

SOUTH AFRICA / JUDGMENT

# Coppejans v Bosman (34676/2013) [2014] ZAGPPHC 1033 (15 December 2014)

**[2014] ZAGPPHC 1033****COURT**

North Gauteng High Court, Pretoria

**BEFORE**

Kubushi

**CASE / FILE NUMBER**

34676/2013

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**Source record****REPUBLIC****OF SOUTH AFRICA****IN****THE HIGH COURT OF SOUTH AFRICA****(GAUTENG****DIVISION, PRETORIA)****CASE NO: 34676/2013****DATE: 15 DECEMBER****2014****NOT REPORTABLE****NOT OF INTEREST TO****OTHER JUDGES****IN THE MATTER****BETWEEN:**

CATHERINA

WILHEMINA

COPPEJANS.....PLAINTIFF

and

HERMANUS

FRANCOIS

BOSMAN.....DEFENDANT

**JUDGMENT**

Heard on: 03 DECEMBER 2014

Handed down on: 19 DECEMBER 2014

KUBUSHI, J

**INTRODUCTION**

- [1] This is an action for damages based on the *actio de pauperie* and in the alternative the *actio legis acquiliae*. The plaintiff alleges that she was bitten by the defendant's dog and the defendant denies that his dog bit the plaintiff. In amplification of the denial the defendant pleaded the presence of a stray dog which provoked the defendant's dog and ended biting the plaintiff on her lower right leg. He also discovered photographs of the stray dog.
- [2] It was brought to my attention that an incorrect answer was given in question 16 of the Minutes of the pre-trial conference of 10 October 2014. The question asked in that respect was: 'whether it was the defendant's case that the dog was provoked'. The answer that appears thereon reads: 'yes' whereas it was supposed to read: 'no'. By agreement between the parties I was requested to delete the incorrect answer so that the answer should read: 'no'. This answer puts to rest Mr Bosman's plea that his dog was provoked.
- [3] Before the plaintiff led her evidence, the plaintiffs counsel made me aware that he intends to object to the use by the defendant of the photographs filed of record on paginated page number 105 to 132 on the basis that: the photographs were not properly discovered; the plaintiff was not, on request, provided with the originals of the photographs; the photographs are not in their original format, they have been adjusted to fit onto A4 pages; and there is no legend provided to indicate which dog is or dogs are depicted in the photographs and when were the photographs taken.
- [4] In response to the objection, the defendant's counsel applied for the photographs to be provisionally allowed for use in the cross examination of the plaintiff because there would be no prejudice. According to counsel, even though the photographs were not properly discovered, as alleged by the plaintiff, the defendant was entitled to lay a factual basis. The contention being that the plaintiff did not after receipt of the uniform rule 36 (10) notice, arrange for the inspection of the photographs. After a protracted argument by both counsel as to whether or not I should provisionally allow the photographs for cross examination, I ruled that the photographs be used provisionally. Only a few of the photographs were referred to during cross examination. The plaintiff's counsel did not seriously pursue his objection against the use of those photographs by the defendant's counsel. Both counsel did not address the objection during their closing argument. It is my view that the plaintiff suffered no prejudice in the use of the photographs by the defendant, the photographs are, therefore, admissible in evidence.

[5] At the commencement of the trial and per agreement between the parties, I made an order separating the merits from quantum. As a result the aspect pertaining to quantum, contained in paragraphs 7 and 8 of the particulars of claim was separated and postponed sine die.

[6] I was also handed a document which set out facts which, according to the parties' counsel, were common cause between the parties. The common cause facts arise out of the answers to questions in the pre-trial minutes, as well as from the plea filed by the defendant. The following facts were common cause:

*"1. The plaintiff is a 67 year old woman born on the 7th of July 1947;*

2. The plaintiff lives at 498 Vermont Crescent.

3. The plaintiff was in Vermont Crescent on Saturday, 19 May 2012;

4. The defendant resided at 470 Vermont Crescent on the 19th of May 2012;

5. The defendant was the owner of a bull mastiff (Boerboel) dog called Max;

6. The defendant's dog Max exited 470 Vermont Crescent in the presence of the defendant

7. The defendant's dog Max crossed the street approaching the plaintiff.

8. The plaintiff was bitten by a dog;

9. The defendant had his bull mastiff (Boerboel) dog called Max anaesthetised on Monday, 21 May 2010 (two days after the incident);

10. At the time of the incident, the defendant was also the owner of a small dog called Blackie."

[7] The plaintiff tendered the evidence of two witnesses, the plaintiff herself and her husband Mr Coppejans. Only one witness was called for the defendant, the defendant himself. I shall for convenience refer to the witnesses in this action in their respective names. I shall refer to the plaintiff as Mrs Coppejans, the plaintiff's witness as Mr Coppejans and the defendant as Mr Bosman.

#### THE PLAINTIFF'S EVIDENCE

[8] Mrs Coppejans' testimony in short is that on 19 May 2012 she was walking along Vermont Crescent. This is her daily exercise routine and has been so for the past thirty years. She walks approximately 400 meters by walking around Vermont Crescent ten times on a daily basis. On the day in question, as he was walking towards Mr Bosman's house she heard dogs barking. She looked up and about 20 metres away she saw Mr Bosman and the dogs - a small brown dog and a Boerboel. Mr Bosman stays on the same road six houses away from hers. Mr Bosman opened the gate and let the two dogs out. The dogs were barking and stormed at her. She stood dead still and did not make eye contact with them. The dogs went passed her approached her from behind and the Boerboel bit her lower right leg. She fell forward and shouted for help. She looked up and saw the legs of a man walking towards her. At the same

time there was something over her and it was removed and there and then she felt a relief on her. When asked what that thing was she responded by saying uVes, I am dead sure that it was the Boerboel and Mr Bosman who were on me.” After she felt the relief, she repeatedly tried to stand up but was unable to. Mr Bosman came back and told her that she was going to lock up the dogs. He also tried to help her to get up but had to try a coupler times before he was able to. He insisted that she sit on the side of the road but she wanted to go to Hugo, her husband. She then walked in the inside of the Crescent. She was able to walk - the right leg was fully functional despite being bitten; the left leg although she could use it she did not have any feeling in it. She walked to her house, she rang the bell and her youngest son came out and she informed him to bring a cloth and to get her to the doctor. Her son bound her upper right leg with his belt to stop the bleeding and made her sit on the grass. Her husband then came out intending to take her to a doctor but before they could go, Mr Bosman arrived in his motor vehicle. Mr Bosman asked her to lie on the backseat of his motor vehicle and drove her to the emergency department at Fairy Glen hospital. Her husband set with her in the backseat and her son followed in their motor vehicle. She was in great pain and her husband was the one who pointed out the direction to Mr Bosman. During the drive to the emergency department Mr Bosman repeatedly said it should not have happened. She was stabilised at the emergency

ward and referred to the Zuid Afrikaanse hospital. Mr Bosman settled the bill charged at the Fairy Glen hospital. Whilst at the Zuid Afrikaanse hospital, Mr Bosman requested to see the wounds and she showed them to him. The emergency ward recommended that she be taken by ambulance to the Zuid Afrikaanse hospital but her husband refused because they had a motor vehicle. Mr Bosman then offered to take her in his bloodied motor vehicle. At the Zuid Afrikaanse hospital she was admitted and x-rays were taken of her left leg. The x-ray indicated that she suffered a fracture. She was later taken to theatre where the wound on the right leg was attended and the left leg set in a plaster cast. Mr Bosman remained at the hospital until she was admitted. He came again on Sunday. He visited her again either on Monday or Tuesday. On Wednesday, 23 May 2012, she was taken back to theatre where the wounds on the right leg were cleaned. Screws were inserted in her left leg and a moonboot fitted. She was discharged from the hospital on Friday 25 May 2012. On Tuesday, 29 May 2012, Mr Bosman came to her house. She was still in bed and Mr Bosman visited with her in the bedroom and her husband was present. Mr Bosman offered to settle her medical bills by paying her an amount of between R10 000 and R12 000 but she refused the offer.

- [9] During her evidence, Mr Bosman’s version about the stray dog was put to her and she vehemently denied that there was a stray dog in the vicinity where the incident occurred. She also insisted that she was never before told about a stray dog being there, she heard about the stray dog two years after the incident from her attorneys. According to her there is only one entrance into the Crescent and if there was another dog there she would have walked passed it and saw or heard it because a stray dog always causes chaos. She said if there is a stray dog all the dogs around there would have barked and she would have heard that. She has for thirty years walked around the Crescent and she knows that some of her

neighbours there owned dogs. She had previously talked to Mr Bosman about his dogs because at most two to three occasions she requested Mr Bosman to keep the dogs on leash when outside the premises but his answer was that either the dogs were old or they will do nothing.

- [10] Mr Coppejans as already stated was in the motor vehicle with Mrs Coppejans when she was conveyed by Mr Bosman to the emergency ward at the Fairy Glen hospital and from Fairy Glen hospital to the Zuid Afrikaanse hospital. His evidence is that Mr Bosman told him that he will pay for everything. This he repeated again on Sunday evening when he met with Mr Bosman at the Zuid Afrikaanse hospital. Mr Bosman sent him a short message service (SMS) informing him that he had been to visit Mrs Coppejans at the hospital. Mr Bosman offered to prepare supper for him and his son for the whole week but he only accepted the offer for the Monday evening. When he took the plates back to Mr Bosman on Monday 21 May 2012, Mr Bosman told him that he had his dog Max put down. Mr Bosman also said that he would not deny that it was his dog. When Mrs Coppejans was home, Mr Bosman came to visit. He discussed the medical aid used by Mrs Coppejans with him. Mr Bosman offered to pay all the small medical expenses which the medical aid will not cover. In this regard he offered to make a lump sum payment of between R10 000 and R12 000. The offer was refused and Mr Bosman was informed that the legal route will be taken. Mr Coppejans came to know about the stray dog two years after the incident took place. He confirmed Mr Bosman's payment of R120 for the admission of

Mrs Coppejans at the Fairy Glen hospital. He did not have money on him to pay the bill and Mr Bosman offered to pay it with his card.

#### DEFENDANT'S EVIDENCE

- [11] Mr Bosman's version of the incident is that at the time of the incident he owned two dogs - Max the Boerboel (bullmastiff) and Blackie. At the time of the incident he had been staying in the area for 31 years and during that time he had owned about five bullmastiffs. The dogs were properly trained. He knew how to train dogs and his dogs are obedient and would stay where he told them to stay without a leash. Max was a house dog - it stayed in the house. There is a palisade fence around the front entrance of his house with a small gate on the right hand side and a locked gate on the left hand side -this gate is never opened. At the back and on the side of the house is a wall. All the dogs are kept on the premises behind the fence. He trained Max in the street. He does not train his dogs in the garden because they will get distracted. Max never attacked anybody while training even though

at some stages he would be standing about 20 to 30 metres from it, whilst sitting and waiting for instructions and people will be passing by. Part of his usual activities in the morning is to fetch his newspaper in front of his garage. The normal process is that the two dogs would go out with him. He opens the small gate and the dogs rush out to fetch the paper before he gets to it. They would then want to play a little. That morning, on Saturday 19 May 2012 at 07:30 he went to fetch the paper with Max only. Blackie was asleep in the upper part of the house. He opened the gate to

fetch the paper. Max got out with him as usual. As they were approaching the front of the garage Max saw another dog (the stray dog) straight ahead of them and started running towards that dog. He ran after Max. At the same time he saw Mrs Coppejans in the same line as the stray dog and Max. He gave Max instructions by saying "Huis toe". But Max ran faster and eventually slowed down. He was all that time concentrating on Max. When he looked up he saw Mrs Coppejans on the ground. He went and stood over her or lay sort of over her with his hands in front. He saw Max standing in the middle of the street waiting for him. According to Mr Bosman, he has trained Max that when he lies down it (Max) has to stop. He then said to Max "huis toe". He took Max home closed and locked the gate. He laid over Mrs Coppejans just to protect her from the strange dog that he saw on her right hand side at the moment or before the incident. After locking the gate he went back to Mrs Coppejans and saw that there was some blood on her leg. He told her to lie on the grass and went to look for some towels to block the blood. When he returned from the house Mrs Coppejans and the stray dog were gone. He then took his

motor vehicle and drove to her place. During all that time Max was never left alone it was under his control at all times. He took Mrs Coppejans to Fairy Glen hospital together with Mr Coppejans and later he took them to the Zuid Afrikaanse hospital. At the Fairy Glen hospital he offered to pay for the admission fee although he could not remember how much it was. He offered to pay because Mr Coppejans did not have money. His usual activity on Sundays is to work in his garage which is facing the street and he would normally open the garage door. On the Sunday after the incident, he was working in the garage he had the door opened, and saw Blackie following a smell along his neighbour's fence. The dog went past the Baloyi's fence (the Baloyi's house is the one immediately next to Mr Bosman's house) and went into the Meyer's property (the Meyer's property is adjacent to the Baloyi's house). At that moment he saw with difficulty that a dog was lying there in a corner of the Meyer's property. About a week thereafter he got to discuss the stray dog with his neighbour across the street. The neighbour told him to take photographs of the dog. The first photograph he took of the stray dog was on 2 June 2012 and it was lying in the corner of the back part of the Meyer's house. It was the same dog that he saw on 19 May 2012. He did not know its owner. On 19 May 2012 there were dustbins and boxes standing on the pavement next to where the incident happened. He saw the stray dog come from those dustbins just behind Mrs Coppejans. It should be noted that Mrs Coppejans had indicated under cross examination that on the day in question she did not see the boxes and dustbins. She only saw them on the photographs she was shown in court by Mr Bosnian's counsel - photographs on page 125, 126 and 127 of the record.

[12] Under cross examination Mr Bosman admitted that in 2010 Max bit a Dachshund dog, that later died, in the street next to his garage. He also confirmed Mr Coppejans' testimony in regard to the offer to cook for him and his son for a week. He however denied that he offered to pay Mrs Coppejans' medical expenses but confirmed that he offered to pay her a once off amount of R10 000. He made these offers because his wife who suffered from breast cancer asked him to settle this matter. According to Mr Bosman, since his wife got ill she developed generous tendencies and would time and again give or donate in kind or in cash. He also confirmed that he had Max put down on the Monday following the incident. According to

Mr Bosman, Max, which was a house dog, had become too much for his wife and his wife had previously nagged him to have the dog put down because she could no longer cope. After this incident he then decided to have it euthanized.

#### ISSUES IN DISPUTE

[13] The crisp issues to be determined are, as a result,

1. whether or not there was a stray dog that bit Mrs Coppejans; if not
2. whether or not Mr Bosman was negligent in allowing Max into the street.

[14] From the argument of Mrs Coppejans' counsel it appears that Mrs Coppejans ended up relying on the alternative claim of negligence rather than the *actio de pauperie*. In order to succeed in this claim, Mrs Coppejans must allege and prove the act or omission on which the cause of action is based. She must also establish a causal connection between the negligent act relied on and the damages she suffered.

[15] Where there are two stories mutually destructive before the onus is discharged, the court must be satisfied upon adequate grounds that the story of the litigant upon whom the onus rests is true and the other false. Consequently it is essential in this case to determine which of the two versions is the more probable.<sup>1</sup>

[16] My view is that issues before me can easily be determined on probabilities.

#### THE STRAY DOG

[17] It is common cause that Mrs Coppejans was bitten by a dog. The question is which dog bit her?

[18] It is Mr Bosnian's defence that there was a stray dog at the scene of the incident which bit Mrs Coppejans and caused the injuries she sustained. The onus is on the defendant to prove the defence. The plaintiffs onus is to prove that she was bitten by Max.

[19] There are three dogs put on the scene by the parties - each party places two dogs on the scene. According to Mrs Coppejans' evidence she was stormed by Max and Blacie and Max bit her. The contention by the defendant's counsel is that Mrs Coppejans does not know which of the two dogs bit her because she did not see the dog that bit her. The defendant's version is that there was Max and a stray dog on the scene and Mrs Coppejans was bitten by the stray dog.

[20] The evidence of Mr Bosman that there was a stray dog in the vicinity where the incident occurred and that it bit Mrs Coppejans is not convincing to me. In actual fact it is improbable based on the reasons advanced hereunder. Mr Bosman's evidence is that he did not see the stray dog bite Mrs Coppejans because at that time he was concentrating on Max. In a direct question put to him by his counsel he patently stated that he did not see any of the dogs bite Mrs Coppejans.

- [21] He does not mention the stray dog at all during the time he is in contact with the Coppejans. His testimony is that he was in regular contact with either Mr Coppejans or Mrs Coppejans from the time Mrs Coppejans was bitten until she was discharged from hospital. He even visited Mrs Coppejans at home after being discharged from hospital. He communicated with Mr Coppejans telephonically and even sent him a short message service (SMS). During all this time of contact Mr Bosman never once mentioned the stray dog. He specifically did not mention that he was not at fault as the damage was caused by the stray dog but instead offered to pay Mrs Coppejans an amount of RIO 000. It is common cause that Mrs Coppejans and her husband only came to know about the stray dog two years after the incident. Having seen the stray dog, it seems very strange that he would not mention it either to Mrs Coppejans or Mr Coppejans. Neither does he mention it to his wife.
- [22] The story Mr Bosman wants to convey is that the stray dog rushed to Mrs Coppejans bit her and ran off. This also is not probable. In his evidence the stray dog was by then already confronted by Max who had seen it and gave chase. He also said that at the time he saw the stray dog Mrs Coppejans was in a straight line between Max and the stray dog. This does not explain how the stray dog would have been able to bite Mrs Coppejans at the back of her leg.
- [23] Soon after he realised that Mrs Coppejans was bitten by the stray dog, Mr Bosman does not go looking for it. If he was as concerned as he wants me to believe the normal thing to do, in my view, would have been for him to go out looking for the stray dog. He sees the dog on Sunday and does nothing about it. He only decides to take photographs of the stray dog after he is told by a neighbour to do so. At the very least he should have called the Society for the Prevention of Cruelty to Animals (SPCA) to come look for it. Instead of doing that, he takes the stray dog in and stayed with it for 48 hours. A dog which he does not know and which he says it bit someone else. He knew that the dog was dangerous. He only gets to call the SPCA after the dog tried to attack him. Even so he is not the one who calls the SPCA but a neighbour. This is not a normal reaction of a person who has seen a stray dog which has bitten someone. The evidence does, as such, not convince me that there was a stray dog there and should be discarded.
- [24] The evidential value of the photographs he took of the stray dog some days later is suspect and is no proof that the dog was on the scene on the day of the incident. The photographs do not show when they were taken. Mr Bosman's evidence as to when the photographs were taken is very vague - he mentioned various dates as to when the photographs could have been taken. What comes through clearly is that the photographs were taken some two weeks after the incident.

#### DID MAX CAUSE THE INJURIES?

- [25] The question that follows is was Mrs Coppejans bitten by Mr Bosnian's dog Max? To me the answer to this question is yes. Mr Bosman's counsel when addressing me in argument wanted to convey that Mrs Coppejans does not know which dog bit her because she was stormed by two dogs. To this it can be safely said that it could not have been Blackie which

bit the plaintiff. The evidence is that Blackie was a small dog. As such it cannot be said that the injuries suffered by Mrs Coppejans were inflicted by Blackie. It is common cause that the injuries were very serious. The injuries caused Mrs Coppejans to bleed profusely and her son had to stop the bleeding with his belt. Mrs Coppejans' clothes depicted on the photographs on pages 80 and 81 of the record also show that she bled a lot. She spent the whole week in hospital. The incisions as depicted on the photographs on page 86 and 88 of the record are very deep and could not have been inflicted by a small dog like Blackie. The teeth of a big dog like Max must have inflicted those injuries.

- [26] Mrs Coppejan's evidence is that she fell after being bitten. Having the size of Blackie in mind, it is improbable that a small dog like Blackie could have forced Mr Coppejans to fall. Remember her evidence is that immediately she saw the dogs storming her she stood still. She could therefore have not fallen because of Blackie. Even then this was not Mr Bosman's case as pleaded.
- [27] The only other dog that was there was Max. Mrs Coppejans' evidence is that she was bitten by Max. She persisted even under cross examination that she was bitten by Max. She was also vehemently adamant that what were over her when she was lying on the ground were Max and Mr Bosman.
- [28] This evidence is fortified by the conduct of Mr Bosman after the incident. Even though the Coppejans have a motor vehicle, he offers to take them to hospital; he pays for the admission fee at Fairy Glen hospital - Mr Coppejans' evidence is that he could have returned to pay the admission fee; he offers to make supper for Mr Coppejans and his son for the whole week; he offers to pay the plaintiff's medical costs and in fact offers to pay R10 000 in full and final settlement; to crown it all he puts Max a healthy perfect dog down.
- [29] Mr Bosman's explanation why he offered to give the Coppejans R10 000 or why he put Max down is not plausible. He says he was asked by his wife to pay the R10 000 in order to settle the house and according to him it was to avoid litigation. Why would there be litigation if his dog did not cause the damages? Remember at the time he offered the money there had not been talk of taking the law route' as Mr Coppejans put it. The coincidence of the timing to put Max down is too much of a coincidence. It just happened that at the same time as he had intended to put Max down this incidence happened. To show that Max was put down because it had bitten Ms Coppejans - in his response to a question put to him during cross examination, Mr Bosman replied that because of the incident he decided to put the dog down.
- [30] Mr Bosman's evidence is that when he saw Mrs Coppejans lying down he laid over her in order to protect her against the stray dog. This is not how a person confronted by a vicious dog would react. This is a dog that has just bitten someone and which is unknown to him. The reaction, in my view, would have been to chase the dog away. He does not do so, but opt to lie over Mrs Coppejans. His explanation that Max is trained that when he (Mr Bosman) lies down it must sit exacerbates issues. If Max was not attacking Mrs Coppejans why was it

then necessary for Mr Bosman to lie over Mrs Coppejans. The only inference that I can draw is that Mr Bosman was protecting Mrs Coppejans against Max in this way, by laying over Mrs Coppejans Max would know that it must sit. This explains why the defendant lay over her - to protect her against Max. If Max did not bite Mrs Coppejans and was so well trained as Mr Bosman wants me to believe, why was it necessary to keep an eye on it at all time? why was the first thing that Mr Bosman thought of doing was to have Max behind the gate before he could even attend to Mrs Coppejans who was hurt and profusely bleeding? If Max was trained why did it not listen to Mr Bosman when he ordered it "huis toe"? Mr Bosman's testimony is

that he said "huis toe" to Max twice and in both instances Max did not obey him. After the first instruction it continued running towards the stray dog and he had to run after it. After the second instructions he had to take it back home and lock the gate. All these questions are left hanging from Mr Bosman's evidence.

- [31] I am satisfied about the evidence of both Mrs Coppejans and Mr Coppejans. They were credible and honest witnesses. There was no contradiction in their respective evidence nor did they contradict each other in so far as their evidence supports each other. Mrs Coppejans was steadfast in her evidence. Though she conceded that the incident happen very quickly and she could not remember everything that happened, however, she provided a clear picture of what happened that day.
- [32] I cannot, however, say so with Mr Bosman. I did not find him to be a credible witness. Most of his evidence was fabricated as he went along. For example, the evidence that he took the stray dog in and have it sent away after it attacked him from behind, was new evidence that was only introduced during cross examination. He played on my sympathies, going to the extent of even crying in court, by trying to give an impression that his wife was still ill and afflicted with cancer. It, however, came out under his cross examination that his wife has had a reconstructive surgery and has been in remission since 2010. In his own evidence, he saw Mrs Coppejans in a straight line with Max and the stray dog. Even though he was concentrating on Max he should still have seen Mrs Coppejans being bitten and as she fell down.
- [33] Mr Bosman's evidence in regard to when he took the photographs of the stray dog is contradictory. His initial evidence is that he took in the stray dog for 48 hours in May 2012 after the incident of 19 May 2012. When confronted with this answer he became aware that he could not then have taken the photographs in June 2012. The version then amplified that the stray dog had attempted to bite him, a version that was never put to any of the plaintiff's witnesses.

## NEGLIGENCE

- [34] The first question is whether the owner or person in charge of a dog ought reasonably to have foreseen that it might run into the street and in so doing cause damage to a passer-by. According to human experience, a dog has a tendency to run into the street for one reason or another and thereby create a danger for the users thereof.<sup>2</sup>
- [35] An owner of a dog, who allows it to stray into a public street, contrary to the principle of the edict, is considered to be guilty of negligence.<sup>3</sup>
- [36] It is common cause that Mr Bosmar's dog Max stormed out of the gate. Mr Bosnian's defence is that the dog exited the premises as a result of the presence of the stray dog, which exit was not foreseeable. I have since ruled that the evidence of Mr Bosman that there was a stray dog should be discarded. As a result I have to hold that Mr Bosman ought to have foreseen the possibility of Max storming out of the gate and causing damage. The evidence shows that this has happened before where Max had stormed into the street and bit a Dachshund which later died. There is also evidence that Mr Bosman was used to allow his dogs to go out of the yard without a leash, even on the day in question Max was not on a leash. Mr Bosman is aware of the Municipality by-laws which prohibit a person to allow any dog to be at large in a public street or public place without a leash or chain and under the control of that person. There is also the unchallenged evidence of Mrs Coppejans that she has previously warned Mr Bosman to desist from allowing his dogs in a public street or place without a leash.

#### COSTS

- [37] Vexatious, unscrupulous, dilatory or mendacious conduct on the part of an unsuccessful litigant may render it unfair for his or her harassed opponent to be out of pocket in the matter of his or her own attorney and client costs.<sup>4</sup>
- [38] The contention by Mrs Coppejans' counsel is that Mr Bosman should be visited with a cost order on an attorney and client scale in order for the court to show its displeasure in how Mr Bosman handled the case.
- [39] It is my view that Mrs Coppejans is in the circumstances of this case entitled to costs on an attorney and client scale. Mr Bosman's glaring acceptance of liability by offering to settle the claim and by having the dog Max put down without any plausible reason why he did so, calls for a punitive cost order against him. There is actually no reason why he proceeded in defending this claim.
- [40] In the premises I make the following order:
1. The defendant is causally liable for the proven or agreed damages suffered by the plaintiff.
  2. The defendant is ordered to pay the plaintiff's attorney and client costs which costs shall include the costs of senior junior counsel and the costs of transcribing the record.

EM KUBUSHI

JUDGE OF THE HIGH COURT

APPEARANCES:

HEARD ON THE : 03 DECEMBER 2014

DATE OF JUDGMENT: 15 DECEMBER 2014

FOR PLAINTIFF: ADV G NAUDE, of CHRISTO BOTHA ATTORNEYS

FOR DEFENDANTS: ADV J van den BERGH. instructed by KEMP ATTORNEYS

1 National Employers' Mutual General Insurance Association v Gany 1931 AD 187 at 199

2 Deysel v Karsten

[1993] ZASCA 117; 1994

(1) SA 447 (A)

3 O'Callaghan NO v Chaplin 1927 AD 310 at 368

4 Nel v Waterberg Landbouwers Ko-operatiewe Vereeniging 1946 AD 597 at 607

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