo was to be taken and when the incident occurred. Despite her presence, on the evidence as it currently stands, the second respondent at no stage prevented or warned the appellant not to get too close to the cage and/or not to touch the fence of the cage and/or not to stick her finger(s) through the fence during the process of posing for the photo.
- [34] In this regard the court a quo found as follows at paragraph [22] of its judgment:

"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 appellant shortly before the incident."

[35] I cannot agree with the aforesaid conclusion of the court a quo. The appellant and Ms Holroyd could not have testified as to what the second respondent saw or did not see. The fact of the matter is that on the appellant's case as it currently stands, the second respondent was present without uttering any warning to the appellant. It would therefore be for the respondents to present evidence in response to the appellant's case as to what the second respondent saw or did not see at that stage.

[36] Mr Boing testified in his evidence in chief that he had knowledge of the bear which was being kept in a cage on the respondents' premises and that during visits to the premises of the respondents, he saw the bear in the cage. He testified that in his view the following shortcomings existed in the manner and circumstances in which the respondents held the bear in the cage:

1. Although legislation exists which prescribes specifications for cages of indigenous animals, it contains no specifications with regard to cages for foreign animals, such as a bear. However, in his opinion the cage in which the bear was held was too small which would have frustrated the bear.
2. The wire fence which covered the iron bars of which the cage was made, was not strong enough.
3. In circumstances where members of the public were to be allowed at the cage, a second railing or fence should have been erected at a distance of at least 1,2 metres from the bear's cage to prevent members of the public from coming too close to the cage. The mere fact that the cage was built on a concrete platform was not enough to keep such persons at a safe distance from the cage.
4. There were no sign boards which warned members of the public of the danger the bear constitutes. He testified that members of the public should have been properly be informed that the bear is a dangerous animal.

[37] It is common cause that the defendants had a valid permit which authorised them to keep the bear on their premises in the said cage. As already mentioned, Mr Boing testified that at the time no legislation existed which prescribed specifications for cages of indigenous animals, such as a bear.

[39] During his evidence in chief he presented the following evidence, which is reflected at p. 124/21 to

p. 125/8 of the record:

"So wat, wat ek net probeer vasstel is dit is hulle het nie by u kom advies vra oor hoe hierdie hok moet .lyk nie, wat die spesifikasies moet wees nie?

... Nee Edelagbare.

Op die stadium toe u nou daar inspeksies gedoen het vir watter rede ookal het u ooit aan die, aan die Regals uitgewys dat die hokke is nie eintlik geskik nie of nie volgens u standaard wat u sou verwag nie? ... Nee Edelagbare. Dit is in die eerste plek nie my mandaat gewees nie aangesien dit 'n uitheemse dier was. Ek was ook nooit daar om na die diere te kyk. Dit het maar toevallig gebeur dat ons die diere gesien het. Ons het by mnr Regal gereeld uitgekom oar taksidermie aangeleenthede."

[40] In its judgment the court a quo dealt with certain aspects of Mr Being's evidence, whereupon it made certain conclusions:

"[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... 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 defendants' 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."

[41] Mr Boing did in fact concede that before the permit was issued, the cage would have been inspected. He, however, also testified that he himself never inspected the cage and never attended to the premises of the respondents for purposes of inspecting the cage. The inspections were done by his colleagues who did not have the same specialised knowledge he has. He further testified that because at the time no specifications existed for a cage in which to keep a bear, his colleagues would not have raised any issue regarding the safety of the cage.

[42] Mr Boing more than once emphasised during his cross- examination that whenever he visited the premises of the respondents, it was in relation to issues with regard to the taxidermy business of the first respondent. He, however, readily conceded that he knew about the cage and that he knew what the cage looked like since he and the first respondent often stood next to the cage in the shade whilst conversing.

[43] The following question and answer followed in his cross- examination, as reflected at p. 137/21 to p. 138/13 of the record:

" Use dat u by verskeie geleenthede saam met mnr Regal daar by die hok staan en u kyk vir die beer en u sien die hok, en dan verstaan ek van u op geen stadium het u vir mnr Regal gese maar hoor hierso ou maat, hier is darem iets gevaarlik hier hoor. Daardie beer gaan daardie ogiesdraad opfrommel die dag ashy lus is om dit te doen. Hierso moet 'n heining hier om wees, netnou steek hy sy poot daardeur en hy gryp iemand. U se u het nooit so iets vir horn gese nie? ... U Edele, ja in nagedagtenis moes 'n ou dit dalk vir horn gese het, maar soos ek vroeer gese het, het ek was nooit daar vir diere besigheid nie. Ons het van die taksidermie winkel af gestap na die horingstoor toe en dan stap jy by die hokke verby en ek kom uit 'n dieretuin agtergrond uit. Dit was vir my partykeer mooi om die diere te sien. Maar dit het nooit in my kop gekom om vir horn te se weet jy daar is tout met die hokke nie. Nee ek het dit nooit gese nie."

[44] However, in my view, the aforesaid concessions on which the respondents so heavily relied, should be considered in conjunction with the following explanations which Mr Boing gave, but which the court a quo failed to take into consideration.

1. Mr Being explained that he might have warned the respondents about the dangerous situation with regard to the cage had he known that members of the public were also allowed at the cage. In this regard he explained at p. 139/20 to 140/10 of the record that there is a difference between the bear's owners being present at the cage as opposed to members of the public who are unknown to the bear:

"En ek wil dit aan u stel dat u wat u lewe aan natuurbewaring en hokke en goeters gewy het u sou dit vir horn verseker gese het as u gedink het daardie hok is gevaarlik, u sou dit gedoen het. Ek sou dit moontlik gedoen het, U Edele, as ek geweet het hy laat publiek daar toe en mense toe by die hokke. Maar ek het gedink dit is 'n suiwer taksidermie en that is, dis dit.

En nee wat mnr Boing, u het tog ten minste geweet dat mnr Regal self en sy vrou kom van tyd tot tyd daar by die hok om met hul troeteldiertjie te gesels of wat ookal. Dit maak mos nou nie saak of daar nog een of twee ander ouens ook van tyd tot tyd daar kom nie. U sou vir horn gese het, stel ek aan u, as u gedink het daar is iets gevaarlik. ... Ek sou, U Edele, maar daar is 'n verskil tussen die eienaar van die dier en vreemde mense wat die dier kom besoek. Daar is beslis 'n verskil."

2. The aforesaid evidence of Mr Being also corresponds with evidence which he presented already during his examination in chief at

p. 120/17 to p. 121/16 of the record:

"Nou wat se u van die feit dat die, die getuienis in hoof namens die eiseres was dat sy voorsien is van 'n perske deur Me Regalengevra is om die dier te voer. Wat is u siening random dit? ...

Edelagbare...die algemene Jan Publiek kan nie voorsien, ek bedoel almal is nou nie diere kenners nie. Ek glo die persoon, die eienaar van die dier behoort 'n diere kenner te wees. So Jan Publiek neem aan as die baas die dier kan voer dan kan ek ook seker naby horn kom. En die ongesonde praktyk is dat jy, die eienaar raak aan die leeu (beer) en dan, dan dink Jan Publiek hulle kan ook aan die beer raak. ... En dis net waar die probleem inkom. Die beer is gewoon aan sy eienaar maar hy is nie gewoon aan lede van die publiek nie. En ek staaf my woorde deur my ondervinding in die dieretuin. Ons het spesifieke mense gehad wat spesifieke diere opgepas het en hulle het dit vir jare gedoen. Ons het nie die arbeid in die dieretuin gereeld rondgeskuif tussen hokke nie. Ashy by die bere gewerk het, het hy omtrent lewenslank by die bere gewerk en so by die roofdiere ensovoorts."

3. In cross-examination Mr Being was referred to a letter, dated 19 August 2014 issued by the Department, which letter, although signed by the Acting Head Director, was written by Mr Being. In the said letter reference was made to the respondents' bear and, inter alia, stated the following:

"Enclosures were inspected prior to permits being issued. Enclosure was found to be in good order and permits have always been kept updated."

In re-examination when Mr Being was asked what he meant by_ the aforesaid, he responded as follows at p.154/24 to p. 155/12 of the

record:

"As daar staan dat die 'enclosure was found to be in good order' wat word daarmee bedoel? Beteken dit die beer sal nie ontsnap nie of beteken dit hy is veilig vir besoek deur die publiek of beteken dit die beer behoort gelukkig te wees met die omgewing waarin hy is, wat beteken dit? ... Dit beteken, U Edele, verskeie dinge. Dit beteken die beer sal veilig wees binne-in die hok en dat hy goed versorg word.

Beteken dit dat die hok is voldoende beveilig dat die publiek horn mag besoek? Kan u dit daaruit lees? ... Nee, ek glo nie, soos ek vroeër gesê het U Edele. dit gaan oor die dier vir ons. So die hok is goed genoeg om die dier binnekant te hou en hy word goed versorg. Dis, dis al wat ek eintlik bedoel het by daardie brief." (Own emphasis).

Conclusion:

- [45] When considering the issue of the respondents' negligence, it is important to consider it in the light of Mr Boing's evidence that in the circumstances where the encaged bear was not open for visits by members of the public, the inspection of the cage by his officials and the issuing of the permit were done for the purpose and on the basis of the safety and the well-being of the bear, not for that of members of the public, such as the appellant.
- [46] In my view Mr Boing's evidence may be found to be sufficient for the appellant to ultimately succeed in proving that the first and/or second respondents were negligent in one or more of the manners pleaded. The evidence led on behalf of the appellant was sufficient that a court may find in the appellant's favour on the basis of the *actio legis aquiliae*.
- [46] On a proper reading and consideration of the totality of Mr Boing's evidence and bearing in mind that he is an expert in his field, it *prima facie* indicates that the fence which covered the cage (or part thereof) did not afford adequate protection against the bear and that the first and/or the second respondents were negligent in allowing members of the public, and the appellant in particular, to come and to be in close proximity of the bear's cage in circumstances in which they failed to take adequate, reasonable and necessary steps to protect him/her against the bear·by, *inter alia*:
1. their failure to have erected a second railing or fence at least 1.2 meters from the bear's cage; and/or
 2. their failure to have expressly warned the appellant from coming in close proximity of the cage and/or from touching the cage/fence.
- [47] The second respondent *prima facie* also created a false sense of safety to the appellant by having invited the appellant to feed the bear to the bear through the fence of the cage, whilst the second respondent knew· or ought to have known that it was dangerous to do so.
- [48] In the circumstances the court *a quo* could also not have found that the appellant accepted the risk of injury (*volenti non fit iniuria*), moreover so considering that the burden of proof with regard thereto rests upon the respondents.
- [49] In my view the appellant made out a *prima facie* case to which the respondents have to respond, failing which the appellant may succeed in her action based on the *actio legis aquiliae*.
- [50] For purposes of this appeal, the aforesaid *prima facie* grounds of negligence on the side of the first and/or second respondents are sufficient for the appeal to succeed. This, however, does not mean that after having considered the totality of the evidence after the close of the respondents' case, the court *a quo* may not find that the appellant proved additional grounds of the pleaded negligence on the part of the first and/or second respondents.

Order:

1. The appeal succeeds and the order of the court a quo, dated 11 December 2014, is set aside and substituted with the following:

"The application for absolution from the instance is dismissed, with costs."

2. The respondents are ordered to pay the costs of the appeal, jointly and severally, payment by the one the other to be absolved.

C. VAN ZYL, J

I concur

M.L OPPERMAN, J

N.S DANISO, J

On behalf of appellant:

Adv. FG Janse van Rensburg

Instructed by:

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BLOEMFONTEIN

On behalf of the respondents: Adv.

JJF Hefer SC

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