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

JUDGMENT

Not Reportable

Case No: 17913/2020

In the matter between:

DANIEL CEBO BOTTOMAN

PLAINTIFF

and

NIZAAM ROSSIE

FIRST DEFENDANT

SHIYAAM ROSSIE

SECOND DEFENDANT

Neutral citation:

Coram: Mgengwana; AJ

Heard: 14 May 2026

Delivered electronically: The judgment is handed down electronically by circulating to the parties or legal representatives by email. The date for the handing down of the judgment is deemed to be, 2 September 2026.

Summary: Delict – Actio de pauperie- Strict Liability - Defence thereto – Onus to begin - Negligence.

ORDER

- 1 Plaintiff's claim is dismissed with costs inclusive of counsel's fees on Scale B.

JUDGMENT

MGENGWANA; AJ

Introduction

[1] This is an *actio de pauperie* that has been brought by the Plaintiff for damages allegedly suffered by him as a result of being bitten on the mouth by a dog named King owned by the Defendants on the Day of Reconciliation

of 2018 while he was at or near 2[...] T[...] Street, Thornton, Western Cape (the incident).

[2] In seeking to persuade this Court to find the Defendants liable, the Plaintiff pleaded as follows:

(a) That at the time of the incident, King acted contrary to the nature of domesticated dogs.

(b) That in the event of this Court finding that King had not acted contrary to the nature of domesticated dogs, then in that event, the Plaintiff alleges the incident was caused by the negligence of the Defendants in that they:

(i) Failed to ensure that the dog remained inside the premises situated at 2[...] T[...] Crescent, Thornton in the Western Cape (the premises).

(ii) Failed to keep King away from the boundary wall, when they knew the dog was able to jump higher than the wall.

(iii) Failed to increase the height of the wall when they knew that the height of the wall was insufficient in keeping King within the boundaries of their premises.

(iv) Failed to avoid the incident when, by exercise of reasonable care, they could and should have done so.

[3] In response to Plaintiff's claim, the First Defendant pleaded he is the owner of King, a watchdog together with two other dogs. Although the First Defendant admitted that the Plaintiff was bitten by King, but he denied the rest of the allegations outlined above and in amplification of that denial he pleaded as follows:

(a) That the incident took place when the Plaintiff, without permission and consent from the Defendants and without him have the legal right

to do so, entered the premises of the Defendants by protruding his head over the boundary wall that is between the properties of the parties to this litigation (the parties), and looking into the property of the Defendants.

(b) That the Plaintiff was intoxicated and appeared to intimidate the dogs of the First Defendant.

(c) That the Plaintiff's head was protruding onto the property of the Defendants, while the Plaintiff saw the First Defendant's dogs in the vicinity and next to the boundary wall.

(d) That it was at this time that King bit the upper lip of the Plaintiff while the Plaintiff's head was inside the property of the Defendants.

[4] The First Defendant accordingly denied that King acted contrary to the nature of his class. The First Defendant averred further that the Plaintiff (whenever he was intoxicated) had a habit of leaning over the property of the Defendants despite being warned continuously and on numerous occasions by the First Defendant not to do so.

Preliminary issue

[5] At the beginning of hearing, there was a dispute between the legal representatives of both parties as to which party had the onus and the duty to begin. The Plaintiff therefore motioned an application in terms of Rule 39(11) of the Rules of this Court which provides as follows:

“Either party may apply at the opening of the trial for a ruling by the court upon the onus of adducing evidence, and the court after hearing argument may give a ruling

as to the party upon whom such onus lies: Provided that such ruling may thereafter be altered to prevent prejudice”

[6] In support of Plaintiff’s application, Plaintiff’s counsel submitted that because the First Defendant had already admitted in his plea that the Plaintiff was bitten by a domesticated dog owned by him, *actio de pauperie* has been established by the Plaintiff. If the First Defendant believes that he has a defence against Plaintiff’s claim, then the onus of establishing this defence rests on him as an owner of the animal. According to Plaintiff’s counsel, this is in line with the court’s findings in *Da Silva v Coetzee*¹ and which Boshoff J found as follows:

“The *onus* is *prima facie* discharged when the plaintiff has proved that his wife was attacked and bitten by the dog without apparent cause. To escape liability the defendant, as the owner, must then prove that it was the fault of the plaintiff’s wife or that the dog had been provoked by some extrinsic cause. If the defendant fails to prove that, then the plaintiff must succeed.”

This Court notes that this approach was also followed by our Supreme Court of Appeal in *Brahman and Another v Dippenaar*² and *Van Meyeren v Cloete*³.

[7] In opposition to the above counsel for the Defendant submitted that the *actio de pauperie* has not been established as it is disputed that King acted contrary to the nature of its class. She submitted further that even if it is alleged that the question of *res ipsa loquitor* arises in this matter, the duty to begin and onus does not shift. In support of her last submission, this Court

¹ *Da Silva v Coetzee* 1970 (3) SA 603 (T) at 604A - B

² *Brahman and Another v Dippenaar* 2002 (2) SA 477 (SCA) at para 20

³ *Van Meyeren v Cloete* 2021 (1) SA 59 (SCA)

was referred to the case of *Goliath v MEC for Health, Eastern Cape*⁴ in which Ponnan JA found as follows while writing for the majority.

“[10] Broadly stated, *res ipsa loquitur* (the thing speaks for itself) is a convenient Latin phrase used to describe the proof of facts which are sufficient to support an inference that a defendant was negligent and thereby to establish a *prima facie* case against him. The maxim is no magic formula (*Arthur v Bezuidenhout and Mieny* 1962 (2) SA 566 (A) at 573E). It is not a presumption of law, but merely a permissible inference which the court may employ if upon all the facts it appears to be justified (Zeffert & Paizes ‘The South African Law of Evidence’ 2ed at 219). It is usually invoked in circumstances when the only known facts, relating to negligence, consist of the occurrence itself (see *Groenewald v Conradie*; *Groenewald en Andere v Auto Protection Insurance Co Ltd* 1965 (1) SA 184 (AD) at 187F) - where the occurrence may be of such a nature as to warrant an inference of negligence. The maxim alters neither the incidence of the onus nor the rules of pleading (*Madyosi v SA Eagle Insurance Co Ltd* 1990 (3) SA 442 (A) at 445F) – it being trite that the onus resting upon a plaintiff never shifts (*Arthur v Bezuidenhout and Mieny* at 573C). Nothing about its invocation or application, I daresay, is intended to displace common sense. In the words of Lord Shaw in *Ballard v Northern British Railway Co* 60 Sc LR 448 ‘the expression need not be magnified into a legal rule: it simply has its place in that scheme of and search for causation upon which the mind sets itself working’ (cited with approval in *Naure NO v Transvaal Boot and Shoe Manufacturing Co* 1938 AD 379 and *Arthur v Bezuidenhout and Mieny* at 573F-G).”

⁴ *Goliath v MEC for Health, Eastern Cape* 2015 (2) SA 97 (SCA)

[8] In *Muller v De Waal and Another*⁵ Fortuin J also stated the following: (15448/17) [2023] ZAWCHC 173

“[17] The plaintiff bears the onus of showing that Bentley acted contrary to the nature of an animal of its kind. This onus is *prima facie* discharged once the plaintiff shows that she was bitten without apparent cause.”

[9] The above submissions having been made, this Court was called upon to make a determination in terms of Uniform Rule 39(11) as to which party has a duty to begin in the proceedings. Subsequently, this Court made a determination that the Defendant is the one who has the duty to begin as he is the one who now has the *onus* to prove his defence against the *actio de pauperie* as the Plaintiff has made out a *prima facie* case on the papers in that he alleged that he has been bitten by King, a domesticated dog owned by the First Defendant for no apparent cause. It must be remembered that the First Respondent has already admitted in his plea that the Plaintiff was indeed bitten by King who is owned by him. It must also be kept in mind that in an *actio de pauperie* the liability of the owner is based on ownership alone and fault on his/her part is not a requirement, strict liability is imputed to him/her by virtue of being an owner of a domesticated animal. This is not a shifting of an *onus*; the decision is based on the acceptance of the averment that the Plaintiff has made out a *prima facie* case against the Defendant. After the ruling, the First Defendant was called to the witness box to give evidence.

⁵Muller v De Waal and Another (15448/17) [2023] ZAWCHC 173

The evidence

[10] In addition to what has already stated in his plea, the First Defendant testified as follows:

(a) The incident took place on his birthday, so he was not present at home when the Plaintiff was bitten by King as he had been taken out by family for breakfast, so he only saw the incident on a video footage which was presented and played in court without any objection from the Plaintiff. The footage did not have an audio, but it clearly showed the Plaintiff's head protruding into the yard of the Defendants while the entire body of the Plaintiff was in his own yard. While the head of the Plaintiff was still protruding, King could be seen jumping upwards and contacting the face of the Plaintiff. It was at this point that the Plaintiff was bitten by King on his mouth.

(b) Before the incident, he had spoken to the Plaintiff on more than one occasion wherein he had requested him to refrain from seeking to talk to his dogs or/and play with them because every time he does so the dogs get agitated and start barking loudly and thereby making noise. In these instances, he would have no option but to call the dogs into the house to prevent them from making noise and being more agitated. At some point he had to tell him to leave his dogs alone and should not concern himself with them as they are not his and therefore, none of his concern.

[11] The Second Defendant testified as follows:

(i) That King was bought by the First Defendant as a watchdog that was regarded as a family member of the Defendants' household. King is

calm but would bark if there were people at the gate, if he was hungry, needed something or when Plaintiff came to the perimeter wall.

(ii) That the tendency of the Plaintiff to come to the perimeter and seek to play with the dogs occurred in the afternoons while Plaintiff was drinking alcohol and playing loud music. She said on more than one instance the First Defendant had asked him not to interfere with the dogs as doing same worked the dogs up. She also said that King had a good relationship with the people in the house and would listen to the instructions of the First Defendant.

(iii) According to her, when they returned from breakfast, they were incorrectly told by the wife and the son of the Plaintiff that King had jumped into their yard, bit the Plaintiff and jumped back into his yard.

[12] After the Defendants led their evidence and Defendants' counsel closed Defendant's case, counsel for the Plaintiff asked for judgement in Plaintiff's favour without closing her case. She submitted that Uniform Rule 39(6) permits her to do so. This Court stood the matter down to enable the parties to make submissions supported by relevant authority in this regard. After the submissions were made the Court adjourned the matter to the next day for a consideration and the determination on issue. The Court is very much indebted to both counsels for the well-considered and well researched submissions in this regard.

[13] As a point of departure, this Court had to consider Rule 39(6) which provides as follows:

"At the close of the case for the plaintiff, the defendant may apply for absolution from the instance, in which event the defendant or one advocate on his behalf may

address the court and the plaintiff or one advocate on his behalf may reply. The defendant or his advocate may thereupon reply on any matter arising out of the address of the plaintiff or his advocate.”

Prima facie, absolution from the instance, is an option that is only open to the Defendants but not the Plaintiff.

[14] In the Second Edition of Erasmus Superior Court Practice the following is stated at D1–534A:

“If the defendant adduces his evidence first, because he bears the burden of proof or because, by reason of an admission or presumption, the duty to adduce evidence is on him, there can be no question of absolution from the instance being granted. If the defendant fails to discharge the burden of proof or the duty to adduce evidence, the proper order would be judgment for the plaintiff. If onus is on the defendant, the court cannot, after he has led his evidence, give judgment for the plaintiff unless and until the plaintiff closes his case. Earlier cases in which absolution was granted in such circumstances must now be regarded as incorrect.”⁶

[15] In *Government Employees’ Pension Fund v VR & L Rental (Pty) Ltd t/a Dros Fried Chicken*⁷ and Basson J held as follows therein:

“[13] Absolution from the instance may only be granted at the end of a plaintiff’s case if there is no sufficient evidence upon which a reasonable person could find for him or her. The defendants (the respondents in this matter) would only have been entitled to judgment if they discharge the burden of proof. In such circumstances the judgment would be a dismissal and not an absolution of the instance. If a defendant fails in discharging the onus, then the plaintiff will be entitled to judgment. As the court affirmed in *Ramnath v Bunsee*:⁴ “The truth turns upon para (c) of section 48 of the Magistrate’s Court Act. This reads: The court may, as a result of the trial of an action, grant absolution from the instance, if it appears to the court that the evidence does not justify the court in giving judgment for either party” Speaking of

⁶ Van Loggrenber, Erasmus Superior Court Practice 2 ed vol 2 (2023) at D1 – 534A

⁷ *Government Employees Pension Fund v VR & L Rental (Pty) Ltd GP (A203/2020) [2021] ZAGPPHC 675*

the identical section 46 (c) of the 1917 statute, Matthews, J., in *Subakka v Moonigadu*, supra said: "The provisions of that action do no more than state the course which should be observed in all courts where a judicial officer is unable to satisfy himself on which side truth lies" Paras. (a) and (b) of section 48 relate to judgement for the Plaintiff and the Defendant respectively, in so far as he has proved his case. As to paragraph (c), clearly if the evidence does not justify the court in giving judgment for the Defendant because he has not proved his case, when the onus is upon him to do so, that very fact justifies the court in giving judgment for the Plaintiff, having regard to the logical principles relating to onus. It cannot be said that the evidence does not justify the court in giving judgment for the Plaintiff, in those circumstances. Consequently there is no room for an absolution'.

[14] Similarly, in *Sentraalwes Personeel Ondernemings (Edms) BPK v Nieuwoudts*, the Court held:

"Die laaste grond waarop aansoek om absolusie gedoen is, was dat daar weers wanvoorstelling deur die eiser se agent aangaande die betekenis van klousule 21 van die kontrak geen wilsooreenstemming end us geen kontrak tussen die partye tot stand gekom het nie. Dis n feitevraag waarna die bewyslas op die verweerderes gerus het...Daar was dus geen ruimte vir die bevel van absolusie van die instansie nie. Sien *Arter v Burt* 1922 AD 303 te 306. Die Landdros behoort dus die aansoek om absolusie van die instansie van die hand te gewys het. Die appel slaag gevolglik met koste wat insluit die koste van twee advokate".

[16] In *Underberg Dairy (Pty) Ltd v The Dairy Boys (Pty) Ltd and Others*⁸, Motha AJ found as follows:

"12. To the extent that the Appellant insisted on its position being analogous to the position of a Defendant applying for an absolution from the instance at the close of a Plaintiff's case, it is incorrect.

⁸ *Underberg Dairy (Pty) Ltd v The Dairy Boys (Pty) Ltd and Others* (193/2021) [2022] ZAGPPHC 894

13. To further clarify the legal position, I can do no better than to refer to the Court a quo's judgment on leave to appeal, in paragraph 3 thereof, where it was stated:

"It is of utmost importance to point out that if the Defendant adduces evidence first, either because he bears the burden of proof or because by reason of an admission or presumption like in casu, the duty to adduce evidence is on him, there can be no question of absolution from the instance being granted. See *Scheepers v Video & Telecommunications Services* **1981 (2) SA 490E** at 491H-492A; *Arter v Burt* **1922 AD 303** at 306 and *Hirschfeld v Espoch* **1937 TPD 19**. Therefore, absolution from the instance when the burden is on the Defendant is an unviable proposition."

[17] The genesis of the above findings is the decision of Van den Heever who found as follows in *Schuster v Guether*⁹:

"Mr. Goldblatt wishes to move for judgement without closing his case. This I think he cannot do; it is entirely within the discretion of the plaintiff as to whether, and if so, what evidence he wishes to tender. He may, therefore, close his case at this stage and move for judgement, but it seems to me that he cannot ask the Court to judge on a substantial issue between the parties before the Court is in possession of all the evidence which the parties propose to tender. I rule therefore that it is not competent for the plaintiff to move for judgement without closing his case."

[18] After considering submissions made by the respective counsels and the above authority which was brought to this Court's attention by Ms. Sprighton, counsel for the Defendants, this Court had no alternative but to dismiss Plaintiff's application for judgement without closing his case. After the above, dismissal counsel for the Plaintiff then proceeded to close her case without leading the evidence of the Plaintiff and requested judgement in favour of the Plaintiff which judgement was then reserved.

⁹ *Schuster v Guether* 1933 SWA 114 at page 115 - 116

Applicable legal principles

[19] The following is said at paragraph 32 of Volume 15, Third Edition of LAWSA about the *actio de pauperie*:

“The *actio de pauperie* is a form of strict liability which has its origin in Roman Law. It was thought that the action had been abrogated by disuse, but the Appellate Division confirmed its existence in *O’Callaghan v Chaplin*. In *SAR&H v Edwards De Villiers* CJ noted: “The action lies against the owner in respect of harm (*pauperies*) done by domesticated animals, such for instance as horses, mules, cattle, dogs, acting from inward excitement (*sponte feritate commota*). If the animal does damage from inward excitement or, as it is also called, from vice, it is said to act *contra naturam sui generis*, its behaviour is not considered such as is usual with a well-behaved animal of the kind”¹⁰

[20] In the same paragraph the following is said:

“In modern law there are six essential elements of the action:

- (a) harm,
- (b) conduct by a domesticated animal;
- (c) a causal link between conduct and harm;
- (d) the defendant must have been the owner of the animal at the time of the injury;
- (e) the animal must have acted contrary to the nature of its kind – *contra naturam sui generis*; and
- (f) the animal must have acted from inward excitement or vice – *sponte feritate commota*.”¹¹

[21] In the same paragraph the following is said:

“The following defences are available:

¹⁰ 56 Lawsa 3 ed para 32 referring to *O’Callaghan v Chaplin* 1927 AD 310 and *SAR&h v Edwards* 1930 AD 3

¹¹ Ibid

That the plaintiff was to blame for the animal's action; there was negligence on the part of the controller; someone else or something else provoked the animal, that is, it did not behave from inward excitement or vice; the Plaintiff was not lawfully on the premises; and *volenti non fit iniuria*.”¹²

[22] In *O’Callaghan NO v Chaplin*, Innes CJ (with De Villiers concurring) gave the following description of the *actio de pauperie*:

“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. The same principle applies to injuries inflicted by a dog on another animal, and to injuries inflicted by any animals falling within the operation of the pauperien law. It is confined of course to cases where liability is based upon ownership alone.”¹³

[23] In *SAR & H v Edwards*, De Villiers JA stated the following:

“Dating back as this form of remedy does to the most primitive times, the idea underlying the *actio de pauperie*, an idea which is still at the root of the action was to render the owner liable only in cases where so to speak the fault lay with the animal. In other words for the owner to be liable, there must be something equivalent to *culpa* in the conduct of the animal.”¹⁴

[24] Wallis JA found as follows in *Meyeren v Cloete*:

“Mr van Meyeren does not dispute that the requirements of pauperien liability were satisfied. He sought to escape liability on the basis that what occurred here was not his fault. But absence of fault has never been a basis for avoiding pauperien liability. It proceeds on the basis of strict liability arising from ownership of the animal that

¹² 57 Lawsa 3 ed para 32

¹³ *O’Callaghan NO v Chaplin* 1927 AD at 329

¹⁴ *South African Railways and Harbours v Edwards* 1930 AD at 10

caused the harm. Absence of fault is a ground for resisting Aquilian liability, not a claim under the *actio*."¹⁵ (My underlining)

[25] Wallis JA also made the following finding in the same case:

"[20] In *O'Callaghan NO v Chaplin* two circumstances were identified in which the owner would not be liable. The first was where the injured party was in a place where they were not entitled to be. The obvious example would be that of a housebreaker bitten by a watch dog. Another would be where the animal was chained to restrain it and the injured party ventured within reach. However, in general, if the harm occurred in a public place, such as a public street, the owner would be liable. The second exception was the relatively obvious one where the injured party or a third party provoked the attack by goading or provoking the animal. The application of these defences where children are involved may create problems, for example, where a child enters a neighbouring garden to retrieve a lost ball, or where one child teases a dog and the dog bites another child. I would also be hesitant to say that the homeowner was free from liability because the intruder was in the wrong place, if a watchdog savaged the intruder in the way these three dogs savaged Mr Cloete. However, these problems do not arise in this case and can be left for consideration when such a case arises."¹⁶

[26] The classic test for negligence is articulated by Holmes JA in *Kruger v Coetzee* 1966 (2) SA 428 (A) as follows:

‘For the purposes of liability *culpa* arises if –

(a) a *diligens paterfamilias* in the position of the defendant –

(i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and

(ii) would take reasonable steps to guard against such occurrence; and

¹⁵ Van Meyeren v Cloete 2021(1) SA 59 (SCA)

¹⁶ Ibid

(b) the defendant failed to take such steps.’¹⁷

[27] In *Pillay v Krishna*¹⁸ at 951-2, a three-legged approach was stated as follows with regards to burden of proof:

‘The first principle in regard to the burden of proof is ... If one person claims something from another in a Court of law, then he has to satisfy the Court that he is entitled to it. But there is a second principle which must always be read with it ... Where the person against whom the claim is made is not content with a mere denial of that claim, but sets up a special defence, then he is regarded *quoad* that defence, as being the claimant: for his defence to be upheld he must satisfy the Court that he is entitled to succeed on it ... But there is a third rule, which Voet states in the next section as follows: “He who asserts, proves and not he who denies, since a denial of fact cannot naturally be proved provided that it is a fact that is denied and that the denial is absolute.’

[28] All that the Defendants have to show in this action is that the Plaintiff was bitten by King due to his own negligence or due to provocation or some other extrinsic cause.¹⁹

Submissions made on behalf of the parties

[29] In her written and verbal submissions counsel for the Plaintiff submitted that in their evidence, the Defendants dismally failed to prove provocation, trespassing and voluntary assumption of risk as these words are

¹⁷ *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E-F.

¹⁸ *Pillay v Krishna* 1946 AD 946 at 951-2

¹⁹ *Muller v De Waal and Another* at par 17

used in law reports and law textbooks. To advance her argument in this regard, she posited that none of the Defendants used the words “provoke or provocation” when they were presenting their evidence in court or in their plea. So, the defence of provocation is not available to the Plaintiffs.

[30] Counsel for the Plaintiff submitted further that the Plaintiff had instead used the word “intimidate” to describe the conduct of the Plaintiff shortly before being bitten by King. According to counsel for the Plaintiff “intimidation” is not a known defence to the *actio de pauperie* because one cannot “intimidate” an animal. In fact, according to counsel for the Plaintiff, imputing the word “intimidate” to an animal would constitute the impermissible attribution of human emotions to King as was found in *Van der Westhuizen v Burger*.²⁰ So intimidation cannot come to Defendants assistance as well according to counsel for the Plaintiff.

[31] Counsel for the Plaintiff also submitted that the Plaintiff cannot be accused of trespassing for merely protruding his head into the Defendants yard whilst his body was firmly in Plaintiff’s yard. She also submitted that the defence of *volenti non fit iniuria* is also not available to the Defendants as they have dismally failed to satisfy the requirements thereof.

[32] On the other hand, counsel for the Defendant submitted first and

²⁰Van der Westhuizen v Burger 2018 (2) SA 87 (SCA) para 18.

foremost that the evidence presented by the Defendants in this Court should be accepted because it has not been controverted as no evidence was presented to court by the Plaintiff or on his behalf.

[33] She also submitted that Plaintiff's conduct was evidently negligent as he had been previously warned not to put his head over the boundary wall as he may be bitten by the dogs. The Plaintiff had also been the Defendants' neighbour for over a year and he knew that the First Defendant had large dogs. The Plaintiff had never been introduced to the dogs and had only ever been received aggressively by King.

[34] She also submitted that the Plaintiff, having full knowledge of the potential harm that may be caused by King, an American bulldog which is a guard dog, and acting in appreciation of the risk, voluntarily assumed the risk of harm when he protruded his head into the Plaintiff's yard and accordingly cannot claim in terms of the *actio de pauperie*.

[35] She submitted further that counsel for the Plaintiff made much of the fact that the word "provoked" was never used in Defendants' pleadings. According to her, this is neither here nor there, as evidence that demonstrated the alleged provocation was presented to court. It is evident from the pleadings, as well as the joint practice note, that the Defendants relied on a defence of provocation.

Application of the Law to the facts

[36] As a point of departure, this Court has taken judicial notice of the fact that the Plaintiff had decided not to testify in his case even though he was present in court and had listened to the presentation of Defendants' evidence. His decision not to testify in court despite hearing what was said about what transpired on the date of the incident and about his behaviour in general towards the dogs after allegedly consuming intoxicating liquor has resulted in this Court drawing an adverse inference against him. Therefore, the evidence that that was presented to this Court by the Defendants is accepted as it was not controverted. The findings that will be made by this Court will therefore be based on this evidence and the dictates of trite law.

[37] The salient facts of this case are that the incident that is the subject of this litigation took place when the Plaintiff protruded his head into the yard of the Defendants. These facts are corroborated by a video clip of the incident that was played in court. The *viva voce* evidence and the video clip clearly show that Plaintiff's conduct of protruding his head into the yard of the Defendants was the precursor to the incident.

[38] After viewing the aforementioned video clip, the question of whether Plaintiff's conduct constituted provocation or not pales into insignificance as what is important is that it is Plaintiff's conduct that invited a reaction from King and it is this reaction that has caused Plaintiff's harm. Plaintiff's conduct when he decided to protrude his head into his neighbour's yard for no apparent reason is exactly what Judge Fortuin refers to as "some other extrinsic conduct" in the case of *Muller v De Waal*. This conduct does not have to be labelled as "provocation" or "trespassing" to be recognised in law

as these labels do not assist the court in its endeavour to establish whether the Defendants have established a defence or not to the *actio de pauperie*. Having said the above, this Court therefore finds that the First Defendant has succeeded in proving that King was reacting to Plaintiff's haphazard protrusion of his head into Defendants' yard when he bit his mouth off.

[39] Moreover, the submission made by Plaintiff's counsel that imputing the word "intimidate" to an animal would constitute the impermissible attribution of human emotions to an animal was a finding made in paragraph 18 of *Van der Westhuizen v Burger* is incorrect. Swain JA was making reference to the idea that an animal can harbour a grievance when he made that finding.

[40] This Court also finds that the incident that is the subject of this litigation was solely caused by the sole negligence of the Plaintiff. It cannot be in dispute that the incident would not have taken place if the Plaintiff had not decided to poke his head into the Defendant's yard. The incident would have also not taken place if the Plaintiff had heeded First Defendant's warning that he should refrain from seeking to concern himself with the wellbeing of the dogs as the dogs are none of his concern. Even if the Plaintiff was trying to establish a close relationship with the dogs, he should have, as a reasonable person, recognised that his overtures were not being reciprocated with friendly gestures by the dogs and he should have kept a distance from them. His failure to do so portrayed a high level of recklessness on his part.

[41] Lastly the Plaintiff who knew that the Defendants dogs, which were guard dogs, would always be agitated and bark loudly when the Plaintiff approached the border of the two houses to interact with them. He therefore

voluntarily assumed the risk of being bitten by the dogs when he decided to protrude his head into the Defendants yard while knowing very well that agitated dogs that bark loudly have the capacity to inflict injury on one. The Plaintiff can therefore not blame anyone for voluntarily assuming the risk of being bitten by King.

[42] Based on what this Court has found in the preceding paragraphs, this Court finds that the Defendants have been successful in mounting several defences against the *actio de pauperie* instituted by the Plaintiff.

[43] In the alternative to the *actio de pauperie*, the Plaintiff instituted a claim against the Defendant based on *lex aquilia*. A litigant who seeks to rely on *lex aquilia* needs to prove fault on the part the alleged wrongdoer to succeed with his or her claim. The Plaintiff can however not succeed with his claim as he has failed to discharge the onus that has been placed on him as he has failed to testify in court in order to prove fault on the part of the Defendants.

[44] In the result I make the following order:

- (a) Plaintiff's claim is dismissed with costs inclusive of counsel's fees on Scale B.

TJ MGENGWANA
Acting Judge of the High Court

APPEARANCES:

For the plaintiff: Ms. R. Van Wyk

Instructed by: DSC Attorneys

Mr. J. Potgieter

For the defendant: Ms. J.V. Sprighton

Keith Sutcliffe & Associates Inc.

Mr. K.J. Sutcliffe