

In the matter between:

SONWABILE MTOKWANA

Plaintiff

and

REGINALD TROLLIP

Defendant

JUDGMENT

NHLANGULELA DJP

[1] These are action proceedings in which the plaintiff sues the defendant for payment of damages arising from an alleged biting by the dog belonging to the defendant. The plaintiff's claim is premised on *actio de pauperie*. Therefore, in terms of the case of *Loriza Brahman v Dippenaar* 2002 (2) SA 477 (SCA) the plaintiff bears onus to prove the existence of the ingredients of *actio de pauperie*, which are the following:

- (a) the defendant is the owner of the dog that bit the plaintiff;
- (b) the dog is a domesticated animal;
- (c) the dog acted contrary to the nature of domesticated animals generally (*contra naturum sui genesis*) in causing damages to the plaintiff;
- (d) the conduct of the dog caused the plaintiff's damage.

See: Harms: *Amler's Precedents of Pleadings* 9th Ed at pages 40-41.

[2] The task at hand is to determine the issue of liability as the issue of *quantum* was separated by agreement of the parties in terms of the provisions of Rule 33 (4) of the Uniform Rules of this Court.

[3] In this case the defendant pleaded that the plaintiff was bitten by certain dogs, not his dog. Therefore, the plaintiff is saddled with onus to prove all the ingredients of *actio de pauperie* against the defendant.

[4] On the one side, the plaintiff and Ms Phumeza Mnqwazana, his witness, testified. On the other side, the defendant and Mr Trevor Cornwell, his witness, testified.

[5] The background facts are that on 30 October 2013 and at Stinkwood Street, Hillcrest, Mthatha, the plaintiff was bitten by a dog(s) which caused him bodily injuries, and certain sequelae thereof. The defendant took the plaintiff to *St Mary's Hospital* on his bakkie and paid a fee in the sum of R400,00 that was required by the Hospital, which the plaintiff was unable to pay. The plaintiff was admitted and detained there for a period of approximately one week for the purposes of medical treatment.

[6] The plaintiff testified that he resides at No. 60 Rosewood Street, Hillcrest, Mthatha. On 30 October 2013 he left his place of employment to get home. It became necessary for him to walk past Stinkwood Street in order to reach home in Rosewood Street. The time was about 7:30 pm. It was already dark and raining. He had an umbrella in his possession. When he reached the section of Stinkwood Street that is adjacent to the house of the defendant, and just opposite the gate, which was open, a dog emerged from the gate, charged at him and upon contact with the dog he was felled into a pothole that was filled with rain-water. The dog persisted in its attacking mode as the plaintiff was lying on his back helplessly. He could only scream asking for help. The screaming drew the attention of the number of ladies whose attempt to remove the dog from the plaintiff was thwarted by the angry and growling dog that would not let loose of

the plaintiff. It took Mrs Trollip to come to the scene who managed to remove the dog from the plaintiff and ordered it back into her premises. According to the plaintiff the brutality of the attack and biting by the dog caused him serious bodily injuries on the legs, hands and chest. Having been relieved from the attack certain children, who had also been attracted to the scene helped him to call his friend by the name of Willie to rush to the scene. The defendant too, whose bakkie had been seen by the plaintiff parked in front of the gate, arrived to give assistance. After Willie had lifted the plaintiff from the ground and placed him into the defendant's bakkie, the defendant took the plaintiff to Dr Malinga's surgery and, thereafter, to *St Mary's Hospital* where he was admitted for a week. The plaintiff told the Court that there was never an occasion whilst he was lying down and bitten by the defendant's dog when one Mr Trevor Cornwell came to his rescue by pelting the dog with stones to chase it away.

[7] When the plaintiff was cross examined he denied that she told the magistrate of the criminal court during trial that he did not notice "from which homestead the dog was coming from." He agreed with the defendant that a group of women at the scene shouted "Baby-Boy, Baby-Boy!" (a reference to the defendant) to alert him that the plaintiff was being mauled by a dog(s). He denied that the defendant's bakkie was parked inside the premises of his house at the time when the dog was attacking him.

[8] With regard to the identity of the dog(s) that caused the damage the plaintiff was confronted with the record of criminal proceedings at page 2, line 3 which reads:

"I met a big dog which was approaching me from the front. This dog did not bark when I met it and it attacked and bit me. I did not notice from which homestead the dog was coming from." (underlining is for emphasis)

However, on the same page the following appears at lines 15 – 24:

"[The residents] intervened but in vain and they called the owner of the dog. A female person arrived and apparently, she was accused's wife. The lady arrived and took her dog

and left. The dog is a big one and had a big head. It was about +/- 60cm tall. The lady took her dog and did not come back, and the coloured people phone her, and she came back. The dog had no belt on its neck. The lady was called by coloured people, and they told her to take me to hospital. They asked her how her dog got out of the yard and why was she not tying the dog up as the dog had been biting people.”

[9] The plaintiff denied that the evidence he gave against the defendant in the criminal court exonerates the defendant from liability because it soon came to light that the dog that bit him came from the premises of the defendant.

[10] Ms Mnqwazana is the wife of the plaintiff. Other than to confirm that she got to the place after the dog(s) had bitten the plaintiff, and that she was present at *St Mary's Hospital* when the plaintiff was admitted in a ward to be treated for dog biting, the evidence of Ms Mnqwazana is based on the report given to her by Mrs Trollip, the wife of the defendant. She testified that she arrived at the scene after the plaintiff had been injured and when he was being taken into the vehicle of the defendant to be conveyed to hospital. At that time Mrs Trollip approached and informed her that the plaintiff had been bitten by a dog belonging to her and the defendant. Mrs Trollip told her that her dog had left the premises through the gate; and she had thereafter found it at the scene biting the plaintiff. At that time, there was also a group of women present at the scene. Although she met Mrs Trollip for the first time, Mrs Trollip introduced herself as the wife of the defendant, and that she worked at a hardware shop near Bucca Star Café, Mthatha. They later on exchanged cell phone numbers for the purposes of discussing about progress made by the plaintiff whilst under treatment at St Mary's Private Hospital, and to negotiate settlement of damages. Ms Mnqwazana also told the Court that the defendant gave her a lift from *St Mary's Hospital* to her house at Rosenwood Street. On the way the defendant made the undertaking to compensate the plaintiff for damages that were caused by his dog. Based on Mrs Trollip's report, Ms Mnqwazana denied the version of the defendant that it was not his dog that bit and caused the plaintiff serious bodily injuries.

[11] Mr Trevor Cornwell was the next witness to testify, doing so to bolster the defendant's case that it was not the dog of the defendant that attacked and injured the plaintiff. He told the Court that at about 7:30 pm, he and about four other persons were standing in the open space of the premises of Charmaine, his cousin. The cousin's house is situated in Stinkwood Street, Hillcrest, Mthatha, and is removed from the defendant's house. He stated that it was not yet dark. He heard dogs barking and screams emanating from the street. They picked up stones, left the premises and threw stones at 7-8 dogs, chasing them away towards the lower side of the street. Then he saw the defendant's dog jumping over the wall fence of the defendant's premises and threw stones at it to prevent it from attacking the plaintiff. The next thing he saw was the defendant driving out of his yard until he stopped it near the place where the plaintiff was lying down. When asked the question: "What about the keys?", he replied that he saw the defendant going back to his house and coming out with keys and unlocking the gate. Thereafter, he and his companions reverted to the house of his cousin.

[12] Under cross examination Mr Cornwell stated that the dog of the defendant emerged at a time when the 7-8 dogs were still mauling the plaintiff and, as it were, it assisted him in chasing the dogs away. He did not see the women standing across the street, opposite the defendant's house, and shouting: "Baby-Boy, Baby-Boy...!" He also stated that he did not see the defendant picking-up the plaintiff from the street.

[13] Mr Trollip, testified that at about 7:30 pm he and his wife heard dogs barking from outside, and then heard voices of people shouting his nick-name: "Baby-Boy, Baby-Boy...!" He and his wife decided to respond to the call by going outside. As the gate of his house was locked, he stood near the fence where he was informed by four women and few men standing not far from his house, that his dog had jumped over the wall. On that information he was prompted to get back into the house to fetch gate keys in order to open the gate. After doing so, his wife alone went out of the yard as he had to get back to the

house to fetch keys for his bakkie. On his way back he heard his wife asking him to hurry up to the street where the plaintiff was lying down. He then started the bakkie and drove it on the reverse gear out of the yard until he stopped it near the plaintiff. Realizing that the plaintiff was injured he lifted him up and placed him into the bakkie. The people who had called him to the scene were too old to assist him to carry the plaintiff into the bakkie. He drove the plaintiff to, firstly, Dr Malinga's surgery and, after that, to *St Mary's Private Hospital* where the plaintiff was admitted. He told the Court that he paid a sum of R400,00 to the Hospital because the plaintiff was unable to pay for himself. He denied that he had made an undertaking to pay for the damages as alleged by Ms Mnqwazana.

[14] The defendant told the Court that after his wife had opened the gate she shouted for his dog to return to the yard, and it responded. However, the defendant stated under cross examination that there was never an occasion during his presence on Stinkwood Street when he had to chase dogs away. But he later retracted this statement and said that he did see many dogs on the street.

[15] When Mr Trollip was asked about the type of a dog he was keeping in his yard, he stated that it was a domesticated animal, not a vicious dog such as a pit-bull. He stated further that his dog was kept by him for the purpose of preventing thieves who had been used to trespassing into his premises and stealing his diesel and motor vehicle tyres. For that purpose, he would routinely keep his dog under a chain during the day and remove the chain at night time.

[16] According to Mr Trollip the reason why he took the trouble of taking the plaintiff to the hospital was because he was merely rendering help to the plaintiff who could not go to hospital on his own due to dog-bite injuries he had sustained. He disavowed the claim made by the plaintiff's wife that he had done so because his dog had bitten the plaintiff.

[17] Mrs Trollip did not testify, yet she is the co-owner of the dog that allegedly bit the plaintiff.

[18] It is common cause that the parties have presented evidence of conflicting versions; the plaintiff stating that the vicious dog belonging to the defendant mauled him. On the other hand, the defendant's case is that, the plaintiff was injured by dogs that did not belong to him. For this reason, the Court should assess the credibility and reliability of each of the witnesses who testified and weigh that up against the overall probabilities of the entire evidence that was led. This approach is articulated in the cases of *Stellenbosch Farmers' Winery Group Ltd and Another v Martell Et Cie and Others* 2003 (1) SA 11 (SCA) para [5]; *Santam Bpk v Biddulph* [2004] 2 All SA 23 (SCA) at para [6] and *National Employers General Insurance v Jagers* 1984 (4) SA 437 (E) at 440D-G.

[19] As I understand the direct evidence of the plaintiff, the dog that bit him emerged from the premises of the defendant and it attacked him from the front. He had not provoked it, and at the time there were no dogs present in Stinkwood Street. His belief that the dog belonged to the defendant is shown in lines 15 – 24 of the criminal record and it is confirmed by the words and conduct of the defendant's wife. The evidence that women who were present on the Street called for the defendant to stop his dog from attacking the plaintiff is not neutral. It corroborates, inferentially, the fact that the dog was generally known to be the property of the defendant. The evidence of the defendant does not discredit the plaintiff's evidence with regard to the identity of the dog that caused harm to the plaintiff. On his own showing, his wife shouted for his dog that was outside the yard and occupying Stinkwood Street, to come back into the premises of the defendant. Although the defendant did not see what his dog did in the street, the shouting for his intervention alerted him to the presence of his dog in the street at all material times relevant to the dog attack upon the body of the plaintiff. The attempt to impeach the credibility of the plaintiff by the statement he made in the magistrates' court did not succeed because, having denied that he did not know where the dog came from, he explained in this trial that the dog came from the premises of the defendant. His explanation is supported by the evidence set out

on page 2, lines 15-24. I do not see contradictions between the evidence adduced in the magistrates' court and in this Court.

[20] The gist of the evidence adduced by Ms Mnqwazana is that a report given to her by Mrs Trollip implicated a dog belonging to the defendant. Her evidence established the fact that Mrs Trollip is the wife of the defendant. The evidence of the defendant does confirm the presence of his wife at Stinkwood Street, as well as that his wife called his dog back to the yard after opening the gate and taking a look at the place where the shouting ladies had drawn her attention to, the place where the plaintiff lay into the pothole that was filled with water. According to Ms Mnqwazana the report was given to her by Mrs Trollip that she saw her dog biting the plaintiff and she was the person who removed it from the plaintiff. This evidence is not inadmissible hearsay in nature by reason that the provisions of s 3 (c) of the Law Of Evidence Amendment Act 45 of 1988 permit the Court to admit the evidence of Ms Mnqwazana in the interest of justice. The Court was not told by the defendant that his wife was impeded from testifying in order to contradict the evidence that she saw her/defendant's dog biting the plaintiff. It would be prejudicial to the plaintiff, and the Court, to exclude the hearsay evidence of Ms Mnqwazana in the circumstances. Ineluctably, the inference to be drawn is that Mrs Trollip saw her dog biting the plaintiff.

[21] The defendant's contention is that because he did not see his dog biting the plaintiff, therefore, the plaintiff's evidence that he was bitten by his defendant's dog should be rejected. For this theory to be believed, he chose to introduce Mr Cornwell to supplement his evidence. But the evidence of Mr Cornwell is not cogent. The contradictory evidence of the defendant concerning presence or absence of many dogs in the street does not make his poor evidence any better.

[22] Mr Cornwell's evidence does not accord with the general probabilities of this case. He told this Court that when he left the premises of his cousin he, and 4 unidentified persons, threw stones at 7-8 dogs chasing them away from the

plaintiff until they disappeared down the street. He stated further that he saw the plaintiff's dog jumping over the wall fence at the same time that 7-8 dogs were biting the plaintiff. He also stated that the defendant's dog assisted him by chasing the dogs away. Although the evening of 30 October 2013 was, according to him, not dark he did not see the people who called the defendant to the scene. He also did not see Mrs Trollip removing the dog from the plaintiff and it returning to the yard. That the defendant's dog did not reach the plaintiff is negated by the evidence that the defendant's dog chased 7-8 dogs down the street; the evidence of the defendant that he did not see dogs in the street; and the evidence that Mrs Trollip removed the dog from the plaintiff contradict the evidence of Mr Cornwell and, generally, impugn his credibility and the reliability of his evidence.

[23] It appears that Mr Cornwell arrived at Stinkwood after the plaintiff had been attacked by the defendant's dog. Had that not been the case, Mr Cornwell would have seen Mrs Trollip ordering the dog back to the yard (the version of the defendant). For this reason, the version of the defendant that his wife called the dog back to the yard cannot co-exist with the version of Mr Cornwell that the dog assisted him to chase away 7-8 dogs down the street. Based on this material contradiction in the defendant's case, the evidence of Mr Cornwell that he saw the defendant's dog jumping over the wall fence cannot be sustained. The defendant, and the plaintiff, told the Court that the evening was dark. Mr Cornwell said it was not dark. This contradictory evidence does mean that his ability to see defendant's dog biting the plaintiff was compromised by darkness. I do not even believe Mr Cornwell's evidence that he saw the defendant fetching keys is correct given that, according to the defendant, the gate was still closed when he went to fetch the keys. In my opinion the entire evidence of Mr Cornwell bears the hallmarks of a made-up story and it, therefore, falls to be rejected.

[24] It was not available to the defendant to say that his dog did not reach the plaintiff because he and his wife heard screams from the street the people shouted to attract his attention towards the plaintiff who was lying on the street, and bitten by a dog as his wife asked him to hurry up to the scene, and that his wife shouted for his dog to leave the street and return to the yard.

[25] In my opinion, the evidence of the plaintiff is simple and straightforwardly true. That includes the identification of the dog and the uncontradicted evidence of Ms Mnqwazana that Mrs Trollip admitted to her that the dog that bit the plaintiff was the property of the defendant. The evidence of the defendant and Mr Cornwell is not probable if regard is had to the acceptable evidence of the plaintiff that he screamed for help after the sudden mauling by the defendant's dog that had ensued. The women and men who alerted the defendant of the damage caused by his dog must have been triggered by the dog attack that had already ensued. An analysis different from that would be completely out of touch with the probabilities of this case.

[26] In this case the evidence establishes all the essential elements of *actio de pauperie*. A finding that the defendant is liable does not depend on existence of fault on his part for the damage caused by his dog. The case of *O'Callaghan NO v Chaplin* 1927 AD 310, applied in the case of *Van Meyeren v Cloete* 2021 (1) SA 59 (SCA), is in point. More may be said about the domesticated dog of the defendant. It is quite clear from the evidence that the dog was not used as a pet. It provided security required by the defendant, for use by the owner, against thieves. In order to strengthen the fighting capabilities of his dog, the defendant chained it during the day and released it to patrol the premises during the night. It is common knowledge that even domesticated dogs that are chained and/or tethered for long periods can become highly aggressive. The defendant's dog is not an exception. The premises of the defendant were fenced by a building block-wall. The gate was kept under lock and key at all times. Evidently, the gate was open when the dog, without provocation, sneaked out of the yard and

pounced at the plaintiff as he was walking past the house. For the domesticated dog that the defendant's dog obviously was, the behaviour exhibited by it on Stinkwood Street during the evening of 30 October 2013 was *contra naturam sui generis*. The existence of such behaviour attracts liability on the part of the owner for the damage caused by his dog. The rationale for liability of the owner is stated in *Van Mayeren v Cloete* in para [33] as follows:

“[33] The underlying reason for 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, it is appropriate for the owner to bear the responsibility for that harm. Dekker, in a note to the passage from Van Leeuwen's *Commentaries* dealing with the *actio de pauperie*, said:

‘... there is no absurdity in obliging him to make compensation whose animal has caused the damage, or who has excited and goaded it on to the damage of another ...’.

This rationale is almost precisely the same as that of Innes CJ and Kotzé JA 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. In other countries, hampered by the English common law *scienter* rule, that position has been enshrined in statute for nearly two centuries.”

[27] In the result the following order shall issue:

1. The defendant be and is hereby held liable to pay the plaintiff such sum of damages as may be proved at the trial in due course.
2. The defendant to pay costs of the trial on the liability issue.

Z. M. NHLANGULELA

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

MTHATHA

Attorney for the plaintiff : Mr Pangwa
c/o Caps Pangwa & Ass
MTHATHA.

Attorney for the defendant : Mr A.S. Zono
c/o Messrs A.S. Zono & Ass
MTHATHA.

Heard on: 09, 10 and 11 November 2021

Delivered on: 30 November 2021