IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No.: 3761/17

REPORTABLE

In the matter between:

MICAYLA CLAIRE MARSHALL Plaintiff

and

THEO PILLAY Defendant

JUDGMENT ELECTRONICALLY DELIVERED ON 28 APRIL 2023

KUSEVITSKY J

Introduction

[1] This is an action instituted by the Plaintiff against the Defendant under the *Actio de pauperie*, it being common cause that the Plaintiff was bitten by the Defendant's Husky dog.

[2] This matter has a long history. In or around June 2020, a special plea was argued and subsequently dismissed. The matter was then referred back to the case management roll. On 1 March 2021 the matter was declared trial ready and a date allocated for hearing on 14 March 2022. Prior to the hearing, the Defendant, having stated that he was out of the court's jurisdiction, requested a virtual trial, which request was denied. The matter was postponed to 3 May 2022 for hearing and a recordal made that the matter would proceed by way of default hearing in the event of Defendant not appearing on the day.

[3] Due to unforeseen circumstances, the court became unavailable to hear the matter on 3 May 2022 and the matter was subsequently postponed for hearing on 25 and 26 May 2022. On Monday, 23 May 2022 the Defendant advised that he had tested positive for Covid-19 and would be unable to attend the hearing on 25 May 2022. A doctor's note to this effect was provided. The Defendant also stated that he had booked flights and accommodation for the hearing and was having problems in obtaining a refund. Counsel for Plaintiff however did not accept this explanation and insisted that the wasted costs in that respect should be borne by Defendant. Counsel furthermore insisted that Defendant bring a substantive application for a postponement. In a directive to the parties, this Court noted that a substantive application for a postponement under those circumstances would be an unnecessary waste of costs for both parties. The Court granted a postponement for hearing of the matter to 13 and 14 June 2022.

[4] On 8 June 2022, the Defendant notified the parties that he did not get a refund of his flight ticket, and that he could not afford to fly to Cape Town since he

has been unemployed since 2014. He stated that he would be available once he obtained a refund, or raised funds for another flight to Cape Town. When Defendant was reminded that the Court had previously indicated to him that in the event that he could not afford an air ticket, that he could utilize the services of bus transportation, the Defendant indicated that he also could not afford the R 1000.00 for the bus ticket either. In my view, this contention is improbable given the status of the family. The court indicated to the Defendant in correspondence and telephonically that the matter would proceed on 13 June 2022. On the morning of the hearing, the Court furthermore attempted to contact the Defendant. The Defendant indicated that he would not be present. In the application by the Plaintiff to proceed with the trial, Mr Eia for Plaintiff argued that the Plaintiff has been prejudiced in the finalization of the matter. It was also placed on record that the Defendant had been warned on a previous occasion that the matter would proceed in *absentia* should he not attend court. It was also recorded that the Defendant's wife was a senior member of the Cape bar. In the circumstances, the Court directed that the trial would proceed in the absence of the Defendant. In my view, the Defendant was adequately warned that the matter would proceed and it is not for a Defendant to hold the court ransom as to their availability to so appear on the day of the hearing. I now turn to the facts of the case.

The facts

[5] The Plaintiff in this matter was 17 years old at the time of the incident, which occurred on 11 January 2014. She testified that on the day in question, she and her sister were invited to the home of the Defendant's son to attend a social gathering.

She was driven there by her mother. Upon arrival, she notified the Defendant's son that she had arrived. She got out of the car and her sister followed suit. She explained that the house has a boundary fence which is half wall and half fence. There is a pedestrian gate and a sliding gate approximately five or six meters in length.

[6] The Defendant's son came out of the front door, which is located behind security gates. He told her to enter through the sliding gates by the garage and proceeded to open the gate with a remote control. The Plaintiff noticed that there was a dog wondering around in the front yard but paid no attention to it. When the gate opened, two dogs came running out. The one dog, a Siberian Husky, which Plaintiff described as big, ran towards her and without warning, launched itself towards her throat. She raised her arms to ward off the attack which resulted in both her forearms being bitten. Her sister and mother rushed to her aid.

[7] The Defendant's son was still behind the fence when the attack occurred. He seemed in shock. He immediately rushed toward the dog to get it under control. She explained that the dog's face was covered in blood. She was in shock, shaking and crying and was covered in blood. Her mother and sister witnessed the attacked. Her mother immediately rushed her to hospital where she was given morphine. A plastic surgeon later took her to theatre and under general anesthetic did a debridement of the wounds and sutured the wounds in the different layers of skin. She remained in hospital overnight and was discharged the following day with both arms covered in bandages.

[8] Plaintiff testified that school had started a day or two after the incident. She did not go to school immediately. She remained in bandages for many weeks. She was also limited in what she could at school and this was frustrating for her since she was a prefect and was in matric. She and her sister attended the school counsellor to talk about the incident. She testified that during this period, she felt very self-conscience and embarrassed about the puncture wounds on her arms as some people had assumed that she had self-harmed. She stated that she was very angry at what had happened and asked her mother to report the incident at the police station and the local city law enforcement. She testified that she has received subsequent therapy for her anxiety towards dogs. She also complains that she has pain in her wrist when it is cold and her right arm is sensitive to touch.

[9] The Plaintiff stated that she was currently doing her articles in chartered accountancy. With regard to her current state, she testified that she suffers from post traumatic stress disorder ("PTSD") whenever she sees a dog. She testified that in 2016, she sought therapy from Catherine Johnson, a Clinical Psychologist and had six sessions with her, starting from August 2016 to October 2016. She stated that she then had a break and sought therapy again 2022 for three sessions following an incident that had occurred in 2021. She explained that the reason for seeking therapy again is that she roller blades on the Promenade and often feels anxious when she sees dogs running off a leash and towards her. This had happened on two occasions.

[10] In this regard, Plaintiff sought to admit the evidence *via* affidavit of Ms. Johnson in terms of an application under Rule 38(2) of the Uniform Rules of Court.

Ms. Johnson in her report indicated that she first consulted with the Plaintiff during August 2016 for symptoms of post-traumatic stress that she had been experiencing since the dog attack in 2014. She had initially been referred by a psychologist, Melissa Melnick. She stated that Plaintiff exhibited signs of PTSD such as flash-backs, hyper-arousal and avoidance of dogs and in situations where she might encounter them. She added that Plaintiff was responsive to treatment. On 14 March 2022, Plaintiff contacted Ms. Johnson again for a consultation following two incidents that had occurred in the previous three months involving dogs running towards her suddenly while she was roller-blading. She reported that these incidents left her feeling helpful and tearful. Ms. Johnson concluded that Plaintiff required a further 13 sessions in terms of a revised treatment plan.

[11] The next witness to testify on Plaintiff's behalf was Ms. Jacqueline Koep, a qualified physiotherapist who assessed the Plaintiff in June 2016, some two and a half years after the incident. She was tasked to ascertain the Plaintiff's ongoing pain and alleged altered function as a result of the incident. According to her, Plaintiff reported that she was told that there was a dent in her bone which was caused by the dog's tooth. This was however not confirmed by any independent medical report or X-ray and the X-rays done on the day of the incident and one taken subsequently three days later indicated that no fractures had been detected. She also experienced intermittent pain doing certain tasks.

[12] Ms. Koep in her report also suggested six sessions for pain management, followed by 12 sessions over the course of the year. This was to address the change in soft tissue and mobility of the area. Ms. Koep also testified that the Plaintiff suffers

from PTSD which was diagnosed by Melissa Melnick. I was advised by Mr. Eia that Ms. Melnick was now living abroad in New Zealand and that it would have been too costly to fly her out for the hearing. A further application in terms of Rule 38(2) was sought in respect of the admission of Ms. Melnick's report.

[13] In Ms. Melnick's affidavit, she confirms that she examined the Plaintiff on 11 April 2016 for the purpose of preparing a medico–legal report. In her report, she confirms that Plaintiff was 17 years old at the time of the incident and 19 years old at the time of the assessment. The purpose of the assessment was to determine the psychological *sequelae* arising from the dog-bite incident. During the assessment, the Plaintiff told her that she experienced anxiety with dogs; suffers from mood changes and sleep disturbance and ongoing physical pain such as general movement. She opined that the Plaintiff's symptoms met the DSM-V1 criteria for Post Traumatic Stress Disorder. She concluded that Plaintiff consults a Psychologist for psychotherapy to address her ongoing symptoms of PTSD; and a Physiotherapist regarding her on-going arm pain.

[14] Ms. Koep was then asked by counsel whether she agreed with the diagnosis of PTSD; how PTSD manifests and if it was treatable. In view of the fact that the Defendant was absent and also not represented, the Court questioned Ms. Koep's expertise to answer those questions in light of the fact that she is not a qualified expert in this field. Ms. Koep stated that she was studying her Master's degree and one of the subjects covered the topic of PTSD. I am of the view that this is not sufficient to testify on aspects of PTSD as she is not an expert in the field. I will

1 Diagnostic and Statistical Manual of Mental Disorders – Fifth Edition

therefore attach little weight to her evidence in this regard. Ms. Koep did however state that, in terms of her clinical practice, that their function was to be able to be aware of the symptoms of PTSD and to focus on the trauma experience of the person in relation to their complaints. She also changed her initial conclusion of twelve sessions of physiotherapy to six, in order to continue with the process of specific desensitization.

[15] The last witness to testify was Plaintiff's mother, Ms. Gillian Marshall. She confirmed the sequence of events and testified that it was extremely traumatizing to witness the dog attack. She confirmed the contents of the particulars of claim where the Defendant admitted to owning the dog. She further testified that after the incident when she had lodged a complaint with the City Law Enforcement with a view to having the dog euthanized, that the Defendant telephoned her very upset and emotional, and pleaded with her to withdraw her affidavit of complaint. She stated that she softened after hearing his distress and felt sorry for him and decided to withdraw the complaint.

[16] Ms. Gillian Marshall also testified that the Defendant's wife Mrs. Pillay, told her that they would cover the costs of the hospital bills and enquired whether they had medical aid. She advised that she had a hospital Plan, but that the Pillays, although having paid an amount of R 13 185.04 towards the medical bills, did not pay the full amount as there was still as shortfall of R 50 752.652.

2 This amount has subsequently changed. In Plaintiff's heads of argument, an amount of R 50 767.61 is claimed but it is also stated that amount of R 37 567.61 has been paid, leaving a shortfall of R 37 567.61.

Evaluation

[17] By our law, the owner of a dog that attacks a person at the place he or she was injured, and who neither provoked the attack nor by his or her negligence contributed to their own injury, is liable, as owner, to make good the resulting damage.3 Thus, for liability to attach to a defendant, the only proof that is required under this action is that the defendant was at the time the owner of a domesticated animal, that the animal injured the plaintiff without provocation, and that in so inflicting injury, the animal *acted contra naturam sui generis*.4

[18] From the above evidence, it is clear that the Defendant was the owner of the dog at the time of the incident.

[19] With regard to the second question, it is so that negligence on the part of the plaintiff may excuse a defendant's liability. In the event that the animal did not act *contra naturam sui generis*, the *actio de pauperi* will not be available against the defendant who is the owner of the animal. In this instance, the plaintiff will then have to rely on the negligence of the owner in terms of the *lex acquilia*. According to the Defendant's plea, he admitted that the Plaintiff and her sister were invited to his home; that Plaintiff was injured by a Siberian Husky and that she was injured within the boundaries of his premises. The Defendant however averred in his plea that on arrival, the dog jumped up to greet the Plaintiff and she responded and retaliated by hitting the Siberian Husky and pulling its hair. Plaintiff was thus injured when the Husky fended off Plaintiff's "unwarranted attack".

---

3 O'Callaghan v Chaplin 1927 A.D 310 at 329
4 Visser v Visser 2012 (4) SA 74 at 76E-G

[20] In *casu*, since no evidence has been adduced by the Defendant in this regard where the onus would be on him to so prove; this has not been done in this case and therefore the question of provocation or negligence does not feature in this matter. If one considers the evidence of the Plaintiff, that she observed the dog wandering around the garden, not barking at the fence, then I will accept the evidence of the Plaintiff that the attack by the dog when he ran out of the yard toward her had been spontaneous and unprovoked, and that the dog had acted *sponte feritate commota* and *contra sui generis*.5 This evidence was corroborated by Plaintiff' mother.

[21] It is trite that the existence of the *actio de pauperie* is that as between the owner of an animal and the innocent victim of harm caused by the animal, that it is appropriate for the owner to bear the responsibility for that harm. This rationale is almost precisely the same as that of Innes CJ and KotzéJ A in *O'Callaghan NO v Chaplin*, namely that, in general, ownership of an animal should carry with it strict liability for any harm done by the animal.6 It is not in dispute that the Plaintiff was injured and hospitalized as a result of the dog attack, the photographs submitted by Plaintiff on the day of the attack bearing witness to the puncture wounds sustained as a result of the dog bites.

[22] At the hearing of the matter, Plaintiff advised that she would only be proceeding for a claim for Past and Future Medical expenses and General damages.

---

5 Loriza Brahman en 'n Ander v Dippenaar 2002 (2) SA 477 (SCA) at 479F-G
6 *Van Meyeren v Cloete* (636/2019) [2020] ZASCA 100 (11 September 2020) at para 33

Past and Future Medical Expenses

[23] As stated above, and according to the Plaintiff's heads of argument, the Plaintiff admits that Defendant has paid an amount of R 13 185.04 of the R 50 752.65 of medical expenses incurred. This leaves a balance of R 37 567.61 which Defendant is liable to pay Plaintiff.

[24] With regard to future medical treatment, it was confirmed by the expert physiotherapist Ms. Jacqui Koep that the Plaintiff would require six physiotherapy sessions at R 700.00 per session7. I have increased this amount by 10% at R 770 per session which equates to R 4 620.00.

[25] The Plaintiff seeks further compensation for her attendance at clinical psychologist Ms. Catherine Johnson. Whilst I have accepted the reports of Ms. Johnson and Ms. Melnick in terms of Rule 38(2), in my view, a court is not bound by their recommendations at the expense of its inherent discretion in matters of *quantum*. I say this mindful of the fact that Ms. Koep, having had the advantage of hearing the evidence of the Plaintiff and testifying in court, adjusted her initial recommendation to fewer sessions than what was initially proposed. Evidence accepted *via* affidavit in terms of Rule 38(2) does not provide for this opportunity and in my view, could lead to an injustice in the computation of the *quantum* to the detriment of a defendant. In *New Zealand Insurance Co. Ltd. v Du Toit*8, an expert surgeon similarly did not attend court to give oral evidence and his evidence tendered *via* affidavit, for reasons that his day fee would be too costly. His evidence

7 This amount was quoted at 2022 values
8 1965 (4) SA 136 (T) at 137B-C

set out the nature of the injuries and the pain and suffering and the disabilities which Mr. Fourie had sustained. Bekker J, whilst accepting the affidavit in order to curtail costs, opined that it would be dangerous to allow this type of practice, i.e. proving damages by affidavit of a medical practitioner. This sentiment is also echoed by the authors of *Erasmus*9. I similarly agree with this contention. There is a disadvantage of accepting such evidence in this manner, especially when it relates to medical reports and opinions proffered therein, which, as is well known, is prone to challenge or change. A court should therefore be slow to accept such medical evidence on affidavit, other than in exceptional circumstances properly motivated. I say this as a preface to the assessment of general damages and Plaintiff's diagnosis of PTSD in relation to the treatment thereof for purposes of an assessment of future treatments in this regard.

[26] According to the evidence of Plaintiff and the report of Melnick, after the attack, Plaintiff had eight sessions of counselling at school. The incident occurred on 11 January 2014. She then consulted with Melnick around 11 April 2016 and it is in that report that physiotherapy was recommended, which saw Plaintiff attend the rooms of Ms. Koep on 6 June 2016. During August 2016, Plaintiff saw Ms. Johnson for a total of six sessions that year, nearly two and half years after the incident. In my view, there is no reasonable explanation given why the Plaintiff would require nearly double the amount of sessions nearly ten years after the incident. Furthermore, I do not accept the explanation by the Plaintiff that after six years post the incident, that she was still dealing with flashbacks, since on her own evidence, the initial sessions had resolved her anxiety. There is no indication as to why these treatments did not

9 Superior Court Practice under Rule 38(2)

continue after the incident and the explanation that she started attending the sessions again because she had seen dogs running toward her on two occasions is, at best, questionable since it is highly improbable that a student residing on the Atlantic Seaboard would not have been exposed to dogs for a period of six years.

[27] In summary, I am of the view that I am not bound by the recommendations of an expert who has deposed to evidence of her medical report *via* an affidavit in terms of rule 38(2) and in the circumstances, based on the evidence, I am of the view that the Plaintiff is not entitled to a further eight sessions of treatment with Ms. Johnson. My view is further fortified by the fact that Ms. Johnson is not able to definitively say whether the Plaintiff's fear response to dogs will ever be reduced or eliminated. She goes on to explain that it is reasonable for her to '*be seeking further treatment now in the hope of improvement10 in her fear response to dogs in the kinds of situations that are arising in her life at present'*. This sentiment therefore begs the question: *Should a defendant be liable for future therapy sessions ad infinitum and in circumstances where the defendant themselves have not attended therapy for numerous years; and where there is no indication that the specific diminution might resolve*? The answer has to be in the negative since this is precisely why a plaintiff is entitled to a claim for general damages.

[28] I do not intend to rehash the basic principles of the Law of Damages. For purposes of this judgment, it is sufficient to restate the following general principles: Damages generally includes a loss, harm, injury, pain and suffering, loss of consortium, mental anguish, loss of quality of life, emotional distress or disfigurement

10 my emphasis

or impairment. The list is not exhaustive. It is also defined as the diminution as the result of a damage-causing event, in the quality of the highly personal (or personality) interests of an individual in satisfying his or her legally recognized needs, but which does not affect his patrimony.11 Non-patrimonial loss, rights of personality and personality interests includes mental and physical integrity, dignity, feelings, privacy and identity. The following interests forms part of such a highly personal 'non-patrimony'; freedom from pain, emotional shock, psychiatric diseases, psychiatric injury and physical suffering; and the aesthetic interest in having a body which is not disfigured.12 Prospective loss, i.e. the loss which at the time of adjudication is manifested by an expectation that the utility or quality of the patrimony or personality, as the case may be, will deteriorate or will not increase, is accepted as part of the concept of damage.13 It is apparent that the Plaintiff, as a result of the incident has suffered a diminution stemming from the dog attack and which, according to Ms. Johnson causes her significant stress such as to find an impairment in her personality. These are claims which fall under the 'general damages' umbrella and it would be a duplication of sorts if defendant were to be mulcted twice in respect of the same complaint.

[29] In her particulars of claim, Plaintiff claims an amount of R 300 000.00 for general damages. It is so that Plaintiff suffered numerous bite wounds as a result of the dog attack by a big Husky dog that essentially lunged itself towards Plaintiff's throat. She had to be hospitalized, underwent emergency surgery to clean and suture her wounds. She was in bandages for weeks. Although her scars have

11 Visser and Potgieter, Law of Damages 2nd Edition, at paras 5.1, 5.3 pgs. 94-95,
12 This list is not exhaustive.
13 Visser and Potgieter supra, Concept of Damage para 2.3.1 pg. 29

healed, the Plaintiff feels that people might assume that the scars are as a result of self-harm, which causes her huge embarrassment.

[30] It is well established that an assessment of an appropriate award of general damages, is a discretionary matter and has as its objective to fairly and adequately compensate an injured party.14

[31] It should be borne in mind that general damages are awarded for bodily injury, which includes injury to personality as discussed above. Its object is to compensate loss, not to punish the wrongdoer. If it were otherwise, awards would be made even where no loss is suffered15.

[32] An assessment of appropriate general damages with reference to awards made in previous cases is, as Nugent JA observed in Minister of *Safety and Security v Seymour*16, '*fraught with difficulty . . . (t)he facts of a particular case need to be looked at as a whole and few cases are directly comparable . . . (t)hey are a useful guide to what other courts have considered to be appropriate but they have no higher value than that'*.

[33] In *AA Mutual Insurance Association Ltd v Maqula* 1978 (1) SA 805 (A), the court held the following:

14 See Protea Assurance Co Ltd v Lamb 1971 (1) SA 530 (A) at 534H-535A and Road Accident Fund v Marunga ZASCA (144/2002) [2003] ZASCA 19; 2003 (5) SA 164 (SCA) para 23)
15 See Minister of Police v Dlwathi (20604/14) (2016) ZASCA 6 (2 March 2016) at para 9
16 (295/05) [2006] ZASCA 71; 2006 (6) SA 320 (SCA) para 17

"It is settled law that a trial Court has a wide discretion to award what it in the particular circumstances considers to be a fair and adequate compensation to the injured party for his bodily injuries and their sequelae. "

[34] Plaintiff, in motivation for an award of general damages in the amount of R 300 000.00, referred me to cases which in my view are distinguishable from the facts in this matter. In *Visser v Visser*17, the plaintiff's two year son had sustained severe facial injuries. In *Solomon and Another NNO v De Waal*18, the plaintiff there was attacked by a stallion and she underwent no less than four operations; and in *Baker v Spielman et Uxor19*, a woman suffered facial disfigurement where her lower lip was removed by a dog and the corner of her mouth ripped open.

[35] I have had regard to the cases cited in *Hilder v Jafta and Another*20, with amounts quoted according to valuations as contained in The Quantum Yearbook by Robert J Koch.

[36] In *Da Silva v Coetzee21* the plaintiff sustained three teeth wounds in the buttocks and a scratch on the shoulder blade as a result of a dog bite. She experienced severe pain for two days. Hospital treatment and injections were administered and she spent one day in bed. The Court awarded an amount of R 50.00. The 2023 award is in the amount R 4 400.00.

---

17 2012 (4) SA 74 (KZD)
18 1972 (1) SA 575 (A)
19 Quantum of Damages Vol. 1 (1961 Durban & Coastal Local Division)
20 (15902/05) [2008] ZAKZHC 92 (21 November 2008) at paras 32 to 34
21 1970 Vol. 2 Corbett and Buchanan at 163 (T)

[37] In *Mokoena v Minister van Polisie, Qwaqwa en Andere*22, the plaintiff sustained multiple bites on both legs by a police dog. The injuries sustained on the left foot resulted in a loss of dorsiflexion and plantar flexion of his foot. He also sustained injuries to his fingers whilst trying to wrestle open the dog's mouth. The Court awarded an amount of R 5 500,00 for general damages for bodily injuries. The 2023 award is in the amount R 31 000.00.

[38] Lastly in *Joyce v Venter* 23, a dangerous dog attacked the plaintiff by fastening its teeth into his genital organs. He experienced a high degree of shock, pain and discomfort. He was unable to urinate normally and one or two operations would be required to rectify this. A year later the plaintiff still experienced great pain and discomfort in urinating. The Court awarded an amount of R2 000.00 taking into account the pain still experienced by the plaintiff and future pain. The current day value R 73 000.00.

[39] With regard to symptoms associated with post traumatic stress disorder, in *Van der Merwe v Minister van Veiligheid en Sekuriteit en Ander*24, a 63 year old successful building contractor had been unlawfully arrested and detained in police custody for two and a half hours. As a result, he was severely traumatized and had to undergo psychological and psychiatric treatment, without success. He presented with symptoms of depression and symptoms typically associated with post-traumatic stress disorder. He was awarded R25 000 in 2009, which equates to R50 000 in present day value.

---

22 1993 Vol. 4 Corbett and Buchanan G 3-16
23 1979 Corbett and Buchanan at 19(Z)
24 (716/07) [2009] ZANCHC 72 (27 November 2009] C&H Vol. VI at K2 –1; 2009 6 QOD K2-1 (NCK)

[40] In *Van Der Merwe v Minister van Veiligheid en Sekuriteit25*, the court awarded an amount of R25 000.00 to the plaintiff who had suffered psychological trauma and had to undergo psychological and psychiatric treatment without positive results. The plaintiff had symptoms of depression and typical post-traumatic stress syndrome.

[41] Finally, I am of the view that the matter in *Hilder supra* is more on point. In that matter, the plaintiff had been jogging in the street and was attacked by a Boerbol dog in front of the defendant's premises. The plaintiff sustained puncture wounds caused by the bites where the dog took hold of her and shook her from side to side. She was taken to hospital and thereafter transferred to another where she underwent an operation by a plastic surgeon. She spent the night in hospital and was released the next day. She took painkillers and was off work for three weeks. She wore tracksuit pants to hide the scars and bruising. She was also embarrassed for her husband to see her scarring. She also developed a phobia about dogs; described how she had a become antisocial as she feared going out to friends with dogs. She had also stopped running. The doctor who performed the operation commented on the trauma and her distress about facing the prospect of dogs in future. The plaintiff also did not seek any psychological counselling. The court, whilst noting that the doctor was not qualified to give such evidence, awarded the plaintiff three sessions with a psychologist to help her overcome her trauma and fear of dog bites. The defendant in that matter initially denied liability. During cross-examination, it emerged that the defendant and his wife had known about the attack when it had

25 NCHC, Case No: 716/2007

occurred, having been told about it by their domestic worker. The court found his evidence to not be credible. The court awarded an amount of R 30 000. 00 for general damages, which equates to R 64 890.00 in present terms.

[42] After reviewing all of the cases, I am of the view that an amount of R 50 000.00 is a fair award in *casu*.

[43] With regard to the question of costs, the Plaintiff argued that she is entitled to her costs in both prosecuting the claim as well as the costs of the special plea, which costs were held over for determination at the trial. The Plaintiff also argued that this court should exercise its displeasure in the conduct of the Defendant as falling within the meaning of 'vexatious', it being alleged that the Defendant had unduly protracted the matter, and was therefore responsible for escalating the costs considerably.

[44] It is common cause that the incident occurred on 11 January 2014. It is furthermore apparent from the sheriff's return of service that the summons was served on 2 March 2017. The Defendant filed a special plea of prescription to which he was fully entitled to do in law. On 5 June 2020, the special plea was dismissed and the costs thereof held over for later determination. Without pronouncing on the correctness or not of that decision, it is the practice that cost should usually follow the result and as a consequence, except for some unusual factor that would persuade a court otherwise, the Plaintiff would be entitled to her costs of the special plea.

[45] Then, on 11 November 2020, the Defendant, according to the correspondence, in an attempt to resolve the matter, offered the Plaintiff's legal representative an amount of R 50 000.00 in settlement of the claim. It is clear that this offer was rejected by the Plaintiff as the matter proceeded to run its course. Given the above, I am of the view that the Defendant's liability of costs should be limited. I also want to express my displeasure that the matter ran at all, given the fact that one would have assumed that the Defendant, having resided in premises purchased at a cost of R 4 million26, would have had insurance for the property which in the normal course, would have included public liability insurance, together with the fact that on the evidence, the Defendant's wife acknowledged to the Plaintiff's mother that they would cover the medical bills of the Plaintiff. In any event, the insurance aspect is mere speculation as no evidence was adduced in this regard and secondly, it is clear that not all of the hospital bills were paid by the Defendant.

[46] After the dismissal of the special plea, the matter was referred to case management in terms of rule 37(8) of the Uniform Rules of Court and a trial date allocated in 2022. I am however of the view that Defendant should only be liable for Plaintiff's costs up to and including 11 November 2020 which is the date upon which the offer of settlement was made and furthermore, was not made without prejudice. I say this mindful of the fact that the Defendant was litigating in person, and therefore, the formalities in such instances where these offers would usually be incorporated in a rule 34 (1) tender, should not, in my view, preclude a defendant from this mechanism designed to enable a party to avoid further litigation and failing that, to avoid liability for the costs of such litigation from the date of the tender.27

26 According to correspondence in the trial bundle

[47] With regard to the issue of the postponements due to the court's unavailability, I am of the view that neither party should bear the wasted costs occasioned by these postponements. I am however of the view that given the fact that Plaintiff was partially successful in the recovery of her past and future medical expenses, that the Defendant should be liable for the costs occasioned by the hearing of the matter on 13 and 14 June 2022.

[48] In the premises, I make the following order:

1. Judgment is granted against the Defendant in the amount of R50 000.00 in respect of general damages.
2. The Plaintiff is entitled the amount of R 37 567.61 in respect of Past Medical expenses.
3. The Plaintiff is entitled to an amount of R 4 620.00 for future medical treatment in the form of six physiotherapy sessions at R 770.00 per session which equates to R 4 620.00.
4. Defendant to pay the qualifying and attendance costs relating to Ms. Koep.
5. Interest on the aforesaid amounts at the rate of 15.5% per annum, a *tempore morae*.
6. The Defendant is liable to pay Plaintiff's costs of suit on the Magistrates Court scale, except those costs occasioned by the postponements on 3 May 2022 and 23 May 2022 respectively.

---

27 See in general *Singh and Another v Ebrahim* (413/09) [2010] ZASCA 145 (26 November 2010)

D.S KUSEVITSKY

JUDGE OF THE WESTERN CAPE HIGH COURT

APPEARING FOR PLAINTIFF	**ADV. P EIA**
INSTRUCTED BY	**A BATCHELOR & ASSOCIATES**
APPEARING FOR DEFENDANT	**IN PERSON**