NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
EAST LONDON CIRCUIT LOCAL DIVISION

CASE NO: EL 1416/14
ECD 3016/14

In the matter between

BRIAN WILLIAM TROLLIP **Plaintiff**

and

SHERIDENE WATTRUS **Defendant**

JUDGMENT

HARTLE J

1. This action concerns a claim by the plaintiff for damages against the defendant arising from an incident which occurred at her home on 15 April 2014 when a boerboel owned by her named Zeus bit him. He suffered significant

injuries as a result, including the loss of his ear and extensive wounds to his arm, neck and face.

2. By agreement between the parties I granted an order directing that the evidence focus only on the question of liability, the issue of the quantum of damages to stand over for determination until later, if needs be.

3. The plaintiff's claim on the pleadings is based on the *Actio de Pauperie*, alternatively on the *Lex Aquilia*. To the *Pauperien* claim the defendant pleaded a bare denial that her dog acted *contra naturam sui generis* when he attacked and savaged the plaintiff, or that the dog even attacked and savaged him for that matter. She further raised defences – albeit in response to the alternative cause of action, of *Volenti non fit iniuria*; the plaintiff's own negligence and provocation of the dog by him under the peculiar circumstances. The plaintiff, in turn, denies the allegations forming the basis for the defendant's various defences.

4. It is apposite to set out the essential allegations in the pleadings bearing upon the issue of liability. The plaintiff avers that:

> "4. On or about the 15th of April 2014 at approximately 18:30 and at 6A Worral Road, Nahoon, East London, and acting *contra naturam sui generis*, the Defendant's dog attacked and savaged the Plaintiff, in consequence, causing him severe injury.
> 5. Alternatively, in the event that it is not established that the dog acted at the material time *contra naturam sui generis*, the Plaintiff pleads that the Defendant was negligent in that:
> 5.1 The Defendant knew or ought to have known that "the dog" was at times vicious and likely to bite people lawfully present on the premises;
> 5.2 The Defendant failed to take any steps alternatively reasonable steps to safeguard persons lawfully on the premises from possible attack on them by "the dog";"

5. In respect of paragraph 4 of the plaintiff's particulars of claim the defendant admitted only that the plaintiff was "*involved in an incident with* (her) *dog*". Regarding the plaintiff's allegations of negligence on her part in respect of the alternative cause of action, the defendant pleaded as follows:

> "5. **AD PARAGRAPH 5:**
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> 5.1 The allegations herein are denied.
> 5.2 Defendant pleads that Plaintiff was at all material times aware that Defendant kept a fierce dog upon the property, that the dog disliked a collar and leash on it and that such dog was liable to bite and injure a person with whom it was not familiar, but in spite of such knowledge the Plaintiff made contact with the dog where it was isolated in the backyard away from anyone entering the property and freely and voluntarily assumed the risk of injury to himself.
> 5.3 Alternatively, Defendant pleads that Plaintiff, having the aforesaid knowledge, was negligent in entering the area where the dog was isolated in the backyard at the property away from anyone entering the property and that any injury sustained was occasioned by Plaintiff's said negligence.
> 5.4 Plaintiff was warned not to approach the dog where it was isolated in the backyard and was specifically warned that the dog does not like a collar and leash.
> 5.5 Plaintiff unreasonably, intentionally and in total disregard to the said warnings and to his own personal safety, provoked the dog by attaching a collar and leash to the dog."

6. It was agreed between the parties and recorded in the joint proposed final pre-trial order in terms of paragraph 11 of the Case Management Practice Directive that the issues to be resolved at the trial would be confined to the following:

> "1.1 Whether Defendant's dog attacked and savaged the Plaintiff, in consequence, causing him severe injury.
> 1.2 Whether the Defendant's dog acted *contra naturam sui generis*;
> 1.3 Whether the Plaintiff provoked the dog;
> 1.4 Whether the Plaintiff acted negligently;
> 1.5 Whether the Plaintiff, by his conduct, voluntarily assumed the risk to injury;
> 1.6 Whether the Defendant was negligent as alleged by the Plaintiff."

7. Although tersely stated, these issues are to be determined in the greater context of the parties' pleadings. On this subject, I suspect that the plea to paragraph 4 of the plaintiff's particulars of claim was formulated in the manner in which it was so as to avoid attracting an onus to the defendant, but it was certainly not in dispute at the trial that "*the incident*" referred to in the pleadings in fact involved the defendant's dog biting the plaintiff and quite savagely at that. Further, although the issue of the quantum of damages is to stand over for determination until later, it appears to be accepted that in consequence of the attack and biting, the plaintiff sustained certain severe injuries.[1]

8. The centuries old *Actio de Pauperie* attributes strict liability to the owner of a domestic animal which has caused damage to a human being. Liability is based on mere ownership of the damage causing animal. It is neither based on fault on the part of the owner nor on "scienter," that is knowledge by him or her of the vicious propensities of the animal. Liability on this basis is the result of the peculiar historical developments of the *Actio*.[2]

9. That such a claim avails and remains part of our law was settled by the Appellate Division in the matter of O'Callaghan NO v Chapman in 1927[3] and, despite a submission before the Supreme Court of Appeal in Loriza Brahman v Dippenaar[4] in more recent years to the effect that the *Actio de Pauperie* was an anachronism that should no longer be recognized, the court held that the action

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[1] The severity of his injuries was demonstrated by the plaintiff taking off his prosthetic ear when he testified.

[2] See "Animals", Lawsa (3rd Edition), Vol 1, par 402 and the authorities cited therein.

[3] 1927 AD 310.

[4] 2002 (2) SA 477 SCA at [16].

still had a useful role to play, had not fallen into desuetude and was neither unconstitutional nor *contra bonos mores*. Innes CJ in O'Callaghan NO v Chapman clarified the nature and self-limitation of the claim as follows:

> "By our law, therefore the owner of a dog that attacks a person who was lawfully at the place where he was injured, and who neither provoked the attack nor by negligence contributed to his own injury, is liable as owner to make good the resulting damage."[5]

10. It is necessary for the plaintiff to allege and prove the essentials of the claim, namely that the ownership of the animal vested in the defendant at the time of the infliction of the injuries; that the animal was a domesticated animal; that it acted contrary to the nature of domesticated animals generally in causing damage to the plaintiff; and that the conduct of the animal caused the plaintiff damage.[6]

11. *Prima facie* an attack by a domesticated animal is *contra naturam* and therefore unreasonable and wrongful.[7]

12. The onus is on the defendant to displace this inference by adducing proof that there was some force external to the animal which had caused it to act ferociously, thus negating the no fault liability attributed to her as the owner of the dog.[8] The approach to be adopted in this regard is helpfully set out in Thysse v Bekker[9] as follows:

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[5] at 329.

[6] See Amler's Precedent of Pleadings under the heading "*Actio de Pauperie*".

[7] O'Callaghan NO *supra*, SAR & H v Edwards 1930 AD 3 at page 12; Da Silva v Coetzee 1970 (3) SA 603 T.

[8] O'Callaghan NO *supra*, Da Silva *supra* at 604; Green v Naidoo 2007 (6) SA 372 (W), at par 22.

[9] 2007 (3) SA 350 (SEC).

> "The success of that remedy (that is the claim under the *actio de Pauperie)* depends upon proof that W's injuries were caused by the actions of a domesticated animal owned by the defendant which had acted *contra naturam sui generis* - contrary to the nature of its kind. The plaintiff's witnesses have proved positively that the defendant was Prins's owner, that Prins was a domesticated animal, and that he bit W, causing him serious injury. Proof that Prins bit W in these circumstances gives rise to the *prima facie* inference that Prins acted contrary to the nature of its kind. The sole issue is whether the defendant has discharged the *onus* of displacing this inference, which he may do, *inter alia*, by proving that the dog was provoked by the injured party (the provocation, it seems to me, need not be culpable), or by another person, or purely by chance. He has sought to discharge the *onus* by relying on Prof Odendaal's opinion that the dog's conduct in biting W was, from the dog's point of view, expected and normal behaviour, that the dog was acting according to its nature, and that blame for the incident should be attributed to W's behaviour towards the dog."

13. In that matter the defendant has pleaded a defence that owing to the peculiar nature of the dog's breed its action of biting was an instinctive reaction which was the only way in which the dog could have reacted in the circumstances and that, viewed from the dog's perspective, it was to be expected. Hence, so it was submitted, the dog had acted according to its nature. Jones J noted however that even though such a hypothesis - based as it was upon scientific principles, purported to give a reasonable explanation of the dog's behaviour, there were two things that needed to be made clear. One is that it is the court's function and not that of the expert to decide whether the dog acted *contra naturam sui generis* (albeit a court may find guidance in such opinion) and the second is that the conclusion which the court reaches in this regard is based not on scientific criteria but legal criteria which the court is expected to apply.

14. Whilst in that matter the expert purported to explain the behaviour of the dog from *its* point of view Jones J referred to the court's obligation to evaluate the

animal's behaviour against a different and more general standard of behaviour which the law expects of a domesticated animal generally. What that standard is is expressed thus:

> "The issue is not whether Prins behaved according to its own nature, which is the test applied by Prof Odendaal, or to the nature of its breed. It is whether the dog behaved in a manner which the law considers acceptable by animals which share the human environment with human beings because they have over the ages become domesticated."[10]

15. The standard of behaviour contemplated is instructively set forth by Jones J as follows:

> "What is the standard of behaviour which the law expects of a domesticated animal? To state that the animal must not act *contra naturam sui generis* is not a quick-fix answer. This concept is not always easy to define. It has been important in determining the boundaries of liability from the inception of the remedy in Roman law. It alleviates some of the hardship of imposing liability on owners who are not to blame for the damage: owners are not liable for all damage done by their domesticated animals, only for damage caused by them when they act *contra natura sui generis*. Because the law imposes strict or 'no-fault' liability on an owner, questions of judicial and social policy have a role in determining when an animal acts *secundum naturam* or *contra naturam*. The application of considerations of legal policy is not the function of an expert witness in the biological sciences.
> Neither the old authorities nor the modern decisions of the courts provide an exhaustive test for the question of when does the law consider that a domesticated animal acts *contra naturam suam*? But they lay down the approach to be followed. A frequent starting point is the statement in Voet 9.1.4:
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> 'Animals are said to do harm contrary to their nature when, though tame, they take on wildness; as when a horse kicks or an ox gores, albeit that a horse is apt to kick and an ox wont to gore. An ox and a horse, along with other animals which come under the term "cattle", are wont to graze in a herd under the control of a shepherd without doing harm, and to that extent they are counted among tame four footed creatures. Hence it is correctly said that they do damage contrary to the nature of their kind when on their wildness being roused they kick or gore.'"[11]

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[10] *Supra* at [9].

[11] *Supra* at [10] and [11], footnotes omitted.

16. Why this exacting standard is imposed on owners was clarified by Jones J in the following terms:

> "The law expects domesticated animals not to revert to their former wildness. They must suppress instincts which on the face of it are 'natural'. This leads to the conclusion that the expression *contra naturam sui generis* is not to be used literally. This view was expressed in the useful analysis of the authorities in a note by P M A Hunt 'Bad Dogs' (1962) 79 *SALJ* 326, which has been quoted with approval by the courts. The author of the note continues (at 328):
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> > 'De Villiers CJ (at 10) in *Edwards*'s case spoke of behaviour "not considered such as is usual with a well-behaved animal of the kind". "Well-behaved" imports an objective element going beyond "natural" behaviour. Much the same may be said of Laurence J's formulation in *Cowell v Friedman & Company* (1888) 5 HCG 22 at 53: "some vicious, perverse, or unwarrantable behaviour". *The* contra naturam *concept seems, in fact, to have come to connote ferocious conduct contrary to the gentle behaviour normally expected of domestic animals. This imports an objective standard suited to humans. It is far more refined than behaviour literally* natural *to that species of animal. It is what* Voet, *9.1.4, means when he speaks of* animalia mansueta feritatem assumunt.'"[12]

17. It is expected of such animals, because they have become domesticated, that they should be able to control themselves, and if they do not, they are regarded as having acted *contra naturam sui generis*.

18. The rationale behind the notion of *contra naturam sui generis* is because:

> "… domestic animals have been under the influence of man for such a long time that a minimum standard of good behaviour can be expected from them. Thus it is considered *contra naturam* for a dog to bite, an ox to gore, or a horse to kick or to bolt spontaneously when harnessed to a cart or with a rider on its back."

19. The test to be applied by the court in examining the conduct of the animal under scrutiny is as follows:

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[12] *Supra* at [11].

> "In some cases the animal's conduct is categorised as *contra naturam* because it acted from inner excitement or vice or from a reversion to wildness. Sometimes the courts and commentators, to use the language of *Hunt* …, apply an objective standard suited to human beings. Thus '(t)he conduct of the animal is compared with the conduct of a well-behaved animal of its kind - the animal is personified and the reasonable man test becomes the test of the reasonable dog'. This is by way of fiction, a convenient way of stating what the law expects of a domesticated animal. The courts do not literally attribute powers of reason to a dog by measuring its conduct against that of 'the reasonable dog', or literally ascribe to a dog the logical capacity to distinguish between an unjustified attack upon it which it may be 'entitled' to resist in a well-behaved manner and the lawful use of violence against it to restrain it, to which it should submit as a well-behaved domesticated animal."[13]

20. In Green v Naidoo[14] the court assumed that the dog's nature is presumed to be the objective standard of a well-behaved domesticated dog and that this concept imports an objective element taken from the human mores of urban society which are alien to the rural and natural state of the wild and untamed.

21. The Supreme Court of Appeal has further made it clear in Loriza Brahman v Dippenaar[15] that the test to determine whether a domestic animal – normally expected to be "*mak, vreedsaam en gedissiplineerd*" (tame, peaceful and disciplined) has behaved beyond the pale ("*strydig met die aard van die huisdier")* by *"(e)nige optrede wat voortvloei uit feritas (wildheid), fervor (wreedheid) of lascivia (perversiteit)*" is not directed at a specific species of a *genus*, but at the normal conduct of animals belonging to the *genus* in question. The fact of the breed of Zeus in this instance, namely that of the boerboel – even if regarded as somewhat of a more ferocious breed of dog, is therefore irrelevant in the enquiry. Also irrelevant to the enquiry for these purposes (where the claim is limited to the

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[13] *Supra* at [11].

[14] *Supra* at par 18.

[15] 2002 (2) SA 477 (SCA).

fault or temper of the dog) is the question whether the dog behaved contrary to its own particular nature.[16]

22. Whether an animal has acted unnaturally (in the sense of being contrary to its usual habit of tameness) and the question of what caused it to react as it did must in each case be a question of fact and dependent on the peculiar circumstances of the matter. The enquiry to be performed by this court then is directed at ascertaining the conduct expected of a reasonable dog acting in accordance with its nature when faced with such a situation. In the present matter, and despite how the plea was framed, the defendant in order to discharge her liability as owner need prove that her dog behaved in the manner in which she says it did by attacking the plaintiff, not from inward excitement or vice or from a reversion to wildness, but because of the pleaded conduct of the plaintiff which, if found proven, would amount to a reasonable limitation of the *Pauperien* doctrine.[17]

23. In respect of the *Volenti* defence raised by her, which appears to stand on its own footing as a general defence, the defendant is required to prove that the plaintiff was aware of the risk of being attacked by the dog and yet assented to

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[16] S*upra* at [13] and [17- 18], O'Callaghan NO *supra*, SAR & H v Edwards *supra* at 6, Solomon & Another NNO v De Waal 1972 (1) SA 575 (A) at 582 A – E. See also Green v Naidoo in which Satchwell J proceeded on the basis that she had to approach the dog under scrutiny "as yet another exemplar of a pet dog", applying her commonsense and limited experience to the questions to be answered.

[17] See O'Callaghan NO *supra* at 329 regarding the basis for the limitation of the owner's liability to be found in the Digest. There is authority for the application in *pauperien* claims of the fundamental principle that no man can recover damages for an injury for which he has himself to thank. In other words is there any unreasonable conduct on his part contributing to the injury? Examples of limitations are trespass onto the property where the injured party is bitten, provocation by that party or his own negligence. Defences outlined in Lawsa at par 407 are listed as *vis maior*; culpable conduct on the part of the injured party, a third party or another animal; and unlawful presence at the place of injury. Ironically each of these defences, with the exception of the *volenti* defence, suggest an element of blameworthiness on the part of the damage causing animal. Either it caused the damage of its own accord or blame is removed from it and shifted to another cause.

undergo that risk.[18] The approach is different from the defence of the plaintiff's own negligence where the focus is on objective standards of reasonableness. The *Volenti* defence looks at the plaintiff's subjective state of mind.

24. The first enquiry then is what caused the attack. Two possible irreconcilable causes emerged from the evidence. On the plaintiff's version the dog was roused by the barking of a neighbour's dog which caused him to turn on him and attack him. On the test which is outlined above this poses no difficulty in regarding the dog as having acted contrary to his nature and therefore from some inward excitement or vice or reversion to wildness.

25. The defendant on the other hand held out a version that her dog had bitten the plaintiff, who was unfamiliar to the dog, because he had pushed it to extreme behaviour as it were by his own negligence in approaching him in an area of the defendant's property away from anyone entering it and where the dog was isolated, by putting a collar and leash on him which he was known to dislike. This according to the defendant led to the eventual attack when the plaintiff leaned in to take it off the dog or while he was in the process of doing so. In other words, the entire incident was as a result of his own conduct, for which reason she must be discharged from *Pauperien* liability.

26. The plaintiff testified that he accompanied the defendant's mother, with whom he is in a relationship (Ms. Lloyd) to have dinner with the defendant at her home on the particular evening. He was prompted to explain – in order to set the tone for the dog's familiarity with him, that Ms. Lloyd met with the defendant once

[18] Waring and Gillow Ltd v Sherborne 1904 TS 340 at 344; Loriza Brahman *supra* at 487C-D.

a week (generally on a Tuesday while her husband played rugby) when she would spend time with both the defendant and her grandson, who was approximately two years old at the time. He would accompany her on these occasions so had visited the home a number of times and had had regular interaction with the dog.

27. He described it as a young pup weighing approximately 60kg, boisterous and playful but with an even and loving temperament. As far as he was aware, the dog had not received any formal training. His understanding of the reason for this was that the defendant had proclaimed that he was too much of a pup still ("too playful") to get trained.

28. On the issue of the dog's territorial habits, he was certain that it had always had full roam of the defendant's yard generally both in the back and front sections, being closed up in the back only on the occasion of birthday parties if children were around. He believed that this was because it would make a nuisance of itself, rather than because it constituted a danger to the children. On practically all of his visits to the defendant's home the dog would regularly come into the lounge and lie on the floor in front of the couch. He had on occasion petted it, rubbed and scratched it. He had even joined Ms. Lloyd's grandson in rolling on the trampoline with it in play.

29. Concerning the events leading up to the attack itself, the plaintiff recalls that the dog was "*probably a little bit boisterous on the day*" and that the defendant had mentioned that it needed to go for training. Under cross examination he was reminded that she was upset because it had killed a poodle outside their gate the previous day and this thought was foremost in her mind upon their arrival at her

home. Consequently he had offered to help her by putting the dog on a leash to establish its level of training. He had informed her, as a pretext for getting involved on this basis, that he had been involved in the formal training of dogs while serving in the army many years ago. This included obedience training with mostly Rottweilers, German Shepherds and Sheepdogs as guard dogs. The defendant had suggested that it was unnecessary for the plaintiff to involve himself right then and there however since she was busy at the time, but he volunteered that he would walk the dog up and down the driveway on his own while she continued to busy herself with her cooking and preparation in the kitchen.

30. He found the dog in the yard in the front entrance to the defendant's home and fitted its own choke chain to it, the whereabouts of which was pointed out to him by the defendant. He walked it up and down the driveway, about ten or twelve times, stopping on occasion and making it walk backwards as well. In his view the dog appeared to have had some prior experience of command training having regard to the fact that it would walk, follow or stand still next to him at his prompting.

31. Being impressed with the progress made with the dog he called out to the defendant through the kitchen window to come and observe and remarked to her that it actually knew at least a bit about discipline and appeared to listen. He expressed the reservation though that it probably required someone with a firmer hand to control it. (He reflected that the defendant was perhaps too small to manage it.) He thereupon demonstrated to her that the dog was in hand by repeating the exercise with it, walking it to the gate and back and doing exactly as

he had rehearsed with it earlier. Patently up until then this interaction with the dog in this manner had not evoked any negative reaction.

32. When he leaned down near the front door to take off the choke chain however a neighbour's dog barked causing Zeus to make for the wall in the direction of the other dog's barking, jumping against the wall and barking in retaliation. Zeus went as far as the choke chain would allow him since the plaintiff was still holding the leash in his hand, but he turned back towards him and unexpectedly attacked him. He knocked him over and bit him on his arm, hand, throat, and ultimately on his face and ear, ripping the ear off in the process and pulling the skin off his skull. The defendant screamed and managed ultimately to call the dog to order.

33. In the plaintiff's opinion there was absolutely no reason before this incident to suppose that Zeus was a particular danger to him or others, neither was he forewarned by the defendant in this regard. No fear had ever been expressed to him by her that the dog might, for example, injure Ms. Lloyd's grandson who was allowed access to him, evidently without any reservations for his safety. Of course he knew that Zeus had gone out into the street on the night before and had bitten a dog from the neighbourhood, but he considered this to be commensurate with what "*dogs do … sometimes*".

34. Under cross examination he denied the premise of the defendant's defence; his supposed knowledge of the fact that the dog had purportedly turned on her on a prior occasion and had bitten her, because it did not like the collar and leash; or that this constituted the rationale for her and her husband's decision not to proceed

with its training at the dog school. He similarly denied any knowledge that she and her husband were supposedly desirous of putting the dog down. As far as he was aware, it was only after he was attacked that the issue came up for discussion and that the family expressed the wish to rid themselves of the dog. He further denied being apprised by the defendant that Zeus jumps up at strangers or is aggressive towards them when pushed away or that the defendant had felt particularly uncomfortable with the dog moving around inside the house, even before he had fatally attacked the poodle.

35. The plaintiff further denied bearing any knowledge of a rule (which he had supposedly flouted) that the dog be kept strictly in the back yard after the poodle incident, neither did he agree that Zeus had been constrained to that area just before the attack, On the contrary, he recalled him roaming in the front of the home that evening, which is where he had found him when he put the choke chain on him.

36. He denied hearing the defendant say, when he volunteered to take the dog for a walk, that his walking it was “not a good idea” because it disliked a collar and leash and/or warning him that the dog would bite him. He further denied any knowledge of the defendant supposedly asserting as he went outdoors to walk the dog that “I hope you have a good medical aid”. Although he had shared with the defendant that he was accustomed to training dogs, he did not agree that he had consciously offered this as an assurance to her against the supposed concern raised by her that the dog would surely bite him under the circumstances. He agreed though that he had probably said something like this to her to put into context that he knew how to deal with the dog and might be able to assist her by training it.

37. The plaintiff was not in agreement that the dog had attacked him in the process of taking the collar and leash off it although he had leaned down in readiness to do so when the barking of the neighbour's dog interposed itself and provided the spark ostensibly for the ultimate attack upon him by it.

38. Ms. Lloyd who lives together with the plaintiff and is the mother of the defendant testified on behalf of the plaintiff. She could not add much to the issues since she did not observe the attack itself or the plaintiff's interaction with Zeus shortly before this, neither did she overhear any of the conversations between her daughter and the plaintiff. She had been busying herself in the lounge with her grandson whilst the plaintiff and the defendant talked in the kitchen. She surmised that they had discussed the dog.

39. Regarding how it came about that the plaintiff involved himself with the dog, she recounted that she had heard him offer to walk it although the defendant had responded that it was unnecessary to do so ("*No don't worry!*"). She denied any suggestion that the defendant in interacting with the plaintiff about the dog had conveyed an impression that she was uncomfortable with him walking it or that it was liable to bite him.

40. Concerning the nature of the dog and its movement around the home she observed that it had not been restrained anywhere around the home. Sometimes it was in the front, and sometimes in the back ("*There was no specific place he was in*"). Indeed it was often inside the home with them when they visited.

41. She did not consider the dog to be fierce and was surprised to learn that it had supposedly turned on her daughter and attacked or bitten her at school while it was on a collar and leash. She was positive that she would certainly have remembered such an event. She was however aware of the poodle incident. In response to a question whether the defendant still had the dog after the attack on the plaintiff and whether her grandson was allowed access to it, her horror that his father presently still took him with him to feed the dog was quite palpable.

42. She supported the plaintiff's evidence that he had enjoyed a good rapport with Zeus before the incident and that the dog was familiar with him. She also confirmed generally that the dog was not vicious.

43. The defendant's account of the salient events that evening was that after the plaintiff and her mother's arrival at her home and while she was in the kitchen cooking supper, the plaintiff came in and directly took the dog's collar and the leash. She asked him what he was doing and he replied that he was going to take the dog and train it or take it for a walk. She retorted that she was not comfortable with that and remonstrated that the dog did not like a collar and chain. She explained to him that she knew this from her own experience but he assured her that he was comfortable doing so despite her belief that it was not a good idea.

44. She was careful to emphasize that both Zeus and their other dog (a Jack Russell) had upon her mother's arrival been at the back of their house in a fenced off section "*where we keep our two dogs separate from our entrance gate*". According to her it was true that the dogs had roamed freely in the house and the

whole of the yard before the attack on the plaintiff and before it bit another dog the previous day, but that was no longer the position.

45. Asked about the poodle incident - of which she had no personal knowledge, she knew only that their dogs had made their escape from their yard when her husband had opened the gate to let the staff into the main gate at the front the previous day and that Zeus had attacked the poodle which was walking with its owner in the street. The poodle had not survived the attack.

46. Prompted to explain her discomfort concerning the idea of the plaintiff using the collar and leash to walk the dog because of her "prior experience", she described what that was about in the following terms:

> "I had felt that the dog was vicious and I thought that I would try and take him to dog school and see if that would help. On the one occasion at dog school he, there was another Rottweiler that was new to the lesson and I landed up in between the two and they landed up growling and then jumping, trying to attack each other and then I landed up in the middle. So Zeus bit me on the arm during the lesson."

47. According to her – and she was quite emphatic in this regard, her mother had knowledge of the fact that she had been bitten by Zeus on this occasion. She conceded that she had not told the defendant herself however despite that it was put to him under cross examination that he had personally been informed by her of Zeus biting her under these circumstances. Her anticipated testimony was watered down to her rather only making an assumption that her mother had surely passed this information on to the plaintiff thereby making him prescient of the dog's fierce propensity and the risk which he was undertaking.

48. In her perception, despite her telling the plaintiff that she was uncomfortable with him walking or training Zeus, he had pertinently sought to reassure her by informing her that he had trained dogs previously in the army and had experience in this regard.

49. Despite the further anticipation which had been created by the cross examination of the plaintiff that the defendant would testify that she had consciously and firmly warned him a second time of the risk of walking Zeus and had asserted that she had said emphatically that she hoped that he had medical aid because he was going to be bitten, she offered rather feebly in her evidence in chief instead that she had said as much only "*in a joking way*" and as a parting shot to him as he went out the door with the dog to walk it.

50. It is self-evident that the court was faced with mutually destructive versions on the vital issues for consideration as well as in respect of peripheral matters bearing upon the probabilities. The approach to be adopted in circumstances where the evidence is mutually destructive is set forth in National Employers' General Insurance Co Ltd v Jagers[19]; Baring Eiendomme Bpk v Roux[20]; Santam Bpk v Biddulph[21] and Stellenbosch Farmers' Winery Group Ltd and Another v Martell Et Cie and Others.[22] In order to come to a conclusion on the disputed issues the Court must make findings on the credibility of the various factual witnesses; their reliability; and the probabilities.

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[19] 1984 (4) SA 437 (E).

[20] [2001] 1 All SA 399 (SCA).

[21] 2004 (5) SA 586 (SCA) at 589G.

[22] 2003 (1) SA 11 (SCA) at 14J-15D.

51. The plaintiff made a favourable impression on me. His evidence was consistent and logical. Under cross examination he fielded questions without fanfare even though patently inaccurate premises were put to him of what the defendant would supposedly say in her testimony (the exact manifestation of which did not materialize), but this did not detract from the essence of his narrative. No hint of malice or resentment was evident in his demeanour toward the defendant and her husband despite the obviously unfortunate incident and serious injuries sustained by him. He readily made concessions, more especially that there was no basis for the alternative claim of negligence against the defendant on his version. Instead of going out of his way to find fault with her conduct, on the contrary he sought to come to her defence (despite the vehemence with which she maintained that the dog was known to be vicious) that she could not have had any inkling that the dog would bite him and agreed without hesitation that she could not have done anything differently to what she did on that day that would have prevented the dog from attacking him. He also did not seek to downplay that he had boasted in a sense about his prior experience of training dogs in the army, albeit he was clear that his revelation in this regard was not prompted by any fear that the dog would surely bite him as the defendant sought to suggest, but rather that he was keen to assist her with the dog's training and hoped, by virtue of his training experience, to be of some assistance.

52. Ms. Lloyd similarly made a fair impression on me. While it was suggested by counsel for the defendant that she was biased in favour of the plaintiff, on the contrary she conveyed genuine apprehension, and remains so concerned, for the

safety of the defendant and her grandchildren[23] because of what had happened to the plaintiff. Her concern was echoed in the rhetorical question she posed: "(I)f the dog can cause damage to a human being (as it had done to the plaintiff) what's it going to do to my grandchildren, or my daughter?" She struck me as an honest witness who did not hesitate to reply in the affirmative that her daughter was lying if the suggestion was that she supposedly knew that the dog was vicious and that it had bitten her before. Her surprised reaction at this assertion was very obvious.

53. The only discrepancy between the plaintiff and Ms. Lloyd's evidence (which Mr Pieterse who appeared for the defendant urged upon me to find was of a material nature) concerned the frequency of the number of visits by the plaintiff to her daughter's home before the damage causing incident, but in my view nothing much turns on this issue because the defendant agreed ultimately that that her dog was familiar with the plaintiff. I suspect that the fact of the discrepancy itself might be due to the situation that it has become second nature for Ms. Lloyd' to visit her daughter very frequently, perhaps even twice a week, and that this custom has continued even beyond the date of the incident so that she may have overestimated the number of times the plaintiff himself accompanied her. In any event it was not suggested to her that she was lying in this regard neither did she appear in my view to be consciously making anything of the frequency of the plaintiff's visits in order to put a particular spin on it to boost the plaintiff's case. In this vein, of not wittingly painting a picture on his behalf, I mention that it was also purely coincidental that her vague recollection of events that evening fitted in seamlessly with the plaintiff's account of his discussion with the plaintiff around the issue of walking the dog. In trying to make it clear under cross examination

[23] The defendant was pregnant at the time of the incident with her second son who was born afterwards.

that she unfortunately could not relate exact details of what was been discussed but only the gist of it, the distilling by her of her sense of understanding of the discussion - which there was some pressure on her to make under cross examination, was that there was certainly no reservation expressed by her daughter to the defendant that the dog posed a danger. Even her testimony that she had nothing to tell except that the evening ended with this misfortune of the plaintiff sustaining injuries corroborates his version that what happened outside between him and the dog was totally unexpected.

54. The defendant on the other hand did not instill the same confidence in the court. When it suited her convenience she used hyperbole to maximize sensation and to exonerate herself from liability. Further her evidence, especially around why or how she came to deduce that the dog did not like a collar and chain so as to give a context to the so called provocation that the plaintiff had made himself guilty of made no sense. Her tangential experience with her dog and the Rottweiler at the training school which she relied upon failed to explain the dog's supposed dislike of the collar and chain which is at the crux of the *causa causans* of the attack as far as she is concerned:

> "If I understood your evidence correctly, that incurred in circumstances where a Rottweiler and your dog were at each other, and you were between trying to separate them? --- What happens was at dog school they, you weave in and out the other dogs to kind of familiarise them or get them used to other dogs, but because my dog was so much more vicious and bigger, I used to go right on the outside. And so when we were leading out to go back to the car, there was the Rottweiler next to us and they, I don't know which one growled first or if they gave each other a fright, I'm not 100% sure why, but they turned on each other and it just so happened that I was standing here and Zeus was next to me and the Rottweiler was here and his owner on that side of him so I landed up in between.
>
> And those are the circumstances under which your own dog bit you? --- It wasn't, ja that's what happened and then the owner of the Rottweiler called the Rottweiler away, and I don't know if Zeus reacted, he obviously then turned to bite me and he had a choke

> chain on, so I had pulled the choke chain to try and get him to stop and that's when he turned and bit me.
>
> So the Rottweiler was already out of the way. That interaction between those two dogs was no longer happening, it was just you and your own dog. --- That's correct, yes."[24]

55. What the reference demonstrated on the contrary is that the dog was easily roused by its interaction with other dogs which supports the probability in favour of the plaintiffs version that the neighbor's dog's barking rather than him putting the collar and chain on Zeus was the spark for his wild and perverse behavior which culminated in the attack on the plaintiff. Further the distinct impression was gained that the account given by the defendant in her testimony as such was not as dramatic as she must have represented to her counsel in consultation because the premise of the cross examination, which ought to have heralded a fair and accurate hint of what she would supposedly say when she gave her evidence, did not quite meet that expectation. For example, her supposed stern and conscious warning to the plaintiff that the dog was going to bite him and her strongly challenging him that she hoped he had a good medical aid, which would have charged the air with foreboding that something awful might happen if he continued against her wishes to walk the dog, was whittled down to her feebly only joking as much to the plaintiff. (No wonder her mother had not related a sense that the air was pregnant with dread that the walk was going to turn out badly!) Then there was the gauntlet laid down that the plaintiff knew (about the dog's propensity to be fierce) because he had personally been told by her that the dog had bitten her before. That was recanted by her counsel and sculpted down in her evidence to nothing more than conjecture on her part that her mother, who supposedly knew this, had brought the plaintiff up to speed in this regard. The third example was that her counsel put it to

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[24] This extract is from the cross examination of her by Mr Louw.

the plaintiff under cross examination that the damaging causing incident happened in the exact same way as it did with her, i.e. that she got a similar aggressive reaction from the dog when she was putting a collar and leash on him at the training school. This misconception was also retracted by her counsel. Another example of how different her account was to her evidence in chief - foreshadowed as it was by the cross examination, related to her exaggeration that the dog was now not only prone to the provocation because of a specific prior experience, but also generally vicious. She put a particular spin on his temperament when she testified: The dog at training school was "so much more vicious and bigger" than other dogs there that she had to take him "right of the outside" in relation to other dogs there. Supposedly he started showing such aggression to people coming into contact with him in the yard that she and her husband had decided then (seemingly long before the poodle incident) to already keep him locked at the back and that only she and her husband would go into the backyard where he was. But under cross examination when pressed about her knowledge of the dangerous propensity of her dog and what steps she took to ameliorate the situation she now backtracked and offered that before the poodle incident they used to rather "generally" put the dog in the back, bringing him forth only at night when he would roam freely in the whole yard. She added rather self-consciously that we "tried to, if people came there we would put the dog away." Other epithets used to describe the dog which she slipped in at every turn were that the dog was "aggressive", "had been a problem", was "a danger" and that the ultimate attack on the plaintiff was entirely expected from the dog because she believed he was "a vicious dog."

56. She was reluctant to make concessions, her evidence mostly peppered by reservations about the plaintiff or excuses for her behavior when it was getting

uncomfortable for her. An example is where despite her late concession that the dog probably wasn't provoked by him putting the collar and lead on him, that she did however "make him aware that the dog didn't like a collar and lead." Being pressed under cross examination that on her own evidence there was no suggestion that the dog didn't like a collar and leash she qualified that "I felt that he didn't like the collar and the leash on the dog, that's how I saw it." Drawn along with the picture that the dog had shown no negative reaction (despite her reservations) when the chain was put on him, that he had been led through the house on the lead and shown no negative reaction and that he had continued to be walked outside by the plaintiff without incident, he response was to say "No, not at that time" and "I couldn't see around the corner." She was not even prepared to concede without qualification that the plaintiff had played with the dog before rather admitting only that, by extension, he played with the children who in turn played with the dog. Although eventually acknowledging that it did happen that the plaintiff and the dog and her first born son played on the trampoline together, she resisted going along with this comfortable scenario by stating that she hadn't seen the three of them on the trampoline "because (the dog is) a lot bigger than my son, and he tends to bowl people over." Even the suggestion that the plaintiff was not unfamiliar with the dog was resisted. Despite acknowledging that he touched the dog and patted it, her reluctance to simply accept this fact was evident in her qualification that he hadn't known the dog for very long.

57. While she was prepared to agree under cross examination that she may not have heard the dog bark next door the same cannot be said of her testimony in chief. Under examination by her counsel she emphatically (ostensibly without any basis therefor) refuted this as a possibility:

> "He told the Court that just before the dog bit him, there was a dog barking, a neighbour dog. Did you hear a dog barking? --- I didn't hear, he had told me after the fact, I think it was in the hospital that night that the dog next door had barked and he thought that was why the dog had turned, but I didn't hear the dog next door barking so I can't really say if it did.
>
> He also mentioned that just before the dog bit him the dog tried to jump against the wall in the direction where the bark came from. Did you see that? --- No, I don't recall that. I recall the dog turning when he was taking the collar off, turning on him and biting him.
>
> If you say you don't recall, do you dispute that the dog jumped at the wall? --- Yes, I dispute that."

58. She could offer no comment to the suggestion that if she had kept her mother in the loop about being bitten by the dog it was improbable that she would not have remembered being told something as significant as that.

59. That brings me to the inherent improbability in the defendant's case which is this: If the dog was as fierce and unmanageable as suggested by the defendant, it is hardly likely that she and her husband would allow their son, or their staff, or visitors access to the dog as had been the custom (even after the damage causing incident). The fact that the dogs got out of the yard when the staff were making their entrance onto the premises (when it attacked the poodle passing by casually) shows a laxity on the their part which would not have been the case if it was the same menacing animal which the defendant sought to portray which her and her husband wanted to (seemingly even before the poodle incident) put down because it was a known danger. Further, it is most unlikely that the defendant's mother would deny knowing that the dog had bitten her daughter (in order to support the plaintiff's case that he was nescient of the dog's supposed bad temperament), because the corollary of that entails the very frightening prospect (which she on the defendant's version must have reconciled herself with) that the dog could very well

have attacked her daughter or her precious grandchildren, leave alone the plaintiff. All the indicators are that the defendant did not really fear that her dog would attack a human being or pose a danger to people generally.

60. I have no hesitation in accepting the evidence of the plaintiff in its entirety and rejecting that of the defendants where it is in conflict with his. Not only is the plaintiff the more reliable witness, but his evidence fits in effortlessly with the probabilities that the dog was not a fierce one required to be constrained at all cost and that the damage causing incident was entirely unexpected. Concerning the criticism of the probabilities which go against his evidence, as highlighted by Mr. Pieterse, these can be safely discounted. Firstly the plaintiff offered that he knew about the training of dogs not as an indication that he was prepared to take on the risk which the defendant warned against on her version, but because he genuinely wanted to be of assistance. This was natural given his relationship with the defendant through her mother (who is obviously very close to her daughter) and the fact that the dog was regarded by all as been a bit boisterous. Secondly he called the defendant outside to show her that it was going swimmingly, not because he wanted to refute that the dog would bite him on the defendant's version, but rather that it was obedient and open to be trained.

61. I find therefore on the plaintiff's version, which I accept, that the *causa causans* of the damage causing incident was not the supposed act of provocation on the part of the plaintiff by putting a collar and leash on the dog or approaching it where it was isolated and causing it to be walked by a stranger, but rather that it was simply roused by the barking of the neighbour's dog which caused it to react in the manner which unfolded. Against the known standard of behavior of a

domesticated animal, its conduct at the critical moment can hardly be said to be justifiable or warrantable. A reasonable dog in its position faced with the peculiar circumstances would not have turned on the plaintiff. Our law requires a well-behaved dog who is kept as a pet and who knew the plaintiff and had interacted with him on a frequent basis both in play and in the more recent experience of being walked by him without any negative reaction whatsoever to have suppressed any instinct to bite him, regardless of the excitement stimulated in it by the barking of the neighbour's dog, even if the plaintiff was holding the leash restraining him. This is because the operating cause of the harm is not that the dog was coincidentally restrained at that moment, but because in attacking the plaintiff it was acting from inner excitement or vice or wildness which it is not expected to revert to. In my view this is one of those classic cases where the animal is regarded as having acted contrary to the nature of a wee-behaved domesticated animal of its kind. I find therefore that the plaintiff has proved that the dog acted *contra naturam sui generis* when it attacked him.

62. Having preferred the plaintiff's version, there is no room for a finding that the plaintiff either was not lawfully present in the defendant's yard or in contact with the dog when it attacked him. On the contrary, on the facts which I found proven, the defendant offered no resistance to the dog being fetched where he was and being walked. Neither can I find that the dog was provoked by the plaintiff putting the collar and leash on him. I agree with Mr Louw that this concern was opportunistically presented by the defendant as a mere afterthought to exonerate her from liability and has no basis in the evidence.

63. That leaves the defence of *Volenti non fit iniuria*. In this regard since I accepted that the plaintiff could have had no inkling that the dog would attack him, there is hardly room for the suggestion that he subjectively appreciated that there was any risk of danger. Though it may be suggested that he knowingly and wittingly realized a threat because he conceded that the training of dogs was fraught with all kinds of difficulties and dangers, it must be kept in mind that I rejected a finding that it was his handling of the dog in training him that was the *causa causans* of the attack. I accept and reiterate that I find it proven that the wild and perverse behavior of Zeus, for which there is no warrant on the part of a domesticated dog who is supposed to control his instincts, was the cause of the harm. The defendant has in my view failed to discharge the onus of pointing to any other cause.

64. In consequence then I find in favour of the plaintiff on all the issues to be decided. Since the negligence claim was conditional on my not finding that the dog acted *contra naturam sui generis*, I need not traverse this issue any further. I daresay though that I would have been unlikely to find (on the plaintiff's version that the attack was entirely unexpected) that the defendant was in any way negligent. As for the defendant's premise of Zeus being a savage dog to her knowledge, such a finding of negligence on her part may well have been justified because the circumstances would on an objective basis have required of her to have expressly forbidden the plaintiff from having any contact with her dog from where it was supposedly isolated in the backyard for everyone's safety.

65. In the result I make the following order:

(1) The issue of the defendant's liability for the plaintiff's damages is decided in the plaintiff's favour on the basis of the plaintiff's *Pauperien* action;

(2) The plaintiff is entitled to be compensated for such damages as he may prove in due course; and

(3) The defendant is liable to pay the plaintiff's costs.

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B HARTLE

JUDGE OF THE HIGH COURT

DATE OF HEARING : 4 May 2016

DATE OF JUDGMENT: 6 December 2016

Appearances:

For the applicant: Mr. Louw, instructed by Niehaus McMahon Attorneys, 43 Union Avenue, Selborne, East London (Ref. Mr McMahon/ap/GT1080)

For the respondents: Mr Pieterse, instructed by Cliffe Dekker Hofmeyer Inc. c/o Smith Tabata Inc. 12 St Helena Street, Beacon Bay, East London, Ref. Candice Thesen)