IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 2875/2008

In the matter between:

ELAINE KIESEWETTER	**PLAINTIFF**
and	
BASIL GEORGIADES	**1st DEFENDANT**
JACQUELINE GEORGIADES	**2nd DEFENDANT**

JUDGMENT DELIVERED ON THE 19th DAY OF SEPTEMBER 2008

LOUW, J:

[1] This plaintiff is a 41 year old married bookkeeper who has two young children.

[2] The defendants are a married couple. They live with their children in a residential property situated at 8 Queens Road, Rondebosch, Cape (the premises).

[3] While the front entrance to the premises is on Queens Road, the back entrance is through a metal covered sliding motor gate (the gate) into Hazel Road. This gate is not motorised and requires to be opened and closed by hand.

[4] During 2005 and before, the plaintiff regularly walked along Hazel Road after visiting a client whose books she did, to where her car was parked some distance away in a side street. This route took her past the gate to the

premises and she often heard and sometimes saw dogs in the back yard of the premises. These dogs were agitated and barked and snarled when she walked past. There was a sign on the gate warning of a rottweiler dog on guard. The dogs made her nervous and she gave the sliding gate as large a berth as possible.

[5] At approximately five past one on the afternoon of 14 November 2005, when the plaintiff again approached the gate along Hazel Road, three adult rottweiler dogs managed to force their way through a gap between the gate and the wall post and came running towards her. The plaintiff testified that the dogs attacked her and pushed her over and, while she was lying on the ground, one or more of the dogs bit her on her left thigh and forearms. She was saved from further injury by a man whom she had previously seen sweeping the side walk outside the gate at the premises. This man came through the gate and called the dogs off and took them back onto the premises. When the plaintiff herself shortly thereafter went onto the premises, she noticed that the dogs, whom she could still hear, had been secured somewhere inside the building. The man who had come to the plaintiff's rescue turned out to be in the employ of the first defendant as gardener/cleaner. He told the plaintiff that he would call his "boss", the first defendant. The plaintiff then spoke to the first defendant. It is common cause that the first defendant apologised for what had happened and offered to pay the plaintiff's medical bills and to drive her where she needed to go.

[6] Arising from this incident, the plaintiff instituted the present action against the defendants for damages allegedly suffered by her as a result of the attack. She pleaded two causes of action:

1. the *actio de pauperie,* based on the ownership of the dogs; and
2. the *actio legis Aquiliae,* based on wrongful and negligent conduct.

[7] At the commencement of the trial, the defendants who had up to shortly before the trial been represented by an attorney, appeared in person. They explained that they could not afford the services of an attorney for the trial itself.

[8] On application by the plaintiff it was ordered that the issues relating to the defendants' liability to compensate the plaintiff for any damages arising from the incident, be determined first and that the quantum of such damages, if any, be determined later.

[9] It is not in dispute that an incident involving the plaintiff occurred when the three dogs managed to get out of the premises. What is in dispute regarding the incident is whether the plaintiff had in fact been bitten by one or more of the dogs. Whether or not the plaintiff was bitten and the nature of the injuries she sustained is not to be decided at this first stage of the proceedings. This decision is left to be made at the second stage when the quantum is to be decided.

[10] During the course of the trial, the plaintiff admitted that a Mr Hans Hofmeister lived on the premises at the time of the incident and that he was the owner of the three dogs involved. The cause of action based on the *actio de pauperie* consequently fell away and the plaintiff proceeded thereafter solely on the basis of the alleged wrongful and negligent conduct of the defendants.

[11] The undisputed evidence of the first defendant was that his wife, the second defendant, was the owner of the premises. They had allowed Mr Hofmeister, who at the time needed a place to live with his three adult rottweiler dogs, to stay temporarily in a separate flatlet at the back of the premises from 1 November 2005, some two weeks before the incident. One of Hofmeister's dogs gave birth to a litter of puppies at the premises before the incident on 14 November 2005.

[12] The first defendant used the premises not only as a place to live, but also as one of the places from which he ran his business. At the time of the incident, the defendants were experiencing marital problems and the first defendant had not been living at the premises for about one week. He did, however, visit the premises regularly to attend to his business affairs and to visit his children.

[14] The defendants had two rottweiler dogs of their own. They still do. When Mr Hofmeister came to live there with his three dogs, the first defendant

placed their own dogs in the front part of the premises and the two sets of dogs were be kept apart.

[15] It is common cause that rottweilers are large heavy and fearsome looking dogs and that they can inflict serious injuries if they should attack a person. The first defendant testified that adult rottweilers are capable of tearing a person apart. It is clear from the evidence that the defendant knew and understood that although the Hofmeister dogs were friendly and docile around him and his family, he did not know how they would react to strangers and that they had to be kept from getting out of the premises into the street outside where they could be a danger to strangers. The first defendant spoke of the need to provide a safe perimeter for the dogs.

[16] The first defendant testified that he had provided two secure places for Hofmeister's dogs. The one was in the backyard of the premises. The other was an enclosed space inside the building at the back where the dogs could, when it was necessary, be held secluded from the backyard and the rest of the property.

[17] The defendants gave Hofmeister, who was approximately 74 years old at the time, free access to his temporary accommodation through the gate at the back. The first defendant told Hofmeister and the gardener to keep the gate closed at all times. The gate is opened and closed by manually sliding it open and shut. The locking mechanism consisted of a spring loaded hook which became engaged when the gate was pushed tight to the wall post. To

open the gate, the gate itself needed to be lifted up to dislodge the hook and then be rolled back. If the gate was not pushed tightly closed, the hook will not engage and the gate is not closed securely. The first defendant testified that the mechanism was the "cheapest layman's way" to secure the gate and that no dog would be able to open the gate once the locking mechanism had been engaged. Although the first defendant surmised that either Hofmeister or the gardener/cleaner might have left the gate slightly open, it is clear from his evidence that he thought that it was Hofmeister who had omitted to close the gate properly when he left the premises. He stated that older persons loose some of their faculties and that they sometimes forget things and do not always act as one would expect.

[18] After testifying, the first defendant wished to hand in an affidavit by Hofmeister regarding his ownership of the three dogs and the fact that, at the time, he lived temporarily at the premises. The first defendant stated that he did not think that Hofmeister, if he were called to testify, would remember whether he left the gate open or closed. Mr Saner on behalf of the plaintiff objected to the evidence by affidavit, but when it appeared that the defendants intended asking for a postponement to call Hofmeister, who no longer lives in Cape Town, Mr Saner made the admissions regarding the ownership of the dogs and that Hofmeister lived at the premises at the time. The first defendant thereupon closed his case. The second defendant did not testify or call any witnesses.

[19] In **Kruger v Coetzee** 1966(2) SA 428(A) at 430 E – G, the requirements for negligence was stated as follows:

> "For the purpose of liability *culpa* arises if –
>
> (a) A *diligens paterfamilias* in the position of the defendant –
>
> (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
>
> (ii) would take reasonable steps to guard against such occurrence; and
>
> (b) The defendant failed to take such steps.
>
> This has been constantly stated by this Court for some 50 years. Requirement (a)(ii) is sometimes overlooked. Whether a *diligens paterfamilias* in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable must always depend upon the particular circumstances of each case. No hard and fast basis can be laid down".

[20] Hofmeister's dogs managed to get out of the premises because at least one of them was able to force the gate open by pushing its snout into a gap between the gate and the post and then to push the gate open. This could only have happened if the gate had not been closed securely.

[21] While the second defendant is the owner of the premises, both defendants had control over the premises. The first defendant is clearly the dominant partner between him and his wife and even if he was temporarily not living at the premises at the time, he clearly retained at least joint control over the premises. He clearly considered himself to be the person who was

responsible to take steps to safeguard the premises. He gave the instructions regarding the security of Hofmeister's dogs.

[22] The first defendant clearly foresaw the danger to passers-by in the street and the need to take steps to guard against the dogs getting out. It is clear on the evidence as a whole that a reasonable person in the position of the defendants would have foreseen the reasonable possibility that the gate might not be securely pushed tight so as to engage the locking mechanism by the elderly Hofmeister who was prone to forget things.

[23] The question is whether the defendants took adequate steps to prevent the dogs from getting out of the premises. In **Lawsa**: 2nd Edition; Volume 8; Part 1 at p213 it is stated:

> "The standard of conduct required is determined by balancing the recognisable risk against the social value, or utility, of the interests served by the defendant's conduct. Where there is a good chance that the risk of harm may materialise or where the consequences in the event of harm would be serious although the risk is slight, the risk outweighs the utility of the particular conduct in question, and the particular risk-creating conduct is unreasonable and therefore negligent. Apart from the utility of the conduct in question, the cost and burden of possible precautionary measures must also be balanced against the risk. If the burden of eliminating the risk outweighs the magnitude of the risk, the defendant's conduct is reasonable and therefore not negligent."

[24] Mr Saner referred to two decisions as examples of how our courts have dealt with a similar problem of animals (horses and cattle) straying from

adjoining farms onto a national or public road through gates that had been left open, by requiring the use of padlocks or a animal grid[1]. As he pointed out, however, the question of negligent conduct must be decided on the circumstances of the particular case. In **Cape Town Municipality v Butters**[2] it was put as follows:

> "It needs to be emphasised, once again, that in considering issues of negligence what is, or what is not, reasonably foreseeable and what steps, if any, ought to be taken by the reasonable person to avert such foreseeable harm must always depend upon the particular circumstances of each case, that no hard and fast rule can be laid down and that in general it is futile to seek guidance from the facts and results of other cases."

[25] In this case the defendants took the steps outlined earlier. In my view were required to take greater care. They were confronted with an inherently dangerous situation of their own making. Three adult rottweiler dogs that were strangers to the premises being their home and their territory were brought onto the premises. In addition an elderly person with the reduced physical and mental abilities that come naturally with advanced age, became part of their system of security. Prior to this their system of security appears to have worked. There is no suggestion that their own dogs had previously escaped from the premises. The introduction of the elderly Hofmeister with three potentially dangerous adult dogs to the premises created a new danger when it is coupled with the fact that the gate was no longer under the exclusive control of the defendants and their employee. Hofmeister could come and go

---

[1] Mkhwanaze v van der Walt 1995(4) SA 589(A)
Enslin v Nhlapo 2008(5) SA 146 (SCA)
[2] 1996(1) SA 473(C) at 482 E - F

as he pleased without interfering with the defendants' lives. The first defendant made much of the fact that Hofmeister was an adult and that the defendants were entitled to rely thereon that he would act reasonably and responsibly and that the defendants could not be held responsible if Hofmeister were not to heed the first defendant's admonition to keep the gate securely closed at all times. In this case, it was foreseeable that Hofmeister may through oversight, not act reasonable and leave the gate not securely closed. It was not reasonable to continue as before and to simply warn Hofmeister to keep the gate closed.

[26] The first defendant arrived at the premises about one hour before the incident occurred. Mr Saner submitted that the first defendant was negligent in not checking whether the gate had been securely closed. Even assuming this to be correct, it is not known when the gate was left in an unsecure position. It is not proven that if he had checked when he arrived, he would have avoided the incident. Since, however, Hofmeister was free to come and go as he pleased, the defendant should, in my view, have provided a mechanism to lock the gate with a key and lock. This would have required Hofmeister not only to push the gate closed, but also to use a lock to secure the gate. Had he required Hofmeister to use a lock and key, the probabilities are that the gate would not have been left in a position where the dogs could force it open because the locking mechanism had not been engaged.

[27] The nature and extent of the risk to and the interest of the public passing safely along Hazel Road and the seriousness of the injuries to the

court in claims for delictual damages, once the merits are decided in the Plaintiff's favour. I am not inclined to do so in this case. I have some doubt that the plaintiff's quantum of damage will exceed the jurisdiction of the magistrates' court. In my view this is a case where costs should stand over. At the end of the trial the court will be in a position to make an appropriate costs order. The court should not, in the circumstances of this case, at this stage pre-empt that decision which might conceivably be an order for costs on the magistrates' court scale only.

[31] It follows that the following order should be made.

1. The first and second defendants are liable, jointly and severally for such damages as the plaintiff may prove to have suffered as a result of the incident which occurred on 14 November 2005 when she was attacked by the three rottweiler dogs which emerged from their property.

2. The costs are to stand over for determination at the end of the trial.

W J LOUW, J