BARKING UP THE WRONG TREE – THE *ACTIO DE PAUPERIE* REVISITED

Van Meyeren v Cloete (636/2019) [2020] ZASCA 100 (11 September 2020)

1 Introduction

It is trite that the South African law of delict follows a generalising approach (Loubser and Midgley *The Law of Delict in South Africa* (2017) 19–20; Neethling and Potgieter *Law of Delict* (2020) 4–5). This entails that liability will only ensue when all the elements of delict are present. South African law does not recognise individual "delicts" (Loubser and Midgley *The Law of Delict in South Africa* 19; Neethling and Potgieter *Law of Delict* 4). The generalising approach followed in South African law is qualified in that there are three main delictual actions, namely the *actio legis Aquiliae* for patrimonial loss; the *actio inuriarum* for loss arising from intentional infringements of personality rights; and the Germanic action for pain and suffering, in terms of which a plaintiff can claim compensation for negligent infringements of the physical-mental integrity (Loubser and Midgley *The Law of Delict in South Africa* 19; Neethling and Potgieter *Law of Delict* 5). This approach is further qualified in that numerous actions dating back to Roman law still exist in our law today. Included in this mix are the actions for harm caused by animals, such as the *actio de pauperie*, the *actio de pastu*, and the *actio de feris*, each with its own requirements (Neethling and Potgieter *Law of Delict* 435–440; Scott "Die *Actio de Pauperie* Oorleef 'n Woeste Aanslag *Loriza Brahman v Dippenaar* 2002 (2) SA 477 (HHA)" 2003 *TSAR*).

There have been questions as to whether these actions, in particular the *actio de pauperie*, still form part of South African law. In *Loriza Brahman v Dippenaar* (2002 (2) SA 477 (SCA) 487) the defendant claimed that the *actio* was no longer part of the South African law (par 14). The Supreme Court of Appeal (SCA) per Olivier JA held that the *actio de pauperie* had been part of South African law for more than 24 centuries and not fallen into disuse (par 15). Olivier JA held that the fact that the action is based on strict liability (one of the arguments raised against it) is no reason to ban it from South African law as strict liability was increasing and in suitable instances fulfils a useful function (par 15).

The SCA, again, recently confirmed the continued existence of the action in South African law in the case of *Van Meyeren v Cloete* ((636/2019) [2020] ZASCA 100 (11 September 2020) 40). In this case, the SCA had to decide whether to extend the defences against liability in terms of the *actio de pauperie* to the negligence of a third party that was not in control of the animal. The defendant held that the court should develop the common law in

this regard. Considering both case law and the requirements for the development of the common law, the SCA held that such an extension could not be justified.

2 Facts

Mr Gerhard Cloete, a gardener and refuse collector, was on his way to the shop, pulling the trolley in which he collects refuse. While walking past the Van Meyeren house, minding his own business, he heard dogs behind him. Three dogs subsequently attacked him from behind. The dogs belonged to Van Meyeren, who was the appellant in the case. The dogs savaged Mr Cloete, and this resulted in his left arm being amputated. Mr Cloete claimed damages in terms of the *actio de pauperie* and in the alternative, on the basis of negligence (presumably in terms of the *actio legis Aquiliae*). Mr Cloete's presence in the place where he was attacked was lawful and he had done nothing to provoke the dogs. The dogs also attacked Mr van Schalkwyk, a passer-by who had come to Mr Cloete's assistance. Nobody was at home at the time of the incident.

By all accounts, the dogs, mixed breed with pit-bull features, had never attacked anyone and slept in the house. They had the run of the house and the garden, which was fenced and sealed off from the street by means of a padlocked gate. Whether the gate was in fact padlocked on the day of the incident is uncertain. Mr and Mrs van Meyeren testified that the gate was at all times locked with two padlocks. They alleged that the gate had been opened by an intruder. Photographs taken on the day of the incident showed no padlocks. A photograph taken some time later showed the gate with two heavily rusted padlocks (see discussion in 3 1 and 3 2 below).

3 Judgment

3 1 Court a quo

The plaintiff claimed damages in terms of the *actio de pauperie* in the court *a quo* and succeeded (see Scott "Conduct of a Third Party as a Defence against a Claim Based on the *Actio de Pauperie* Rejected – *Cloete v Van Meyeren* [2019] 1 All SA 662 (ECP); 2019 2 SA 490 (ECP)" 2019 82(2) *THRHR* 321 for a case discussion of the decision of the court *a quo*). Initially, the defendant denied that his dogs had been responsible for the attack and if they had been, it was because an intruder had attempted to break into the front door and had broken open the gates to the garden where the dogs were kept. He denied liability and negligence.

The defendant eventually conceded that the dogs were his and that they had acted *contra naturam sui generis*. The court had to decide two questions, namely whether the fact that the gate had allegedly been opened and left open by an intruder could constitute an exception to liability in terms of the *actio* and if so, if the plaintiff could establish liability in terms of the *actio legis Aquiliae*? (*Cloete v Van Meyeren* 2019 2 SA 490 (ECP) 6). The defendant bore the onus of proving that the gate was left open by an

intruder. While the Court regarded the defendant as an unsatisfactory witness, it nevertheless accepted that the gates had been locked and later broken open by an intruder (*Cloete v Van Meyeren supra* par 16). As there was no negligence, the court held that liability in terms of the *actio legis Aquiliae* had to fail.

Dealing with the *actio de pauperie*, the Court commenced by looking at the history of the action (par 18), referring to the historical overview in *Lever v Purdy* (1993 (3) SA 17 (AD) 21C–25F as cited in *Cloete* par 20). With reference to the *Lever* case (*supra*) the court *a quo* found that there were two categories of conduct of third parties that would serve as a defence against the *actio de pauperie*, namely (a) where the third party through positive conduct provoked the animal; and (b) where the third party who was in control of the animal, culpably lost control.

In the present case, the defendant relied on the second defence but did not succeed. In *Lever v Purdy* (*supra*), the defendant argued that the negligence of the intruder who left the gates open but was not in control of the animals would be sufficient to bring the so-called "wider" exception as a complete defence against the *actio de pauperie*. Lowe J argued that while the existence of the "wider exception" finds some support in case law, there is no support for such an extension in Roman law or Roman-Dutch law. Looking at previous cases such as *Lever v Purdy* (*supra*) and *Loriza Brahman v Dippenaar* (*supra*), Lowe J stated that he could "find no convincing support either in principle or flowing from the rules as to pauperian liability justifying the extension of a pauperian defence or exception as contended by the defence" (par 40). The plaintiff's claim in terms of the *actio de pauperie* was, therefore, successful (par 42).

According to Scott (2019 *THRHR* 331), the outcome of this judgment had to be welcomed, as it was in accordance with the approach that the liability of an owner of a domestic animal was based on the risk principle. This is because the person who keeps such an animal creates potential danger, and this justifies holding the owner liable, even in the absence of fault (see discussion below in 4 3).

3 2 Supreme Court of Appeal

The defendant appealed to the SCA, where the court per Wallis JA dismissed the appeal (par 43).

The SCA dealt with three issues, namely:

(a) The treatment of the factual evidence in the court *a quo*;

(b) Whether the *actio de pauperie* was still part of South African law and if so;

(c) Whether the third-party defence should be extended to a situation where the harm would not have occurred, but for the negligent conduct of the third party in circumstances where the third party had no control over the animal.

3 2 1 The treatment of the factual evidence in the court *a quo*

Wallis JA criticised the court *a quo's* handling of the "unsatisfactory and speculative evidence" of the defendant (par 13). The onus of proving that the evidence was correct rested on Van Meyeren. The court was not obliged to accept an improbable explanation merely because there was no other explanation or that the alternative seemed even less probable to the judge (par 13). Wallis JA identified two possibilities, namely (a) the gates were not sufficiently secured to keep the dogs inside, and (b) there was an intruder (the explanation proffered by the Van Meyerens). The issue, in this case, was whether the explanation of the Van Meyerens (that the dogs escaped) was, on a balance of probabilities, the only conclusion that could be reached. Mr van Meyeren bore the onus of proof and did not discharge it. His defence should, therefore, have failed (par 13).

3 2 2 Is the *actio de pauperie* still part of South African law?

Wallis JA summarised the recent history of the action, starting with *O'Callaghan v Chaplin* (1927 AD 310), including a discussion of *Loriza Brahman v Dippenaar* (*supra* par 15–10). From the case law, it is clear that the *actio de pauperie* was and is a part of our law (see discussion below).

Wallis JA described the *contra naturam* requirement as reflecting an element of anthropomorphism (see discussion below) in that "for the owner to be liable, there must be something equivalent to *culpa* in the conduct of the animal" (par 19 referring to *SAR and H v Edwards* 1930 AD 3 9–10). If the animal has not acted *contra naturam* the owner will not be held liable. The onus, in this case, is on the owner to prove that the animal did not act *contra naturam* (par 19).

3 2 3 Should the third-party defence be extended to a situation where the harm would not have occurred, but for the negligent conduct of the third party in circumstances where the third party had no control over the animal?

Mr van Meyeren argued that the defence recognised in *Lever v Purdy* (*supra*) should be extended to exempt the owner from liability for harm caused by the animal in a situation where the harm occurred as a result of the negligent conduct of a third party, irrespective of whether the third party had control over the animal or not.

Wallis JA (par 23) referred to *Lever v Purdy* (*supra*), citing the two instances identified in that case where the conduct of a third would constitute a defence against the *actio de pauperie*, namely (a) striking or provoking the animal in some way; and (b) where the third party was in control of the animal and failed to prevent the animal from causing harm to the victim. These cases were identified by Joubert JA upon a reading of the common-law sources. The minority decision of Kumleben JA referred, in passing, to a

wider exception, but, according to Wallis JA, nothing in *Lever v Purdy* (*supra*) supported the wider third-party defence.

Wallis JA, stated that "these rather cryptic references in and to the old writers on the Roman-Dutch law" do not serve as a clear authority to indicate the existence of a wider defence (par 31).

Van Meyeren argued that the law in this regard should be developed to provide for the wider defence. Wallis JA (par 32, referring to *Mighty Solutions (Pty) Ltd t/a Orlando Service Station v Engen Petroleum Ltd* 2016 (1) SA 621 (CC) 38) summarised the court's power to develop the common law, stating that the power is vested in the High Courts, Supreme Court of Appeal, and the Constitutional Court, by virtue of section 173 of the Constitution. This power has to be exercised "in accordance with the interests of justice" (par 32). The courts are enjoined by section 39(2) to "promote the spirit, purport and objects of the Bill of Rights". When considering whether to develop the common law, a court has to do the following (par 32): (a) determine what the common law position is; (b) consider the underlying reasons for this position; (c) ask whether the rule offends the spirit, purport and object of the Bill of Rights; and (d) consider in which way the common law could be amended, and take into consideration the effects of the change on the particular area of the law.

Wallis J, having had already set out the common-law position (as per (a) above), proceeded to look at (b), namely the underlying reason for the *actio*, which, according to him was that between the owner of the dog and victim, it is "appropriate" for the owner to bear that harm, instead of the victim (par 33). Insofar as (c) is concerned, the appellant did not rely on any specific provision of the Bill of Rights; he also did not (correctly so, according to Wallis JA) allege that the limited exception offended the spirit, purport, and objects of the Bill of Rights. This, according to Wallis JA, was correct, because the *actio* in fact serves to protect the right to bodily integrity in section 12(2); the right to dignity in section 10; and the right to life in section 11 (par 34). The court held that the *actio* exists to protect these rights and it is right to rather develop the *actio* in ways that can protect these rights (par 34).

Counsel for the appellant submitted that given the levels of crime in South Africa it was reasonable for people to want to protect themselves and not everyone could afford sophisticated security systems (par 35). Wallis JA held that while this is true, deterrence and restraint do not mean that the intruder has to be killed or maimed (par 35).In this particular case, furthermore, the dogs harmed an innocent bystander, not an intruder; and this took place, not on the premises of the owner, but in the street (after the dogs escaped). The right to keep a dog for the protection of the home is extensive but this right becomes irrelevant where the dog harms someone outside the home (par 36). The appellant did not deny that the requirements for the *actio de pauperie* were met but claimed that fault was absent. However, as stated by Wallis JA, fault had never been a requirement for the *actio de pauperie* and a defence of absence of fault will not preclude pauperian liability.

Furthermore, Wallis JA held that where the conduct of either the victim or third parties exonerate the owner from liability in terms of the *actio de pauperie*, it is because the conduct directly caused the incident in which the victim suffered harm this refers to circumstances where the owner is unable to prevent the harm from taking place.

Wallis JA referred again to *Lever v Purdy* (*supra*), this time to the minority decision of Kumleben JA, in particular to the following points raised by Kumleben:

(i) The South African law of delict is based on the fault principle – in this regard, Wallis JA pointed out that vicarious liability is strict, as well as liability in terms of certain statutes (par 40);

(ii) Kumleben JA held that if one had to weigh up the interests of the owner, who was not at fault, and that of the victim, who had suffered damage as a result of the conduct of the animal, "considerations of fairness and justice favoured the owner". According to Wallis JA, this interpretation is incorrect, given the constitutional values that he mentioned earlier. Also the dog's owner can obtain insurance cover in terms of a household insurance policy (par 42).

In the final instance Wallis JA recognised that many South Africans choose to have dogs, both for companionship and for protection. This gives rise to responsibilities. When someone chooses to have an animal and someone is harmed by the animal while being innocent of fault, the interests of justice require that the owner should be held liable for the harm that ensued (par 42).

4 Discussion

4 1 The actio de pauperie of yesteryear

The *actio de pauperie* originated in the Twelve Tables (*O'Callaghan v Chaplin supra* 313; Kaser *Roman Private Law* (1984) 252; Neethling and Potgieter *Law of Delict* 435; Polojac "Actio de Pauperie Anthropomorphism and Rationalism" 2012 8(2) *Fundamina* 119; Zimmermann *The Law of Obligations* (1990) 1096) and is said to have been around as early as 450BC (Zimmermann *The Law of Obligations* 1097).

The action was a *noxal* action, meaning that the owner of an animal that caused harm either had to pay compensation or to give the animal to the injured party (Kaser *Roman Private Law* 252; Polojac 2012 *Fundamina* 137; Zimmermann *The Law of Obligations* 1099; *Lever v Purdy supra* 21A; O'Callaghan *v Chaplin supra* 314). Zimmermann writes that animals were regarded to have committed the delict, and "[t]he victim of the injury was thus allowed to wreak his vengeance upon the body of the animal – in the very same way as if the wrongdoer had been a human being" (Zimmermann *The Law of Obligations* 1099; see also Polojac 2012 *Fundamina* 137). If, however, the animal was owned by someone, the victim could not just kill the animal because by so doing he would be infringing the rights of the owner (Zimmermann *The Law of Obligations* 1099). He could, however,

request the surrender of the animal, which was known as *noxae deditio* (Zimmermann *The Law of Obligations* 1099; see also *O'Callaghan v Chaplin supra* 315; *Lever v Purdy supra* 21A).

Eventually, a claim for damages was regarded as a more appropriate remedy as the idea of private vengeance underpinning the law of delict fell away (Zimmermann *The Law of Obligations* 1100). According to Zimmermann, in classical and post-classical Roman law the victim could choose between claiming damages from the owner or the surrender of the animal (*The Law of Obligations* 1100; see also Polojac 2012 *Fundamina* 137).

Another rule – *noxa caput sequitur* – provided that the owner at the time of *litis contestatio* was liable for damages, rather than the owner at the time the harm was caused (Zimmermann *The Law of Obligations* 1100; see also *O'Callaghan v Chaplin supra* 314; *Lever v Purdy supra* 21A). Moreover, if the animal died before *litis contestatio*, the right to institute the action fell away (Zimmermann *The Law of Obligations* 1100).

According to the Twelve Tables, the animal had to be a *quadrupes*, specifically a domestic animal (Polojac 2012 *Fundamina* 123, Zimmermann *The Law of Obligations* 1101; *O'Callaghan v Chaplin supra* 314). Although the word "*quadrupes*" had both a wide meaning (which included wild animals) and a narrow meaning (which was limited to domestic animals) the Twelve Tables used the narrow meaning (Polojac 2012 *Fundamina* 123). According to Polojac, dogs were initially not included within the ambit of the *actio de pauperie*; this only happened once the action was extended by the *lex Pesolania de cane* (Polojac 2012 *Fundamina* 124; see also *O'Callaghan v Chaplin supra* 370). Polojac (2012 *Fundamina* 124) argues that in Classical Roman times the action was only applicable to domestic animals, even though there seem to be varying opinions about this.

Insofar as the *contra naturam* requirement is concerned, Polojac notes that the earliest sources included this requirement (Polojac 2012 *Fundamina* 134; see also *Lever v Purdy supra* 20I; *O'Callaghan v Chaplin supra* 313–314). The animal had to show ferocity beyond its instinctive *feritas*, in other words, the ferocity had to be *contra naturam* (Zimmermann *The Law of Obligations* 1102). According to Zimmermann, this requirement was introduced by Roman lawyers to limit the liability of the owners (Zimmermann *The Law of Obligations* 1102). Polojac notes that because of the "obvious anthropomorphism in its approach to domestic animals" this requirement has been contentious in the literature (see Polojac 2012 *Fundamina* 134–137).

The *actio de pauperie* was received in the Netherlands (*Lever v Purdy supra* 20I–21A). There is uncertainty whether the *noxal* requirement fell into disuse (*O'Callaghan v Chaplin supra* 318; see however Knobel "Remnants of Blameworthiness in the *Actio de Pauperie*" 2011 74 *THRHR* 633 634; Neethling and Potgieter *Law of Delict* 436; *Lever v Purdy supra* 21A). The *actio* came into South African law via Roman-Dutch law (*Lever v Purdy supra* 21A).

4 2 The actio de pauperie today

4 2 1 Requirements

To succeed with the *actio de pauperie* the following requirements have to be met (Knobel 2011 *THRHR* 637, Loubser and Midgley *The Law of Delict in South Africa* 458–462; Louw "Verwere by die Actio de Pauperie" 2001 *De Jure* 159, Neethling and Potgieter *Law of Delict* 436–437; Scott *THRHR* 321; Scott 2003 *TSAR* 194):

(a) The defendant must be the owner of the animal at the time the harm is inflicted. It is not enough that he has control over the animal; he must be the owner in terms of the property law definition of ownership (Loubser and Midgley *The Law of Delict in South Africa* 459).

(b) The animal must be a domestic animal; the following animals are examples of animals recognised by our law as being domesticated: dogs; cats; livestock; bees; horses; mules; and meerkats (Neethling and Potgieter *Law of Delict* 386; Loubser and Midgley *The Law of Delict in South Africa* 459).

(c) The animal must have acted *contra naturam sui generis*. This means that the animal must have acted contrary to what can be expected of a reasonable animal of that kind. The "flipside" of this requirement is that the animal must have caused the damage *sponte feritate commota* or from inward vice. In *Loriza Brahman*, the Court held that the yardstick is the conduct of the genus (in this case cattle) and not a specific species (Brahman cattle – see *supra* par 18). As mentioned above, in *Van Meyeren* Wallis JA speaks of "an element of anthropomorphism [that] underlies the pauperien action" (par 19):

> "It attributes to domesticated animals the self-constraints that are generally associated with human beings and attaches strict liability to the owner on the basis of the animal having acted from inward vice".

The owner in this case bears the onus of proving that the animal did not act *contra naturam sui generis* (*Van Meyeren supra* par 19).

Neethling and Potgieter (*Neethling-Potgieter-Visser Law of Delict* (2015) 386) are of the opinion that the *contra naturam* requirement should be abolished for the following two reasons (*Law of Delict* 386; this is not mentioned in the latest edition of the book):

(i) The requirement points to a "personification or humanisation (see above, Wallis JA describing the test as anthropomorphic) of an animal by virtue of the "reasonable animal" test. They describe this line of reasoning as "artificial and thus undesirable".

(ii) The requirement lends itself to a wider variety of interpretations, thus leading to legal uncertainty and also resulting in any harmful conduct being classified as *contra naturam*, which would then on the basis of policy considerations be felt to found an action for damages.

Knobel is also of the opinion that the *contra naturam* requirement "in the vast majority of applications […] can only function […] as a fiction or catch-phrase denoting a standard of behaviour imposed by the law on domestic animals, and one containing unacceptable remnants of blameworthiness at that" (Knobel 2011 *THRHR* 639). According to Knobel, the best way to rid the *actio de pauperie* of notions of blameworthiness is to drop the *contra natura* requirement all together (2011 *THRHR* 641, 643).

Loubser and Midgley (*The Law of Delict in South Africa* 460) note that the courts apply the *contra naturam* test inconsistently, and that some cases follow a subjective approach by referring to the "innate wildness, viciousness or perverseness" of the animal, while others follow an "objective or reasonable animal" approach. They also identify a third approach, which takes both objective and subjective factors into account.

(d) The plaintiff must have been present lawfully at the place where the harm was inflicted (*Van Meyeren supra* 20; *O'Callaghan v Chaplin supra* 326; see Neethling and Potgieter *Law of Delict* 384 about the approaches to this, namely whether the requirement is a lawful purpose or a legal right on the part of the plaintiff. Neethling and Potgieter (*Law of Delict* 438) regard the "legal right" approach as being preferable).

The following defences can be raised against the *actio de pauperie* (Neethling and Potgieter *Law of Delict* 437; Loubser and Midgley *The Law of Delict in South Africa* 462–463):

(a) *Vis maior* or an act of God;
(b) Culpable or provocative conduct on the part of the victim;
(c) Culpable or provocative conduct on the part of a third party;
(d) Provocation by another animal;
(e) The person who was attacked was not on the property lawfully (*Van Meyeren supra* 20; *O'Callaghan v Chaplin supra* 326 – the court uses the example of a housebreaker who is bitten by a dog); and
(f) *Volenti non fit iniuria.*

In *Lever v Purdy* (*supra*) the court identified two instances where the culpable conduct of a third party could constitute defences against the *actio de pauperie* (21C–25F; see also *Van Meyeren v Cloete supra* 23):

(a) Where a third party through a positive act (such as provocation) caused the animal to inflict an injury upon the victim; or
(b) Where the third party was in control of the animal and failed to prevent the animal from harming the victim.

The court in *Lever v Purdy* (*supra* 21C–25 F) traced these defences back to Justinian and through Roman-Dutch Law to the present day.

In the *Van Meyeren* case the appellant wanted the court to develop the common law to allow for the third-party defence to be extended to a situation where the harm would not have occurred "but for" the negligent conduct of

the third party in circumstances where the third party had no control over the animal. As indicated above, both the court *a quo* and the SCA held that the third-party defence could not be extended in this manner.

4 3 Is it time to put the actio de pauperie to rest?

From case law dating back to *O'Callaghan v Chaplin* (*supra*) it is clear that the action has been a part of South African law for decades:

> "In my opinion, therefore, obsolescence of the option of noxae deditio, leaving the basis of liability under the law of the Twelve Tables intact, would be a perfectly possible, and indeed a satisfactory, legal position"

In *Loriza Brahman v Dippenaar* (*supra*) the defendant argued that the *actio* had fallen into disuse (see also Scott 2003 *TSAR* 194). The court held:

> "[t]he time to carry the *actio de pauperie* to the grave, despite its age, has not yet arrived" (own translation from the Afrikaans)." (par 16)

An argument in favour of retaining strict liability for damage caused by animals is that of the risk theory. Knobel (2011 *THRHR* 639) regards it as the best explanation of why certain forms of delictual liability are strict, rather than fault-based. Scott describes the *actio de pauperie* as the oldest form of risk liability (2003 *TSAR* 194). Neethling and Potgieter (*Law of Delict* 434) write that the risk theory "provides a satisfactory explanation for most of the instances of strict liability which are recognised in our law." The risk principle entails that the defendant creates the risk by keeping the animal; hence, that is a justification for holding him liable should that danger materialise (Knobel 2011 *THRHR* 639; Scott 2019 *THRHR* 331). This sentiment is echoed by the courts. In the *Loriza Brahman* case (*supra* 16) the Court held as follows:

> "[I]f one follows the approach that delictual liability ought to be based on fault, the *actio de pauperie* would appear as "not elegant and anomalous". If, however one's point of departure is a broader vision of delictual liability, that includes deserving cases of risk liability, then the question only is whether the *actio de pauperie* fulfils a deserving role." (own translation from the Afrikaans).

Loubser and Midgley (*The Law of Delict in South Africa* 438) see regard liability as "a type of tax on activities that attract such liability, rather than a penalty for engaging in it".

Knobel (2011 *THRHR* 639) states that even though the *actio* has its origin "in a more primitive legal system" in terms of which an owner is punished for harm caused by the animal to punish an owner for harm caused by an animal, strict liability can be justified in a modern legal system based on the risk principle.

5 Conclusion

The *actio de pauperie* remains a part of South African law despite the fact that our law of delict follows a generalising approach. In addition, the SCA has brushed aside questions regarding its continued existence in South

African law. In *Van Meyeren v Cloete* (*supra*) the SCA reiterated the stance it adopted in the *Loriza Brahman* case, namely that the action remains a part of our law. The SCA has held, furthermore, that the third-party defence should not extend to the situation where the harm would not have occurred "but for" the negligent conduct of the third party in circumstances where the third party had no control over the animal. According to several authors, the risk principle is a justification for the continued presence of the *actio* in modern South African law as a form of strict liability. Keeping domestic animals comes with the risk that they may cause harm and if this risk materialises, it should be the defendant who is held liable for the harm that ensues from the conduct of the animal. (Knobel 2011 *THRHR* 639, Scott 2019 *THRHR* 331). The *actio de pauperie*, despite the onslaughts on its existence, lives another day and in the same guise.

André Mukheibir
Nelson Mandela University