REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED

7/12/13

CASE NUMBER 11599/12

WANDA MARIE COLE **PLAINTIFF**

AND

WILHELMINAH JACOBA PIETERSE N.O. **DEFENDANT**

JUDGMENT

REYNEKE: AJ

[1] This is an action in terms of the *Actio de Pauperi*. The plaintiff claims damages in the sum of R410 000, arising out of personal injuries having been sustained when she was bitten by a dog with the name of Saartjie, belonging to the late Mr Helgaard Salomon Muller McAlphine. Wilhelminah Jacoba Pieterse, in her capacity as executor of the estate of late Helgaard Salomon Muller McAlphine, has been substituted as defendant. The quantum and merits are separated by agreement.

[2] The plaintiff, after all the evidence was adduced, abandoned the alternative claim based on negligence, as contained in para 7 of her particulars of pleadings. The claim in terms of *the Actio de Pauperie* remains.

COMMON CAUSE

[3] The following facts are common cause: The plaintiff and her husband lived in an apartment situated in Villa Lumadi Complex, Kempton Park. Mrs McAlphine, widow of the late Mr McAlphine and their three dogs are still staying in the same complex. Saartjie is a miniature Maltese poodle, the second dog is a cross between a miniature Maltese poodle and a Fox Terrier and the third dog is an ordinary Maltese poodle. All three are small dogs with a height of approximately 20cm measured from the height of their backs to the floor.

[4] A sketch of the McAlphines' apartment was presented. A small pedestrian gate giving access to an enclosed court yard is never locked but stays closed. The width of the court yard, which one has to cross to enter the kitchen door, is approximately two meters. The kitchen and lounge are divided by a serving counter. Next to the counter, facing away from the kitchen door, is a bench. Between the lounge and the carport is a side door with a peep hole.

[5] There were no warning signs to indicate the presence of the dogs. All visitors except the plaintiff used the side door to gain entrance to the apartment. The dogs stayed inside the apartment and the enclosed court yard. If someone is at any of the doors they tend to bark a lot. In order to prevent this behaviour the McAlphines used to lock the dogs in a bedroom before opening the side door to let the visitors in. The dogs have the habit of jumping on the laps of seated visitors.

[6] The plaintiff visited the McAlphines on a daily basis. She always entered without knocking. They had been neighbours for approximately eight months and the relationship appeared to be fairly cordial.

[7] On 3 April 2009, at approximately 15h45 the plaintiff took her two grandchildren, a baby, four months and Jody, four years old at the time, to visit the McAlphines. Her grandchildren had accompanied her to the McAlphines two or three times before. The late Mr McAlphine, Mrs Mcalpine, their three daughters and Le Roux, their son in law, were in the lounge. The plaintiff entered through the gate to the court yard

and opened the kitchen door without knocking. The dogs began to bark and stormed towards them. Jody became frightened and screamed.

[8] Saartjie bit the plaintiff on the right leg just beneath the knee. The plaintiff attended a doctor at his rooms just across the street from the complex, later that same afternoon. That evening, the late Mr McAlphine and Mrs McAlphine visited the Cole's to enquire about the plaintiff's welfare.

THE ISSUES

[9] What remain in dispute is whether the plaintiff had a right to be on the premises, the voluntarily acceptance of the risk of injury, whether the dog(s) was/were provoked, whether it acted *contra naturam sui generis* and whether more than one dog had bitten the plaintiff.

THE PLAINTIFF'S CASE

[10] In brief the evidence of the plaintiff is that she had the baby in her arm and she was holding Jody's hand. She opened the kitchen door without knocking and entered. As the family were busy eating she informed them that she will return later. She did not close the kitchen door behind her. She walked back through the court yard. While she was opening the gate, one of the daughters called her back. All three dogs stormed and Saartjie was jumping towards Jody's face. The plaintiff lifted Jody up into the air with her left arm while she was still holding the baby.

[11] The plaintiff was wearing shorts. Saartjie bit her on the leg. Something that was long and blue was ripped out from her leg. The other two dogs simultaneously clung to her leg with their teeth. Their teeth marks are encoded around the bite that was caused by Saartjie. The bites by the other two dogs did not cause any open wounds.

[12] She screamed to the dogs to go away and also screamed for help. Everybody came out of the apartment but they were afraid of their own dogs and were battling to pull them away from her leg. They took the children and the dogs into the house, leaving her alone and bleeding in the court yard. She went inside the house. One of the daughters cleaned her wounds. The late Mr McAlphine said it was not serious and that they should leave her. She was told that they do not have the money to pay for medical treatment and that they were not prepared to take her to

the doctor. She phoned her husband. He arrived later and took her to the doctor. He had to pay for the consultation before the doctor was willing to treat her.

[13] She received five or six sutures. A few days later the wound became septic and she had to return to the doctor. As a result of the medical treatment the current marks on her leg are not the same in appearance as they were directly after the incident. Five cm beneath the right knee is a visible square scar, being approximately 3cm x 1cm. The plaintiff testified that the teeth marks of the other two dogs are still visible around that mark. After closer inspection I recorded that although the plaintiff had circled the location of the alleged teeth marks on her leg with a pen, scars were hardly visible or identifiable. The plaintiff also pointed to the side of the scar in order to show where the sutures were, but no stitch marks were visible.

[14] It was the very first time that the dogs had attacked her. They were never aggressive towards her before.

[15] She denied that the McAlpines had ever requested her to knock before entering. She is of opinion that she did not need a formal invitation before she would pay a visit as the McAlphines were her friends. She visited them on a daily basis without an invitation.

CLINT EDWARD COLE

[16] Clint Edward Cole, the plaintiff's husband, testified that he was in Vereeniging when he received the call from the plaintiff. He had to travel back to Kemptonpark in order to take her to the doctor. She was waiting for him in the street in front of their apartment. He had to pay R400 before the consultation and treatment.

THE DEFENDANT'S CASE

[17] Sarie McAlphine, 73 years of age, testified that whenever somebody come visiting, they (the McAlphines) will firstly peep through the hole in the door, request the visitors to wait, lock the dogs in the bedroom and only thereafter the door will be opened and the visitors will be invited in. After the plaintiff's arrival the dogs were always locked in the bedroom. Previously her late husband requested the plaintiff in vain not to enter their apartment without knocking.

[18] The dogs did not like the plaintiff as she frequently reprimanded them. Once the plaintiff had the audacity to go to the bedroom to reprimand the dogs, as they continued their barking. The dogs had never before and never since bitten anyone. The dogs are not aggressive towards children or anybody but they always tend to rush and bark a lot.

[19] On the day in question the family and the dogs were sitting in the lounge. She was seated on the bench with her back towards the kitchen door. The plaintiff opened the kitchen door without knocking and entered. The dogs began barking. She did not see the alleged attack as it happened out of her sight. She only heard Jody and the plaintiff screaming. She saw Saartjie running away and although the other two dogs stormed they did not attack but eventually stopped. She took the baby from the plaintiff and her daughter took Jody. Her husband locked the dogs in the bedroom.

[20] According to Mrs McAlphine the plaintiff sustained only a single tiny bite mark of approximately 15mm long. There was just a small amount of blood trickling down her leg. Mr McAlphine cleaned the wound and took the plaintiff to the doctor with his vehicle. She did not accompany them. The plaintiff's husband was not present. That evening, while visiting the plaintiff, her late husband offered to pay the medical costs. Mr Cole mentioned that they also want compensation for pain and suffering.

EUGENE MARIUS LE ROUX

[21] Eugene Marius Le Roux testified that he and his wife, just like all other visitors, always knock at the side door when visiting his parents-in-law. The dogs are put away before the door is opened. Only when the dogs are calmer they will be allowed to be with the family. On this day he was seated in a chair overlooking the kitchen door. He saw the plaintiff with the children when she opened the kitchen door and entered. The three dogs immediately stormed towards them. Jody screamed; Saartjie continued to storm but the other two dogs stopped. The plaintiff stood in front of Jody in order to block Saartjie. The plaintiff kicked towards Saartjie to keep her away from Jody. Saartjie then bit the plaintiff once and immediately let loose. Le Roux helped the plaintiff from where she was sitting on the kitchen door to the bench and cleaned the wounds. He confirmed Mrs McAlphines' description of the wound and added that there was a little patch of loose skin.

THE ONUS

[22] The onus rests on the plaintiff to prove the elements of the claim, but the defendant bears the onus to show that the plaintiff was aware that the said dog was liable to bite people that entered the premises unlawfully and uninvited. (*Joubert v Combrinck 1980 (3) SALR 680).*

THE ARGUMENTS

[23] On behalf of the plaintiff it was argued that the credibility of the witnesses is irrelevant to a large extend as all the elements of the *Actio de Pauperie* has been conceded by the defendant. It was submitted that the fact that Saartjie had never before en never since bitten anyone shows that it was acting *contra sui naturam generis.*

[24] It was contended on behalf of the defendant that the dog was provoked and that the plaintiff did not have the right to enter the premises unannounced.

EVALUATION

[25] There are two quite different versions before me. The plaintiff described a vicious attack by three dogs. She gave the impression that the McAlpines were unhelpful and indifferent. The defendant's witnesses described an almost insignificant incident which did not warrant much fuss, but empathetic assistance was given in any event.

[26] I do not agree that all the elements had been conceded to, or that credibility needs not to be canvassed. The elements of this action, as indicated by Nestadt J in *Da Silva v Otto 1986 (3) SA 538 TPD at 539J-540, are*:

'Die voorvereistes vir die aksie wat hier ter sake is, is: (i) dat die respondent die eienaar van die dier is, (ii) dat die dier *contra naturam sui generis* moes opgetree het; (iii) dat eiser nie nalatig of met onbesonnenheid teenoor die dier moes opgetree het nie; hy moes dit nie geprovokeer het nie; daar moes nie concitatio gewees het nie; (iv) dat hy regmatig op die plek moes gewees het waar die dier hom beseer het.'

[27] In addition to the aforesaid, I quote the words in *Vermaak v Khoza 1979* ***(1)*** *NPD 579 at 581*:

'Daar is niks billiks in die *actio de pauperie* teenoor die verweerder nie: daarkragtens word hy skuldloos aanspreeklik gehou vir die optrede van sy verstandlose diere.'

[28] It is clear that there are factual and legal issues to be resolved and that the elements have to be tested against the evidence. The court has a duty to come to a conclusion on the disputed issues and must make findings on the credibility of the various factual witnesses; their reliability; and the probabilities. (*Stellenbosch Farmers' Winery Group Ltd & Another v Martell ET Cie and Others 2003 (1) SCA at 141J-15A-D; SFW Group Ltd & Another v Martell Et Cie & Others 2003 (1) SA 11 SCA at para 5.)*

[29] The plaintiff was not an impressive witness. She was rambling on without stopping. Numerous times she would repeat her evidence at length and when pressed for a concise answer she would concluded by stating that she could not remember, or that she was confused due to the shock.

[30] The plaintiff was adamant that something that appeared to be long and blue in colour was ripped from her flesh. On closer scrutiny it appears that Jody had told her so. One needs not to be an expert in order to deduct that it could possibly be a vain. It is strange that the plaintiff did not see this herself but was relying on this information obtained from a four year old child. I do not accept this part of her evidence.

[31] The plaintiff was cross-examined at length about various documents. With reference to a letter by the plaintiff's attorney, where there is referral to one dog only, she testified that she was misunderstood. She explained that Dr's Kruger, Wolmarans and Ford in their three respective reports also referred to one dog only, as only one dog was responsible for the big hole in her leg. Her explanations are satisfactory, as they are in line with her pleadings, specifically para 5 of the particulars of pleadings, where it is alleged that 'The dogs attacked the Plaintiff and one of the dogs injured the Plaintiff by biting her on her right leg.' Her explanation is also in line with her further particulars where it is stated that the plaintiff was bitten by three dogs.

[32] One month after the incident the plaintiff made a statement under oath at the police station. All the contents are not in line with her evidence in court. Initially she testified that she did not read the statement before she signed it, as she was in a state of shock at the time. When the passage of time since the day of the incident was highlighted she explained that she was under medication, confusing her state of mind. She explained that she only in court realized that she does not agree with all the contents. Despite these explanations being unconvincing, I do not make any negative deduction against the plaintiff in this regard as the correctness of the statement was not admitted and the contrary was not proved.

[33] I am conscious that this trial is only concerned with the merits and that the nature of the injuries appears not to be relevant at this stage. Despite resistance by counsel on the basis of irrelevancy, I requested to see the scars as it seemed at the time that the appearance of the scars could possibly indicate whether the description of the attack by the plaintiff, or Le Roux, was the more probable. I foresaw the possibility that there would have been an obvious difference between a small 1,5cm wound, although healed, in comparison with an open wound requiring at least five or six sutures, surrounded by teeth marks. The inspection unfortunately did not assist me, as the initial appearance of the scars had changed due to further medical treatments.

[34] Although the plaintiff was verbose she did not contradict herself on crucial aspects and was not shown to be untruthful.

[35] Her evidence about the happenings concerning the visit to the doctor is corroborated by her husband.

[36] Mr Cole testified that he had transported the plaintiff to the doctor and that he had paid the doctor before the consultation. Page 22 in Bundle C is a statement by Dr Kruger, indicating that R400 was paid for dog bites on the date of the incident. The statement does not show by whom the payment was made. None of the parties tendered a receipt. In view of Mrs McAlphines' evidence that they had offered to pay for the medical expenses that same evening, it follows logically that they had not yet made any payments. Although the weight to be attached to Mr Cole's evidence is diminished due to his presence in court while the plaintiff was testifying, the

probabilities show that his version is true, thus corroborating the evidence by the plaintiff in this regard.

[37] I accept the evidence tendered on behalf of the plaintiff.

[38] Mrs McAlphine gave her evidence in a crisp, clear and calm manner. She tendered evidence regarding the attack, which only after cross-examination, when the court had asked clarifying questions, had been identified to be hearsay evidence as she did not see the plaintiff kicking at Saartjie or the actual bite. Notwithstanding the abovementioned, she made a good impression. There are no internal contradictions or improbabilities contained in her evidence.

[39] Mr Le Roux was the only eye witness on behalf of the defendant. He corroborated Mrs McAlphines version and elaborated on the attack. He also made a good impression.

[40]There is no reason not to accept the evidence tendered on behalf of the defendant.

[41] The parties made an issue about whether the attack happened in the kitchen or the court yard. The court yard is two meters wide and two or three steps will cover the distance from the kitchen door to the pedestrian gate. It is virtually the same place and has no significance as it is common cause that the plaintiff had entered the kitchen.

[42] Due to the absence of expert medical evidence describing the nature of the injuries, I find that the plaintiff did not prove on a preponderance of probabilities that the other two dogs had also attacked and bit her.

[43] On behalf of the defendant it was also argued that the plaintiff's non-announcement categorizes her presence to be unlawful, the more so since she was requested to knock. In this respect the plaintiff regarded her conduct as normal amongst good friends. She disputed that she was specifically requested to knock.

[44] See the dictum of Innes CJ in *O'Callaghan v Chaplin 1927 AD 310*, at 329:

'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 his negligence contributed to his own injury, is liable, as owner, to make good the resulting damage.'

[45] The values of the community and the behaviour of the ordinary reasonable man dictate what normal and acceptable behaviour is. Any behaviour which is likely to offend, is unacceptable and contra *boni mores*. The entering of another person's residence without knocking or announcing oneself and without waiting for a response to effect that one is allowed to enter, is regarded as rude and unacceptable. Even the McAlphines' own children abided by this basic rule when they were visiting their parents.

[46] According to *McKerron RG The Law of Delict 7th ed at 254*, every person who enters another's premises in order to communicate with the occupier or other person on the premises, unless the person knows or ought to know that his or her entry is prohibited, has a lawful purpose to be on the premises. Although the McAlphines did not approve of the plaintiff entering without knocking, she was not prohibited to be on the premises or in the apartment. However, the fact that an unexpected guest was not expressly prohibited to be on the premises, does not *per se* gives such a guest the right to enter unannounced or to enter uninvited. Such conduct will be as unacceptable at the uncomfortable hour of 2h00 in the morning, as it will be unacceptable at any other time. There is no reason why the same conduct will be acceptable because it was in the afternoon.

[47] In *Stolzenberg v Lurie 1959 (2) SALR WLD 67, at 74A,* it was held that the question in each case must be whether the circumstances are such as to reasonably lead to the conclusion that the whole risk was voluntarily incurred by the plaintiff. The plaintiff knew that her unannounced entrance into the court yard or the kitchen would cause the dogs to storm and bark, as they always behaved as such. The McAlphines, not being forewarned that the plaintiff was about to enter, could not timeously lock the dogs out of sight. Despite the plaintiff's knowledge she still chose to take her grandchildren with her and to continue with her old ways.

[48] The last issue is whether Saartjie was acting *contra naturam sui generis*. In *Da Silva at 541 F-G* it is said:

'... die gedrag van die betrokke hond moet teen die aard van 'n ordentlike en goedgemanierde hond wees. Hoewel alle honde byt en onder sekere omstandighede sal byt, word 'n hond wat iemand byt regtens beskou *contra naturam* op te getree het, omdat daardie gedrag van 'n hond wat nie daartoe aangehits is nie, as onaanvaarbaar beskou word; die gedrag van die hond word as onregmatig beskou.'

[49] The fact that Saartjie had never before and never since bitten any person does not necessarily lead to the conclusion that she had indeed acted *contra naturam sui generis* and that her behaviour thus is unacceptable. See in this regard *Solomon v De Waal 1972 (1) SA 575 A at 582:*

'I agree with the following remarks of Hunt, the author of an article entitled '*Bad Dogs' in (1962) 79 SALJ 326 at 328:* "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." '

[50] Also see *Green v Naidoo and Another 2007 (6) SA 372 WLD,* para 21, where Satchwell J affirmed that:

'The somewhat bizarre nature of the *rationes* in the authorities are to the effect that 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.*'

[51] In *Loriza Brahman en 'n Ander v Dippenaar, 2002 (2) SA 477 (SCA) at 485 H-J* it was confirmed that the Court should have regard to nothing more than the *genus* of the animal to which it belongs.

[52] The test is not whether the specific animal had acted contra its own peculiar personality; the test is whether Saartjie had acted contra the nature of her *genus*. In this matter before me the question about what the nature of a dog, or the species of a miniature Maltese poodle is, remains unanswered. No expert evidence on the psychological nature of a Maltese was adduced.

[53] Thus I can only consider the evidence describing Saartjie as a miniature breed Maltese poodle, being a pet dog who likes to sit on people's laps, that it is in her

specific nature to bark and storm when someone is at the door, whether familiar or not, and that she will sometimes continue barking even when she is isolated.

[54] People keep pets for different reasons, including for their ability to warn their owners if there are visitors and intruders. The plaintiff was aware that the dogs were jealous of their territory, including the court yard, and that they would bark and rush at any visitor. Despite this knowledge she still chose to enter the court yard and the kitchen together with her two grandchildren, without announcing her presence, and without waiting to be invited into the house.

[55] The act of kicking was not the trigger causing the dog to become agitated. Saartjie had already stormed towards Jody before the plaintiff tried to kick her. The presence of the plaintiff in their territory again provoked the dogs, as it always did in the past. The presence of the two children probably further provoked them.

[56] I find that the defendant showed on a preponderance of probabilities that the plaintiff was aware that the said dog was liable to be provoked by any people that entered the premises. The provocation caused Saartjie to bite. In the absence of evidence to effect that such behaviour is not *naturam sui generis,* I find that the plaintiff failed to show on a preponderance of probabilities that Saartjie acted *contra naturum sui generiis.*

[57] JUDGMENT

The plaintiff's action is dismissed with costs.

REYNEKE: ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA, GAUTENG LOCAL DIVISION, JOHANNESBURG

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