

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA (Northern Cape Division)

Date heard: **17/09/2007** Case number: **CA&R 147/2005**
Date delivered: **28/09/2007**

In the matter between:
[9.1]

MOTSWANA, THYS
Appellant

and

[9.2]THE MEC FOR SAFETY AND SECURITY
Respondent

(a) Coram: Bosielo AJP et Lacock J

[9.3]JUDGMENT

(a)LACOCK J:

- 1] The appellant in this matter, Mr. Thys Motswana, was the unfortunate victim of a vicious attack by a police dog, a German shepherd named "Rommel". As a result of the injuries sustained during this attack, the appellant claimed for damages against the respondent in the Magistrate's Court, Vryburg.

Before the commencement of the trial before the magistrate, the parties agreed to proceed to trial on the issue of liability only, and that the issue in regard to the *quantum* of damages suffered, was to stand over for determination at a later stage.

The magistrate found that the respondent proved on a balance of probabilities that the police officer and handler of Rommel, one sergeant Van Niekerk, was, given the prevailing circumstances, justified in setting his dog on the appellant for purposes of taking him into custody, and dismissed the appellant's claim with costs. Hence the present appeal.

The crisp issue argued before us on appeal was whether the magistrate was correct in finding that Van Niekerk's conduct was justified within the applicable purview of sec. 49 (2) of the Criminal Procedure Act, no. 51 of 1977 (the Act).

- 2] Although conflicting versions of the alleged events were presented to the Court *a quo* by the appellant on the one hand and the respondent on the other hand, I am, for purposes of the appeal, prepared to accept the version presented on behalf of the respondent as the more plausible and probable one. That version of the relevant events together with the factual circumstances which

were common cause between the parties, can be summarised thus:

[21] Spurred by an incident at one of the schools in Vryburg, racial tension between members of the White community and members of the Black community erupted in Vryburg, which tension led *inter alia* to the petrol bombing of a certain liquor outlet in Vryburg on 24 February 1988. Members of other units of the Police Force from elsewhere were summoned to assist the Vryburg police in maintaining law and order in Vryburg. The two witnesses who testified on behalf of the respondent, sergeant Van Niekerk and inspector Botha, both members of the dog-unit stationed at Stilfontein, were two such policemen summoned to assist at Vryburg.

[22] Shortly after Van Niekerk was informed that a liquor outlet in town had been set on fire, he received instructions to proceed to the taxi rank in Moffat Street, Vryburg and to search all vehicles leaving the taxi rank for the presence of petrol bombs. At his arrival at the taxi rank, two minibus taxis exited from the taxi rank into Moffat Street. He drove his own vehicle, an Opel Kadett, into the opposite lane of the road, thereby blocking the road and forcing the taxis to stop.

As he approached the driver of the front taxi, the appellant, and who happened to be the owner of this taxi, pulled up in a Nissan pick-up truck on the side of the road. The appellant was visibly agitated and shouted at Van Niekerk that he was not allowed to stop the vehicles. Although Van Niekerk tried to calm the appellant and to explain his conduct, the appellant refused to listen to him, and started to push Van Niekerk against his chest. Van Niekerk retreated towards his vehicle whilst the appellant was still pushing him against his chest. At this point in time, the appellant shouted to the driver of the taxi to "*stamp die Staatsvoertuig uit sy pad*". Van Niekerk was now on the right hand side of his vehicle, and when pushed by the appellant for the third and last time, he went around his vehicle to the left hand side and opened the left rear door of his car where he kept his police dog. Just before he released the dog, Van Niekerk warned the appellant that he would lock him up ("*dat ek hom gaan toesluit*"). Clearly before the appellant could react to this warning, Van Niekerk released the dog and instructed it to attack the appellant.

- [23] The dog bit the appellant on his left lower leg, and the appellant fell to the ground. Van Niekerk pulled the dog, which was holding onto the

appellant's leg, away from the appellant and clipped a leash to its collar. Whilst holding on to the dog, Van Niekerk instructed two of his colleagues to put the appellant in a police vehicle. As these two policemen approached the appellant, he stood up and hobbled in the direction of his vehicle. Van Niekerk again released his dog and instructed it to attack the appellant. This time the dog grabbed the appellant on his right lower leg, and again forced him to the ground. Van Niekerk pulled the dog from the appellant and the latter was put in a police van and driven to the local police station.

[24] The appellant suffered a number of serious wounds to both legs where the dog bit into his flesh, and received treatment in hospital for the injuries sustained.

[25] At the time of this incident, approximately 150 people were gathered inside the taxi rank, and a few policemen prevented them from leaving the taxi rank. The mood of these people was described as riotous, but they posed no immediate danger to Van Niekerk when he was confronted by the appellant.

At the same time, a number of people,

approximately 30 in number, gathered at the opposite side of Moffat Street where the appellant's truck was parked. This small crowd was also described as riotous, but also posed no danger to Van Niekerk. Van Niekerk in fact only became aware of this small crowd when the appellant hobbled in the direction of his car after the first attack of the dog on himself.

- 3] The relevant portion of sec. 49 (2) of the Act (as substituted by sec. 7 of Act 122 of 1998) reads,

"If any arrestor attempts to arrest a suspect and the suspect resists the attempt, or flees, or resists the attempt and flees, when it is clear that an attempt to arrest him or her is being made, and the suspect cannot be arrested without the use of force, the arrestor may, in order to effect the arrest, use such force as may be reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing"

Before its substitution, sec. 49 (1) of the Act read,

"If any person authorised under this Act to arrest or to assist in arresting another, attempts to arrest such person and such person-

- (a) resists the attempt and cannot be arrested without the use of force; or*
- (b) flees when it is clear that an attempt to arrest him is being made, or resists such attempt and flees, the person so authorised may, in order to effect the arrest, use such force as may in the circumstances be reasonably necessary to overcome the resistance or to prevent the person concerned from fleeing."*

It is common cause that the respondent bore the onus of

proving that the force used by Van Niekerk to apprehend the appellant was reasonably necessary. See **R v Britz, 1949 (3) SA 293 (A) at 303 to 304; Sambo v Milns, 1973 (4) SA 312 (T) at 320 D; Matlou v Makhubedu, 1978 (1) SA 946 (A) at 959 A to B; Wiesner v Molomo, 1983 (3) SA 151 (A) at 157 C to D; Minister of Law and Order v Monti, 1995 (1) SA 35 (A).**

- 4] For purposes of this judgement I will accept, without deciding, that the appellant, whilst pushing Van Niekerk against the chest, committed an offence of assault, and/or contravened the provisions of sec. 67 (1) of the South African Police Service Act, no. 68 of 1995, in that he obstructed a member of the police service in the performance of his duties; that Van Niekerk attempted to arrest the appellant; that the appellant resisted the said attempt; that, after Van Niekerk pulled the dog from the appellant the first time, the appellant endeavoured to flee; and that it was not possible for Van Niekerk to apprehend the appellant without the use of force. I will furthermore accept, again without deciding, that, had the use of a police dog been reasonably necessary to apprehend the appellant, such force would have been proportional in the circumstances.

The only remaining question for consideration is therefore whether the respondent succeeded in proving, as the magistrate held, that the use of the dog to apprehend the

appellant was “*reasonably necessary*” and therefore justified.

- 5] In considering this question, it is necessary to apply the following *dicta*:

“I do not think that it is necessary to review at length the authorities which deal with the tests to be applied in determining whether the use of force in effecting an arrest is justified. Many of them are conveniently reviewed in the recent decision of Sambo v Milns, 1973 (4) SA 312 (T), and, as far as I understand the argument in this case, the following principles were agreed to be of application.

(a) *The test whether it was reasonably necessary to injure the plaintiff in effecting the arrest is objective, namely, whether it was reasonably necessary for a person in the position of the second defendant to act as he did in order to arrest the suspect.*

(b) *Every other reasonable and available step should be taken to effect the arrest before recourse is had to conduct likely to injure the suspect.*

(c) *As far as sec. 37 (1) of the Act is concerned, and assuming that it has correctly been held to apply to cases where the suspect is injured but not killed, it must be shown by the defendant that the suspect fled or resisted and that he could not be arrested by means other than those which caused his injury.*

Counsel were agreed that there appeared to be no statutory provisions which expressly authorise or regulate the use of dogs by the police and that this case therefore falls to be decided in accordance with the above principles.”

**(Jooste, N.O. v Minister of Police and Another, 1975
(1) SA 349 (ECD) at 352 E to H).**

“By die beoordeling van die vraag wat hier ter sake is, nl. of Jonker se besluit geregverdig was of nie, is die toets objektief, en by die soek na die antwoord op hierdie vraag moet 'n mens bepaal of Jonker se optrede redelik was. (Kyk in die algemeen Wolpe and Another v Officer Commanding South African Police, Johannesburg, 1955 (2) SA 87 (W) .) Dit hoef nouliks gesê te word dat 'n mens op al die omstandighede van die saak moet let en in die lig daarvan oor die redelikheid al dan nie van Jonker se besluit moet oordeel.”

(Minister van Polisie v Chetty, 1977 (2) SA 855 (AD) at 897 A).

“Die tweede geskilpunt, naamlik of die geweld wat deur die respondente aangewend is, in die omstandighede redelikerwys nodig was om die appellant te verhinder om te vlug, word nou behandel. Ten aanvang wil ek benadruk dat die voormelde toegewings hier ook van belang mag wees, soos byvoorbeeld dat die geweld aangewend is om te verhoed dat die appellant vlug. Die Hof moes beoordeel het of die respondente bewys het dat die geweld in die omstandighede van die besondere saak redelik was. Nie alleen word dit in gewysdes benadruk nie maar dit blyk ook uit die bewoording van die artikel. Na my mening is dit in die beoordeling van die redelikheid van die geweld onnodig om na art 49 (2) te verwys, behalwe dat die toets wat daar aangegee word ook in hierdie geval van pas is, naamlik of die arrestant met minder ernstige geweld op 'n ander wyse verhinder kon word om weg te vlug.”

Macu v Du Toit en ‘n Ander, 1983 (4) SA 629 (A) at 635 B to D, where the Supreme Court of Appeal considered the provision of sec. 49 (1) of the Act prior to the amendment thereof).

“In licensing only such force, necessary to overcome resistance or prevent flight, as is 'reasonable', s 49(1) implies that in certain circumstances the use of force necessary for the objects stated will nevertheless be unreasonable. It is the requirement of reasonableness that now requires interpretation in the light of constitutional values. Conduct unreasonable in the light of the Constitution can never be 'reasonably necessary' to achieve a statutory purpose.”

(Govender v Minister of Safety and Security, 2001 (2) SACR 197 at 205 f).

“In order to make perfectly clear what the law regarding this

topic now is, I tabulate the main points:

- (a) The purpose of arrest is to bring before court for trial persons suspected of having committed offences.*
- (b) Arrest is not the only means of achieving this purpose, nor always the best.*
- (c) Arrest may never be used to punish a suspect.*
- (d) Where arrest is called for, force may be used only where it is necessary in order to carry out the arrest.*
- (e) Where force is necessary, only the least degree of force reasonably necessary to carry out the arrest may be used.*
- (f) In deciding what degree of force is both reasonable and necessary, all the circumstances must be taken into account, including the threat of violence the suspect poses to the arrester or others, and the nature and circumstances of the offence the suspect is suspected of having committed; the force being proportional in all these circumstances."*

(Ex parte Minister of Safety and Security: in re S v Walters, 2002 (2) SACR 105 (CC) at 135 e to h).

[Emphasis supplied]

- 6] The testimony on behalf of the respondent reveals that, at the time when Van Niekerk was pushed backwards towards his car, there were at least two other policemen in the immediate vicinity of the appellant and Van Niekerk viz. inspectors Botha and Ferreira. If it is accepted that Van Niekerk, by reason of his more slender built than that of the appellant, was, as he testified, hesitant to physically bring the appellant under control, the question that immediately arises, is why he did not call on his colleagues to come to his assistance to apprehend the appellant. Van Niekerk explained his failure to call his colleagues as follows:

"Weer eens as dit met die ander polisiemanne wat daar rond

was kon u hulle hulp ingeroep het om die man fisies te bedwing? --- Edelaagbare nee in die sin daarvan dat daar reeds 'n konfrontasie plaasgevind het deur die man my so rondgestamp het en ja, daar was mense wat gesien het wat het gebeur maar hulle het probeer op daardie stadium, as ek daar na kan verwys, skares van ons af weghou want as die mense eers vir jou toegemaak het, dan is die saak verby. Met ander woorde ... (tussenkoms).

Miskien kan u net daaroor meer breedvoerig vir die Hof verduidelik, as u sê hulle het die skare probeer weghou. Wat was die ander polisiemanne se funksie op daardie stadium? -- Hulle het bystand verleen deur moontlik mense wat aan die buitekant uit die 'taxi rank' uitkom. Basies weg van ons af te hou dat die saak nie hande uitruk en ons, as ek die woord kan gebruik, 'outnumbered' kan word. Dat 'n mens met ander woorde nie jouself kan verdedig nie."

(Record p. 132 to 133).

In cross examination he tendered the following explanation:

"Het u dit nie goed gedink om van u kollegas te vra om u te kom help net om die groot eiser onder bedwang te kry nie? -- Edelaagbare nee daar was nie tyd nie. Daar was nie tyd nie. Hoekom nie? U laat die man toe om u vier, vyf keer te stamp terwyl u al rondom die kar beweeg tot u nou uiteindelik gunstig in posisie is om die deur oop te maak sodat die hond kan uitkom. Het u nie enige van daardie tye gedink dis dalk raadsaam om maar een van my kollegas se hulp in te roep nie? --- Nee Edelaagbare ek het nie.

Hoekom nie? U het mos nou al gesien u postuur is te klein vir die eiser. --- Dit is reg. ek het so te kenne gegee maar op daardie stadium het ek nie daaraan gedink om die mense wat aan die buitekant bystand te verleen te roep nie. Ek het nou mos my ding gedoen, om dit so te stel.

Ek het nog altyd gedink die polisie word spesiaal opgelei om hierdie tipe van konfliktsituasies te hanteer en persone onder bedwang te bring ten einde hulle te arresteer. --- Ja dit is so. Is so. Onder andere word die hondemanne ook opgelei om sy hond aan te wend vir sodanige situasie.

Sou u sê dat die gebruikmaking van u hond om die eiser te arresteer is minder geweld of minimum geweld as om een van u kollegas in te roep om u te help? --- Uit my oogpunt as hondegeleier, ja."

(Record p. 157 to 158).

Van Niekerk's initial explanation is without substance. Botha testified that, at the time when Van Niekerk opened the rear door of his car to release the dog, he and Ferreira were in the front of Van Niekerk's vehicle approximately the length of a car away from Van Niekerk and the appellant. They were not preventing people to leave the taxi rank at that point in time. Other policemen exercised this duty. In fact, Van Niekerk did call on Botha and Ferreira to put the appellant in the police van after he removed the dog from the appellant after the first attack. No explanation was given and nor does one present itself why these two policemen were not requested to assist him to apprehend the appellant before the dog was released and instructed to attack the appellant.

Why Van Niekerk set his dog on the appellant the second time is even more incomprehensible. Botha's evidence in this regard appears to me to be not only logical but also reasonable. He testified as follows:

"Goed. Nou is dit nie, kry die polisie nooit staande orders of word hulle nooit opgelei dat persone moet gearresteer word met die minste geweld sonder om beserings toe te dien nie?-- Dit is so, ja. Goed. Nou as van Niekerk nou vir u geroep het en Ferreira voordat die hond nou die eerste keer vir die eiser gebyt het, sou julle darem seker baie maklik die eiser op die grond vasgedruk het en hom geboei het? --- Dis korrek, ja. En kom ons aanvaar nou die hond nou vir die eiser die eerste keer gebyt. Nou is hy kruppel-kruppel hier oor die straat na sy voertuig toe,, sou u hom seker baie maklik ingehardloop het en teen die grond vasgedruk het en hom geboei het? Net een van julle. Ek praat nie eers van al drie nie. --- Dit kon moonlik wees, ja.

U sou dit waarskynlik baie maklik kon regkry. Het van Niekerk ooit vir u geskree 'vang die eiser, hy ontvlug'? --- sersant van Niekerk het vir my en konstabel Ferreira gesê kom help my om die man in die bakkie te laai. Dis toe die hond die eerste keer die eiser gebyt het, sodat van Niekerk die hond afhaal dan kan ek en Ferreira die man vat en in die bakkie laai. Ten tye toe ons om die voertuig kom het die eiser opgespring en kruppel beginne weghardloop.

Goed. Toe hardloop u toe agter hom aan? --- Nee. Toe los sersant van Niekerk van sy hond.

Nou goed. So het u glad nie gepoog om agter hom aan te hardloop nie? --- nee ek gaan nie agter 'n verdagte hardloop as sersant van Niekerk se hond los is nie."

(Record p. 234 to 235).

Clearly Botha and Ferreira would have apprehended the appellant had Van Niekerk not released his dog.

On the strength of the aforesaid testimony, I conclude that no reasonable excuses prevailed for Van Niekerk not to call on his colleagues for assistance to apprehend the appellant. He deliberately opted not to call for assistance, but to rather use his police dog to apprehend the appellant.

- 7] The next question is whether this choice of force, i.e. to use the dog rather than to call on his colleagues for assistance, was, objectively viewed, the option that would probably have caused the least injuries to the appellant. The answer hereto is clearly a negative one.

[81] Van Niekerk himself described Rommel's characteristics as follows:

"My hond is van so aard dat hy, hy het 'n baie aggressiewe neiging in hom en as hy eers gebyt het is daar nie, daar is geen bevel van los nie."

(Record p. 124).

"My spesifieke hond kan ek vir die Hof sê het vasgebyt. In die tyd wat hy byt vervat hy. Met ander woorde hy, soos die Engelsman sal sê, hy vat 'n beter 'grip'.

*U sê u hond was van die soort wat nou en dan vir hom 'n sterker 'grip' probeer kry het? --- Dis korrek.
En elke slag as hy 'n sterker 'grip' probeer kry dan herplaas hy sy tande.
--- As 'n reël kan 'n mens daarna kyk as 'n herplasing van sy tande."*

(Record p. 140).

"Maar hoekom sal 'n hond nou 'n beter 'grip', soos u dit nou stel, wil hê? --- Edelaagbare ek het 'n baie aggressiewe hond gehad. Dit is maar net in sy manier, in sy manier."

(Record p. 142).

This evidence justifies the inference that Van Niekerk, at the time when he set the dog on the appellant, knew that the dog would bite the appellant. He in fact testified as such:

“Nou Rommel, die hond wat nou die eiser gebyt het, as u vir hom die bevel gee, net op die woord kom ...(tussenkoms) --- R I M. RIM.

RIM. Sy eerste reaksie is om die persoon êrens aan sy lyf met sy tande te byt en hom op die grond neer te plaas. Is dit reg? --- Dis korrek. ‘n Mens kan so aanvaar.

Dit gebeur omtrent in 99% van die gevalle. --- Ja.

En so handeling van die hond het noodwendig ‘n besering tot gevolg. --- Dit is korrek Edelagbare.”

(Record p. 158 to 159).

He further knew that the dog would hold onto the part of the appellant’s body where he bit him. This again justifies the further inference that Van Niekerk knew that the appellant would be seriously injured by the dog. It goes without saying that the risk of injury by setting a police dog on a person by far exceeds the risk of injury by the physical overpowering of a person by a number of policemen.

- [82] It therefore follows that Van Niekerk did not employ a method of arresting or apprehending the appellant with the least risk of injury to the appellant. His conduct was therefore not reasonably necessary as contemplated in sec. 49 (2) of the Act and accordingly unjustified.

- 8] A disturbing feature in this matter needs to be addressed briefly. When testifying in this matter, Van Niekerk and Botha both being trained handlers of police dogs, regarded the setting of a police dog on a person to apprehend him as “*minimum force*”. Van Niekerk said the following in this regard:

“Kan ek net vir u vra hoekom het u nie die wapen aangewend om mnr Motswana onder bedwang te kry nie?--- Edelagbare die wapen wat wel in my besit was, was ‘n 9mm pistool gewees met skerppunt ammunisie as sulks en ten opsigte van jou werksaamhede en pligte as hondegeleier, is jou hond basies, volgens ons spesiale magsorders, jou minimum geweld wat aangewend word as hondegeleier. So dit is jou eerste stap waartoe jy sou tree sou dit, sou jy ‘n problem ondervind met wat ook al, is die hond word aangewend.”

(Record p. 131).

“U sÍ daar is ‘n riglyn wat sÍ dat die gebruik van ‘n hond is minimum geweld. --- Ja Edelagbare, as ek net die Hof duidelikheid kan gee rondom dit. Daar is spesiale magsorders in die Hondeskool wat deurgewerk moet word en dan word daar eksamen geskryf rondom dit. Sodra jy basies die hond toegeken word om diens te lewer in die polisie, is dit jou eerste stap tot geweld. As ek dalk net kan verduidelik. ‘n Gewone patrolliewabestuurder sal op ‘n toneel kom en hy vind ‘n konfliktsituasie en daar sou aanranding te vuur plaasvind waar as, my hond word aangewend om enige persoon, hetsy ‘n huisbreker of ‘n bakleier of wat ook al onder dwang te bring en daarna word die arrestasie basies uitgevoer na die persoon onder dwang is. Maar hy word beskou as minimum

geweld. Nou die situasie, staande order wat u gesê het? --- Dis 'n spesiale magsorder verkrygbaar by Pretoria Hondeskool."

(Record p. 155).

"En u sÍ nog steeds vir die Hof dit is minder geweld of minimum geweld as om 'n kollega te roep om u te help om die persoon onder bedwang te bring of om 'n vuurwapen uit te haal, wat nie noodwendig beserings impliseer nie? --- Edelaagbare rondom 'n vuurwapen, as jy 'n persoon rig tot 'n vuurwapen en daar vind 'n struweling plaas, kan dit lei tot 'n skietvoorval waarin 'n persoon noodlottig beseer kan word. Rondom drie of vier persone, een groot persoon probeer fisies aanvat, kan ek net vir die Hof nou waarborg dat daar gaan gevuislansery wees en daar gaan ook beserings plaasvind. So rondom my handeling wat die hond aangewend is, voel ek ek het binne die regte van die spesiale magsorder wat aan my voorgehou is, opgetree. Ek het my hond aangewend soos wat ek opgelei is."

(Record p. 159).

Botha testified as follows:

"Terug by die toneel, daar was vrae aan sersant van Niekerk gestel wat daarop neerkom dat dit moontlik minder geweld sou gewees het as hy sy vuurwapen getrek het en dit teen die eiser se bors gehou het. Wat is u kommentaar daarop? --- Nee dit ...(onhoorbaar) geweld gewees het. Die vuurwapens is ons laaste uitweg. Dis maksimum geweld. Daardie stadium was die honde aangewend. Die honde was minimum geweld."

U sê minimum geweld. Hoekom gebruik u daardie term? --- Minimum geweld is wanneer ons honde aanwend om 'n verdagte in te haal en aan te hou.

Maar verwys u na regulasies of voorskrifte wat u het? --- Ja voorskrifte wat deur die Hondeskool aan ons voorgelê is."

(Record p. 212).

"En die u staande orders van die honde wat gebruik word as minimum geweld, waar is dit? --- Dit sal by die Honde-Eenhede wees.

Het u nie gedink om dit, dis dalk nodig om dit saam te bring vir die Hof nie? --- Nee. Hoekom nie? --- Hondbyt is minimum geweld. Die vraag is ...(tussenkoms) --- Dis by my ingedril"

(Record p. 227).

These "standing orders", if it exist at all, are, to say the least, frightening; and so are the alleged training instructions.

To my mind the setting of a dog on a person for arresting or apprehending that person amounts to grave violation of such a person's fundamental and constitutional rights to dignity, freedom and security, and is an extremely humiliating act perpetrated on such a person. For these reasons policemen "armed" with police dogs should exercise the greatest of care and responsibility before using a dog to arrest or apprehend suspects. Any other form of force likely to cause less serious injuries, if any,

should be considered and applied before setting a dog on a person. Even where the use of a dog is regarded as justified, one would expect the handler of the dog, where this can be done, to at least warn the suspect that the dog would be used, and afford him or her the opportunity or choice to submit rather than to face the risk of an attack by a police dog. See **Jooste N.O. v Minister of Police & Another** (supra) at **354 B** and compare **Minister of Police v Chetty** (supra) at **899 F to H**.

For policemen to regard the use of a police dog to attack a suspect as “*minimum force*” is certainly not legally justified within the purport of sec. 49 (2) of the Act, nor is it constitutionally justified.

[91] Van Niekerk made no attempt to warn the appellant that he would set the dog on him unless he either control himself or submit to arrest.

- 9] By reason of the aforesaid, the magistrate erred in finding that Van Niekerk was justified in setting the police dog on the appellant and thereby inflicting the relevant injuries to the appellant. The appeal therefore succeeds and the following order is made:

A. **The order of the Court *a quo* is set aside and is substituted for the following order:**

"1. The defendant is liable for payment of such damages the plaintiff may prove to have suffered as a result of the injuries inflicted on him by a police dog at Vryburg on 24 February 1998.

2. Costs will be costs in the cause."

B. The respondent is ordered to pay the costs of the appeal.

1) HJ Lacock
[9.4]JUDGE

I concur and it is so ordered.

LO Bosielo
ACTING JUDGE PRESIDENT

For the appellant: Adv PJ Greyling (Instructed by Duncan & Rothman Att., Kimberley)

For the respondent: **Adv SJ Senatle** (Instructed by The State Attorney,
Mafikeng)