In the High Court of South Africa
(South Eastern Cape Local Division)

Case No 1475/2004
Delivered: **31/10/06**
Reportable

In the matter between

JOHAN THYSSE Plaintiff

and

PHILIP ROEDOLF BEKKER Defendant

SUMMARY: *Actio de pauperie* – dog bite – dog held to have acted *contra naturam sui generis*.

JUDGMENT

JONES J:

[1] On 30 November 2003 the plaintiff's 10 year old son Werner was bitten on the face by a dog. The consequences were serious. Surgical repair has been necessary for an avulsion of the right nostril, and a series of further revisional surgical procedures is contemplated. The plaintiff therefore issued summons against defendant, who is his brother-in-law, for recovery of R371 100-00 as damages for and behalf of Werner. He claims under two causes of action: first, under the *actio de pauperie* against the defendant as owner of the dog, which is alleged to have acted *contra naturam sui generis* in biting the child; and, second and alternatively, under the *actio legis aquilia* on the ground that the defendant negligently caused foreseeable injury to the child by failing to take reasonable precautions to prevent the dog from biting the child. The matter is now before me on trial. By agreement the issue is

confined to the question of liability, the quantum of damages to stand over for determination in due course, if need be.

[2] The evidence is that the dog in question, a Border collie called Prins, was a family pet. He was kept at the home of Mr and Mrs Bekker and their adult son, the defendant, at Bluewater Bay in Port Elizabeth. Mr and Mrs Bekker are Werner's grandparents and the parents of his mother, Gerda. Prins had been given to Werner by his mother during 1998 or 1999 when they also were living with his grandparents. Some years later Werner's mother and father (the plaintiff) were married to each other, and they left the Bekker's home for a home of their own. By that time the defendant had become attached to Prins and wanted to keep him. He therefore bought another puppy for Werner and became Prins's owner. Prins remained at the Bekker home.

[3] Prins knew Werner well. They were in daily contact for a number of years when living in the same home, and afterwards Werner would frequently visit his grandparents' home at Bluewater Bay. He was fond of the dog and would often play with it. One of the games was kicking up sea sand at the beach at Bluewater Bay for Prins to jump up to and bite at. Prins would also join in ball games played by Werner and his friends, and sometimes, to their annoyance, would make off with the ball. Prins was not a well-trained house-dog. For example, it was allowed to feed off the table, and was disobedient about getting off chairs when ordered to do so. There is also evidence that it had on a few occasions bitten members of the family before, but there is no evidence of the nature of the bites or the circumstances under which they

happened. This is because this litigation has given rise to some dissension in the family, and family members were diffident about being seen to take sides by giving evidence. Hence the lack of particulars about the previous biting. However, there is no suggestion in the evidence that the previous incidents were good reason for taking precautions against future recurrence. On the contrary, the evidence is that Prins had never bitten the children even during the excitement of a game, that he had never bitten any body outside of the family group with whom he came into regular contact, or that it was ever thought necessary to restrain him on a leash when on the beach and likely to come into contact with members of the public. The evidence of Mr Bekker senior was that Prins was good natured and not a vicious or aggressive animal. The plaintiff suggested in evidence that he was not happy with Prins's temperament because of the look in his eye. But he did not back up this opinion with any objective facts, and he did not ever see fit to instruct or suggest that Werner should not play with Prins or that he should be wary of the dog in any way. The result was that Werner and Prins were used to each other, would frequently play together, and Prins had an expectation that Werner would play with him. Everybody was shocked when Werner was bitten. Nobody expected it.

[4] The evidence of what happened when Werner was bitten was given by his grandfather Mr Bekker senior. That Sunday morning Werner had come to visit his grandparents. They went to the beach together, taking Prins with them. For a while Werner and Prins played the game of kicking up sand. Then Werner began building tunnels. Prins sat at Mr Bekker's feet, waiting for the

game to start again. Then he began to annoy Werner by interfering with the tunnels. Werner shouted his name a few times in an attempt to get him to stop. He then approached Prins and shouted his name again. He tripped in one of the tunnels, pitched forward with his hands stretched out in front of him, and fell on to Prins with his hands pushing against the dog's side. Prins reacted by biting his face. Afterwards, Prins did not persist with an attack on Werner. He stopped biting immediately and then behaved quite normally. The evidence does not disclose how many times Werner was bitten, but the severity of the bite injuries is shown in the photographs. The biting was to say the least nasty; it was even perhaps savage. The evidence also does not disclose whether Werner hurt the dog when he fell on him. But the dog did not utter any sounds to indicate that he was hurt, and it is unlikely that the dog would have been badly hurt by what was after all an ordinary incident which might often happen during the rough and tumble of normal play between a boy and his dog. In all probability the dog in this case got a fright when the boy fell on him, and reacted instinctively by biting.

[5] The plaintiff's evidence did not add any further information. The defendant led no evidence on the facts. He confined his case to the evidence of Professor Odendaal, who gave opinion evidence as an expert in animal behavioural science. The only area of factual dispute comes from an allegation in the defendant's plea that Prins bit Werner after Werner had approached it in a menacing fashion and had fallen on top of the dog. The suggestion of a menacing approach came from an affidavit made by Mr Bekker made some time after the incident. Mr Bekker did not confirm it in

evidence before me. He explained that Werner approached the dog and fell in one action, too quick for a firm conclusion of menace. He made it clear that however the affidavit may be worded the suggestion of menace by the child does not properly arise from his observations. In the light of this explanation, which qualifies the statement in the affidavit, I cannot conclude that there is proof of some sort of sinister menacing approach by the child which is relevant to what happened. In any event I do not believe that it has much significance. But the result is that there is no basis for concluding that the dog was provoked by culpable conduct by Werner.

[6] In my judgment the plaintiff has not discharged the onus of proving any of the grounds of negligence relied on in his particulars of claim for his alternative cause of action. The background information and the evidence of the facts giving rise to Werner being bitten do not prove that the defendant negligently failed to take proper precautions to prevent a reasonably foreseeable and reasonably preventable attack by the dog. The claim under the *actio legis aquilia* must fail.

[7] The same cannot be said about the main claim under the *actio de pauperie*. The success of that remedy depends upon proof that Werner's injuries were caused by the actions of a domesticated animal owned by the defendant which had acted *contra naturam sui generis* – contrary to the nature of its kind[1]. The plaintiff's witnesses have proved positively that the defendant was Prins's owner, that Prins was a domesticated animal, and that

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1 *O'Callaghan* v *Chaplin* 1927 AD 310

he bit Werner, causing him serious injury. Proof that Prins bit Werner in these circumstances gives rise to the prima facie inference that Prins acted contrary to the nature of its kind.[2] The sole issue is whether the defendant has discharged the onus of displacing this inference, which he may do, inter alia, by proving that the dog was provoked by the injured party (the provocation, it seems to me, need not be culpable), or by another person, or purely by chance.[3] He has sought to discharge the onus by relying on Professor Odendaal's opinion that the dog's conduct in biting Werner was, from the dog's point of view, expected and normal behaviour, that the dog was acting according to its nature, and that blame for the incident should be attributed to Werner's behaviour towards the dog.

[8] Professor Odendaal's evidence is based upon his training and experience as an animal behavioural scientist. He explained the dog's reactions in the light of its breed, sex, age, training or the lack of it, and the surrounding circumstances of the background of the excitement of play, the momentary fear by the dog, and the aggravation caused by the possibility of that it was hurt by the fall, and that it felt threatened by the child's behaviour towards it. Some of the facts he referred to were speculative and not proved by the evidence: in particular, the possibility that the dog might have been hurt, and that it was threatened by a menacing approach. Professor Odendaal placed emphasis on Mr Bekker's affidavit of a menacing approach, which he regarded as a reliable description of what happened despite Mr Bekker's retraction. His failure to make a reasonable concession in this regard reflects

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2 *S.A.R* v *Edwards* 1930 AD 3, 12

3 *O'Callaghan* v *Chaplin* supra 329; *S.A.R* v *Edwards* supra 10.

adversely on the acceptability of his opinion generally. It also resulted in his opinion being partly based on incorrect facts. Professor Odendaal's explanation is that the dog's action in biting was an instinctive reaction which was the only way in which the dog could have reacted in the circumstances, and that, viewed from dog's perspective, it was to be expected. He therefore concluded that the dog had acted according to its nature.

[9] Even disregarding the role attributed by Professor Odendaal to Werner, it may be that his hypothesis, based as it is upon scientific principles, gives a reasonable explanation of the dog's aggressive behaviour. But two things must be made clear. One is that it is my function, not Professor Odendaal's, to decide whether or not the dog acted *contra naturam sui generis*. While I may find guidance in Professor Odendaal's expert opinion, I must come to my own conclusion. The second is that Professor Odendaal's conclusion is based on scientific criteria which are different from the legal criteria which I must apply. Professor Odendaal explains the behaviour of this particular dog *from its point of view.* I must evaluate the dog's behaviour against a different and more general standard – the standard of behaviour which the law expects of a domesticated animal generally. The issue is not whether Prins behaved according to its own nature, which is the test applied by Professor Odendaal, or to the nature of its breed. It is whether the dog behaved in a manner which the law considers acceptable by animals which share the human environment with human beings because they have over the ages become domesticated.[4]

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4 *Loriza Brahman en 'n ander* v *Dippenaar* 2002 (2) SA 477 (SCA) 485 paras 17/18.

[10] What is the standard of behaviour which the law expects of a domesticated animal? To state that the animal must not act *contra naturam sui generis* is not a quick-fix answer. This concept is not always easy to define. It has been important in determining the boundaries of liability from the inception of the remedy in the Roman Law. It alleviates some of the hardship of imposing liability on owners who are not to blame for the damage: owners are not liable for *all* damage done by their domesticated animals, only for damage caused by them when they act *contra natura sui generis.* Because the law imposes strict or 'no-fault' liability on an owner, questions of judicial and social policy have a role in determining when an animal acts *secundum naturam* or *contra naturam*.[5] The application of considerations of legal policy is not the function of an expert witness in the biological sciences.

[11] Neither the old authorities nor the modern decisions of the courts provide an exhaustive test for the question when does the law consider that a domesticated animal acts *contra naturam suam*? But they lay down the approach to be followed. A frequent starting point is the statement in Voet 9.1.4:

> 'Animals are said to do harm contrary to their nature when, though tame, they take on wildness; as when a horse kicks or an ox gores, albeit that a horse is apt to kick and an ox wont to gore. An ox and a horse, along with other animals which come under the term 'cattle', are wont to graze in a herd under the control of a shepherd without doing harm, and to that extent they are counted among tame fourfooted creatures. Hence it is correctly said that they do damage contrary to the nature of their kind when on their wildness being roused they kick or gore.'

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5 *Da Silva* v *Otto* 1986 (3) SA 538 (T) 541 I.

The law expects domesticated animals not to revert to their former wildness. They must suppress instincts which on the face of it are 'natural'. This leads to the conclusion that the expression *contra naturam sui generis'* is not to be used literally. This view was expressed in the useful analysis of the authorities in a note by PMA Hunt entitled Bad Dogs, (1962) 79 SALJ 326[6], which has been quoted with approval by the courts. The author of the note continues (328):

> De Villiers CJ (at 10) in *Edwards's* case spoke of behaviour 'not considered such as is usual with a well-behaved animal of the kind'. 'Well-behaved' imports an objective element going beyond 'natural' behaviour. Much the same may be said of Laurence J's formulation in *Cowell* v *Friedman & Company* (1888) 5 H.C.G. 22 at 53: 'some vicious, perverse, or unwarrantable behaviour.' The *contra naturam* concept seems, in fact, to have come to connote ferocious conduct contrary to the gentle behaviour normally expected of domestic animals. This imports an objective standard suited to humans. It is far more refined than behaviour literally *natural* to that species of animal. It is what Voet 9.1.4 means when he speaks of *animalia mansueta feritatem assumunt.*

The underlined part of this passage is specifically approved by Potgieter JA in *Solomon and another NNO v De Waal* 1972 (1) SA 575 (A) at 582B.[7] In that case the learned Judge of Appeal states his conclusion thus (at 582 C – F)9

> In the instant case plaintiff proved that she was bitten by a stallion, a domesticated animal, belonging to Solomon. She also proved that she was lawfully at the place where she was attacked. It was not disputed that the gravel road and the track were frequently and legitimately used by the public.

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6 See also PMA Hunt 'More Bad Dogs' (1962) 79 SALJ 458.

7 Other references in the law reports to the note by Hunt are *Da Silva* v *Otto* 1986 (3) SA 538 (T) 541 D; *Lawrence* v *Kondotel Inns (Pty)Ltd* 1986 (1) SA 44, 51 D; *Deysel* v *Karstens* 1992 (3) SA 290 (E) 295 A; and see 1994 (1) SA 447 (A); *Loriza Brahman en 'n ander* v *Dippenaar* 2002 (2) SA 477 (SCA) 483 C. Note, however, that the conduct of the animal does not have to be *ferocious* in all cases (*Lawrence* v *Kondotel Inns (Pty)Ltd* supra).

> There was evidence to the effect that a stallion, when in the company of mares, may attack a strange male horse which comes near the mares. It does so, said the witnesses, in order to protect its interests in its female company. In principle, such conduct is, in my judgment, no different from that of a mule which kicks as a result of being upset by traffic noises (cf. *Edwards'* case, supra), or a dog which, because of hunger, catches fowls (cf. *Maree* v *Diedericks*, 1962 (1) SA 231 (T) at p. 237), or an ox or bull which gores a person who comes near it. 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*. *A fortiori*, in my view, if a stallion attacks a person on horseback, it acts contrary to the nature of its class, and that is so despite the fact that the attack takes place while the stallion is in the company of mares.

The rationale behind the notion of *contra naturam sui generis* is 'that domestic animals have been under the influence of man for such a long time that a minimum standard of good behaviour can be expected from them. Thus it is considered *contra naturam* for a dog to bite, an ox to gore, or a horse to kick or to bolt spontaneously when harnessed to a cart or with a rider on its back'.[8] In some cases the animal's conduct is categorized as *contra naturam* because it acted from inner excitement or vice or from a reversion to wildness. Sometimes the courts and commentators, to use the language of Hunt in the note supra, apply an objective standard suited to human beings. Thus '[t]he conduct of the animal is compared with the conduct of a well-behaved animal of its kind – the animal is personified and the reasonable man test becomes the test of the reasonable dog'.[9] This is by way of fiction, a convenient way of stating what the law expects of a domesticated animal. The courts do not literally attribute powers of reason to a dog by measuring its conduct against

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8 Van der Merwe in Joubert et al, The Law of South Africa, 2nd ed, vol 1, p 351.

9 Van der Merwe in Joubert et al, The Law of South Africa, 2nd ed, vol 1, p 352.

that of ‘the reasonable dog’, or literally ascribe to a dog the logical capacity to distinguish between an unjustified attack upon it which it may be ‘entitled’ to resist in a well-behaved manner and the lawful use of violence against it to restrain it, to which it should submit as a well-behaved domesticated animal.[10]

[12] In following this approach and applying these principles to the facts of the present case, there can in my judgment be no doubt that our law requires a well-behaved dog who is kept as a house pet, who knows the children of the house well, and who frequently plays with them, to suppress any instinct to bite the children during play. This is particularly so where there is no history of the children being cruel to the dog or hurting it during play. There was here no ‘justifiable’ basis for a domestic animal to react by biting because of the inner excitement caused by fright during the course of a game. This conclusion does not alter even if the child had approached the dog in a menacing fashion. The dog knew the child. Its previous experience with the child did not precondition it to expect anything sinister from the child, even if the child approached it with a menacing posture. The law expects no less of this dog than it did of the dog in *Da Silva* v *Otto*[11] whose conduct was condemned in the following terms by Nestadt J for biting the plaintiff after the plaintiff had struck it with a stick to prevent its unwarranted attack upon the plaintiff’s dog:

> ‘Ek keer terug na die feite in die onderhawige geval. Na my mening het respondent se hond *contra naturam* opgetree toe hy appellant se hond aangeval het en blykbaar gebyt het. Dit is nie die optrede wat verwag kan word van 'n ordentlike en goedgemanierde huishond nie. Wat onmiddellik daarna gebeur het, dit wil sê appellant se poging om hulle uitmekaar te maak, insluitende sy heeltemal verstaanbare gebruik van sy stok op respondent se

10 *Da Silva* v *Otto* supra footnotes 5 and 7.
11 Supra footnotes 5 and 7, at 543 B – C.

> hond, was 'n regmatige en redelike beskerming van sy hond. Die hond se optrede deur appellant in hierdie omstandighede te byt, al was hy blykbaar deur hom seergemaak, moet as *contra naturam* beskou word.
> 'n Verskillende benadering, wat tot dieselfde slotsom lei, is dat respondent se hond se gedrag as deel van een globale handeling beskou moet word, naamlik 'n aanval deur respondent se hond as gevolg van innerlike opgewondenheid en kwaaiheid. Met ander woorde, en selfs in die afwesigheid van deskundige getuienis soos dié van 'n veearts, moet die hond se reaksie, toe hy geslaan is, in die konteks van die hele voorval, as onredelik bejeën word, veral inaggenome dat die getuienis daarop dui dat die aanvanklike houe nie ernstig was nie. Eers nadat appellant gebyt is, is die hond met mening geslaan.'

This is not to say that under no circumstances will the courts tolerate biting by a domesticated dog. In all depends on the facts. For example, in *Harmse* v *Hoffman* 1938 TPD 572, 575 the dog did not act *contra naturam* when it bit the plaintiff after the plaintiff had trod upon it and hurt it, and then stooped down to pat it. In these circumstances even a well-behaved dog would be expected to bite. On the facts of the case now before me, however, the conduct of the dog was anything but expected.

[13] I conclude that the evidence establishes that the dog acted *contra naturam sui generis,* and that the defendant is accordingly liable for such damages as have been suffered in consequence. In the absence of any reasons being offered why costs of the proceedings thus far should not be awarded to the successful party, I think that a proper exercise of my discretion on costs is to award the plaintiff the costs of the trial on the merits.

[14] An order will issue declaring that the defendant is liable for such damages as may be proved or agreed upon arising out of the plaintiff's minor son suffering a dog bite on 30 November 2003. The defendant is further ordered to pay the plaintiff's taxed party and party costs of the trial on the merits.

RJW JONES
Judge of the High court
27 November 2006