Reportable

IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA

CASE NO: 15088/2009

In the matter between:

NICO VISSER Plaintiff

and

HERMAN VISSER Defendant

JUDGMENT

GORVEN J

1]The events of 23 December 2006 were unexpected and traumatic for the Visser family. The plaintiff, his wife ('Mrs Visser') and their three young children lived in Pretoria. They were staying over Christmas at the Amanzimtoti home of the plaintiff's father, who is the defendant, and his mother. That morning they were preparing for a family outing to the Ushaka Marine World. It was hot and the plaintiff went outside to start the engine of his vehicle and activate the air conditioner so as to cool the interior in preparation for the journey. When he re-entered the house, he was met by his son N, aged 2 years 2 months, who raised his hands in a request to be picked up and said 'Pappa'. Because the plaintiff had a younger son who could not walk and who he had to carry to the car, he passed by N without picking him up. N dropped his hands and reached

toward the defendant's Labrador dog, Stoffel, whose face was at the same height as that of N. Stoffel then bit N in the face four times. The plaintiff heard, but did not see, the bites. Mrs Visser saw it happen. Both were powerless to intervene with the result that N sustained severe dog bite wounds to the face.

2]In order to stem the bleeding, the plaintiff put a cloth over N's face. He and the defendant immediately took N to the casualty unit of the nearby Kingsway Hospital. He was met there by hospital staff because Mrs Visser had phoned ahead to alert them. When the wounds were examined they were told that a plastic and reconstructive surgeon would be required and that they should take N to St Augustine's Hospital, some 35 kms away, for that purpose. The plaintiff, the defendant and Mrs Visser did so straight away. There Dr McGarr, a plastic and reconstructive surgeon who examined N about 15 minutes after they arrived, told them that surgery was indicated and that he would attend to it as soon as his schedule allowed. N entered the operating theatre just before 13h00 and the operation lasted just over 4 hours. When N awoke in the paediatric ward he asked what had happened and was very emotional, crying and complaining of pain. It was a feature of all of the evidence that N had, and to this day has, no personal recollection of being bitten. He only knows that Stoffel bit him because he was told so. He was discharged after two days in hospital on 25 December 2006. His physical recovery was good, no doubt assisted by his parents. As Dr McGarr commented in his report, N's parents ensured that the recommended follow up consultations took place and 'strict scar management regime…was closely adhered to'.

3]The incident gave rise to the present action, brought by the plaintiff in

his capacity as N's guardian under the *actio de pauperie*. Demand for payment of quantified damages was made by letter dated 6 February 2007 addressed to both the defendant and his insurance company, which has defended the action. For liability to attach to a defendant, the only proof that is required under this *actio* is that the defendant was at the time the owner of a domesticated animal, that the animal injured the plaintiff (in this case his minor child on whose behalf he sues) without provocation and that in so inflicting injury the animal acted *contra naturam sui generis*.[1] These elements are all admitted on the pleadings. In other words, in the plea the defendant admits liability for any damages which the plaintiff can prove arose from the incident. The only issue on which I was asked to adjudicate is on the quantum of the damages sustained by the plaintiff (in his said capacity) as a consequence of the incident. At the time of trial, N was 7 years and 5 months old. A period of just over 5 years had elapsed since the incident. The damages claimed are for past medical and hospital expenses, future medical, psychological and hospital expenses and general damages for shock, pain and discomfort, trauma, scarring and disfigurement.

4]The past medical expenses were agreed at the trial in the sum of R36 490.59. As regards the future medical, psychological and hospital

1 *South African Railways and Harbours v Edwards* 1930 AD 3 at 9-10 where de Villiers CJ said the following: '[I]t may serve a useful purpose if I attempt to summarize the relevant principles of our law laid down in the more authoritative cases. They are the following. (1) The *actio de pauperie* is in full force in South Africa. But the right to surrender the offending animal in lieu of paying damages - *noxae deditio* - is obsolete with us. (2) The action is based upon ownership. The English doctrine of *scienter* is not a portion of our law. (3) 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. (4) On the other hand, if the act was not due to vice on the part of the animal but was provoked-in other words if there has been *concitatio*, the action does not lie. (5) 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.'

expenses, the psychological expenses were agreed at the trial in the sum of R9 536.00. The medical and hospital costs, if the surgery recommended by Dr McGarr was to take place today, were agreed in the sum of R41 000.00. What remains in dispute for decision is the contingency to be allowed for the possibility that the recommended surgery for scar revision will not take place and the quantum of general damages. As regards the contingency in question, the plaintiff submitted that the calculation should be done on the basis that there was a 10% probability that N would not have the surgery. The defendant submitted that a 25% contingency should be allowed for. I was provided with actuarially calculated figures based on the application of 10%, 15%, 20% and 25% contingencies and it was agreed that I could use those figures once I had determined the contingency.

5]The wounds to N were described by Dr McGarr as follows. A large flap laceration involving the middle section of his forehead above the right eyebrow. A second laceration through the right eyebrow. A degloved wound of the right side of the cheek below the right lower eyelid with tissue loss. A full thickness laceration to the right upper lip as well as lacerations in the neck which were down to the platysma level. On the day of the incident, N suffered severe pain. He had two sessions under anaesthetic; the initial surgery and then on 28 February 2007 for the removal of the stitches. As indicated, when he came round from the first anaesthetic, he was emotional and in pain. The next few days he could not eat, cried a lot and was generally in pain. He had to stop twice during the journey home for painkillers to be administered, having been given medication before setting off. The pain diminished in the weeks after the trip home. The scars have healed well. Dr McGarr, whose evidence in this regard is uncontested, testified that scar revision surgery is indicated

in two respects. The first is a scar in the right eyebrow in the medial third, the width of which is 4mm and which has no hair. The scar splits the eyebrow which makes it extremely visible. A scar of 2mm would be regarded as acceptable and this accordingly requires correction. The second is an area in the right cheek where the colour and contour has not settled well. These constitute follow up reconstructive work arising from the dog bites.

6]The surgical work of Dr McGarr was clearly outstanding. Apart from the two scars mentioned above, the recent photographs of N show a good looking, obviously healthy young boy with no other noticeable wounds. Indeed, nobody testified that any of the other wounds had resulted in visible scarring at this stage. Dr McGarr testified that, because tension on a scar can adversely affect the outcome of such surgery, the scar revision surgery should take place when N stops growing which is likely to be around the age of 16 to 18. Both parents indicated that they would strongly recommend that N undergo the suggested procedure when the time comes.

7]At the trial, the plaintiff and Mrs Visser testified as to the incident and what has happened thereafter. Dr McGarr and Mr Henk Swanepoel, a clinical psychologist who had assessed N, also testified on behalf of the plaintiff. Dr Caron Bustin, an educational psychologist who had assessed N, testified on behalf of the defendant. It must be said that none of the evidence of Dr McGarr was contested and very little of the evidence of Mr Swanepoel and Dr Bustin was contested. All three expert witnesses were a credit to their professions and of great assistance and they are commended on their fair and helpful reports and evidence.

8]The incident had far reaching repercussions for N and the extended family. Two of them took place straight away. The defendant's dog, Stoffel, was put down that day by the defendant's wife with his blessing. The return of the family to Pretoria took place by way of the plaintiff driving back with N and their eldest son while Mrs Visser and the youngest child flew. This was done so that she could arrange for their two dogs to be put down before N arrived home. The approach of the plaintiff and Mrs Visser to dogs after the incident can be characterised as consistent avoidance of, and protection of N from, exposure to dogs. In general, the plaintiff testified that he does not like dogs any more. He said that if the family visited people, N would ask if there were dogs and, if there were, ask that they be locked away. If N was to play with a friend, he would ask whether the friend had dogs and, if this was the case, did not want to go there to play. Where a dog or dogs appeared at school, N removed himself to a safe distance. When walking around the housing estate where they live, N became anxious if he saw big dogs or heard dogs barking and clung to his parents. Things have improved in that he now tolerates smaller dogs, touching them but not playing with them. He recently asked his parents to acquire a dog. Before the incident he slept in his own bed. Afterwards he wanted to sleep with his parents and it took six to eight months for him to again sleep in his own bed.

9]Mrs Visser gave detailed evidence of changes in N's behaviour, illustrated by events in each of the years since the incident. On discharge from hospital he was weepy, unsettled, slept with his parents, would not eat and would not bath. During 2007 he returned to school with dressings on his face. He would not leave his parents in the mornings and go to his class unaccompanied. At one athletics day a child brought a dog and N refused to participate in the meeting. If he heard a dog bark he would ask

if the dog was coming to them. During evening walks around the estate he refused to leave the pram and wanted to avoid houses with dogs, even though they were fenced. In 2008 a friend had a birthday at the zoo and N refused to go. The family acquired cats but he showed no interest. They visited the defendant and his wife and N wanted to know if Stoffel was still there. Only after two days did he relax and accept that the dog was not there. He slept badly if he had been exposed to a dog during the day, wanting to sleep with his parents. In 2009 his attitude to dogs improved but when a friend was to have a dog party, N said that he should not buy a dog but a bird because birds do not bite. The school play was based on the song: 'How much is that doggie in the window' and N refused to take part in it. In 2010 he entered Grade R and took time to adjust to this and a new teacher and friends. Mrs Visser took her children to a lion park and, although one of his brothers stroked the lion cubs, N would not do so. When they went on holiday, they rented a house in the Cape which had animals. He fed the cat and cared for the tortoise but avoided the Jack Russell dog. In 2011 he had a good year in Grade 1 but talked a lot which brought some problems. He started hunting and wanted to shoot anything with four legs. If a child had a party with dogs, N would go to the party but keep his distance. He slept in his parents' bed from time to time and twice wet his bed; once during 2010 and once during 2011. As regards his body image, Mrs Visser testified that N likes to be neat and will often look twice in the mirror to check on his hair. She was therefore adamant that, when the time comes, N will have the surgery for scar revision.

10]N has been asked by friends what caused his scars and tells them that a dog bit him. The evidence was not clear as to when, or how often, this took place. The plaintiff testified that, whilst driving, he noticed N looking in the sun visor mirror and asked him what he was looking at,

receiving the reply that he was looking at the marks on his face. He then asked whether the marks bothered him and N said that he wished they would go away. Both psychological experts testified that N presently has a positive body image and probably has no image of his body before, and therefore without, the scarring. Although she said that it was not decisive in this regard, Dr Bustin testified that in a projective drawing, where N was asked to draw a person and drew himself, no scars had been drawn on the smiling face of the figure he drew. The figure was drawn with attention to detail. In her experience, if scars are problematic and impact on a child's self-image, the child in question tends to depict the scars on such drawings.

11]N has adapted to school well and is performing well academically and socially. He takes part in wrestling and mini rugby. He wants to be a scrumhalf like Francois Hougard, who is a Springbok and member of the Blue Bulls rugby team. There were three or so family therapy sessions with a psychologist shortly after the incident, of which the plaintiff attended one. These were discontinued because it was thought by the plaintiff and Mrs Visser that N was too young and that it was traumatic for them to have to keep recalling the incident. Both parents admitted to feeling guilty that N was bitten, blaming themselves for not having protected him. The plaintiff blames himself for not having picked N up when N asked him to do so that morning. It is quite clear that neither of the parents has resolved the psychological impact on them of the incident. The evidence to this effect by Dr Bustin was not challenged. Her evidence that the approach of the parents has probably prolonged N's anxiety around dogs was also not contested. Mr Swanepoel agreed that their attitude to dogs would have had an impact on N but was, understandably, unable to say to what extent this was the case. While Dr

Bustin attributed no blame to them, she testified that it was regrettable that the family therapy sessions had been discontinued. The goal of these sessions is for each family member to come to terms with the incident and to learn ways of being empowered, and of empowering N, to deal with dogs he may come across. The closer to the incident that these take place, the sooner the incident is processed and the sooner N can be assisted to learn safe and rewarding ways of dealing with dogs. The avoidance of dogs, whilst it was an understandable strategy, has not assisted them or N in the subsequent years. Both the parents and N are oversensitive to dogs and a child takes on his parents' perceptions of dogs.

12]The following points were agreed between the two psychologists regarding N's development. Before the incident he was a well functioning boy, with developmental milestones within the norm. He seems to be functioning on at least an average to high average level of intelligence at present. His referred to inattention can be due to an attention deficit disorder or depression and anxiety although he did not meet the clinical criteria for either of these. As regards the incident, they agreed that the scars on his face from the dog attack are visible but not disfiguring. They agreed that N had suffered from post traumatic stress disorder for between three and six months after the incident. Even though certain of the symptoms might manifest from time to time, this does not mean that he continues to suffer from the disorder. Dr Bustin was asked whether the recent bed wetting incidents showed that N still suffered from post traumatic stress disorder. She stated that this was not the case because other indicators of the disorder were absent. She attributed these incidents to direct stressors which arose because N's fear of dogs has not been resolved. The only key area of disagreement going into the trial between

the two psychologists was whether N has a generalised fear of dogs. Mr Swanepoel was of the opinion that this was the case but Dr Bustin disagreed. As the plaintiff testified, N has improved in his attitude to dogs, will touch small dogs and even asked for a dog. When Mr Swanepoel was told of this evidence, he conceded that this would mean that the fear of dogs was no longer a generalised one. This concession was appropriate. In response to a question Dr Bustin readily agreed that adolescent boys tend to be self conscious about their bodies and that N will probably accept the recommendation of Dr McGarr to have scar revision surgery when he stops growing.

13]Dr Bustin and Mr Swanepoel reached agreement that N requires play therapy for his fear of dogs as well as psychotherapeutic assistance with body image due to the scarring. He will also require psychotherapy during significant junctures of his development, including the shift from primary to high school and the entry to adolescence. The family should also receive family therapy. 16 sessions will be required altogether; ten for N in the areas mentioned above and six for the family.

14]So much for the evidence. In the light of the evidence, the probability that N will not have the scar revision surgery when the time comes and the general damages must be assessed. Apart from his decision in that regard, normal contingencies apply. It is appropriate to bear in mind that the surgery should take place 11 to 13 years from now. Taking into account the commitment of the parents, the opinion of the two psychologists and Dr McGarr and the evidence of Dr McGarr that the scars can be significantly improved to achieve an acceptable level, my opinion is that the percentage contingency for not having the surgery should be assessed at 10%. The present value of the expenses to have

surgery at age 17 with a 10% contingency deducted is actuarially calculated at R34 025. This means that the damages for future medical, psychological and hospital expenses total R43 561 made up of psychotherapy in the sum of R9 536 and R34 025 for the scar revision surgery.

15]When assessing general damages, a different approach is required than that for assessing patrimonial loss. This is because, apart from no reduction in patrimony as with special damages, there is no acceptable way of measuring pain and suffering, disfigurement and the like. People respond to these in a whole variety of ways. Even if there were a universally acceptable way to measure these, there is no way of attributing a money value to them. The assessment is therefore not a precise one. As was stated by Watermeyer JA:

'The amount to be awarded as compensation can only be determined by the broadest general considerations and the figure arrived at must necessarily be uncertain, depending upon the judge's view of what is fair in all the circumstances of the case.'[2]

Previous awards are, as stated by Innes CJ, instructive even if they are never decisive.[3] This is because:

'Nothing like a hard and fast rule or definite standard is to be found in a matter so closely linked with the peculiar circumstances of each case, but some guidance is to be derived from the notion that fairness to both parties is likely to be served by a large measure of continuity in the size of awards, where the circumstances are broadly similar…If there has been a marked change in the value of money since earlier, otherwise comparable, awards were made, this should be taken into account, but not with such an adherence to mathematics as may lead to an unreasonable result….'[4]

It is clear from *Sigournay* that no hard and fast rule exists that previous awards must be used and the awards escalated to the extent that the value

2 *Sandler v Wholesale Coal Suppliers Ltd* 1941 AD 194 at 199.
3 *Hulley v Cox* 1923 AD 234 at 246.
4 *Sigournay v Gillbanks* 1960 (2) SA 552 (A) at 556A-C.

of money has declined.[5] No two sets of wounds are the same and no two people upon whom identical wounds are inflicted respond in the same way or share the same circumstances. The comparison with previous awards is instructive and assists in ensuring that the amount awarded is as fair as possible in the circumstances.

16]The parties agreed that the closest comparable case to the present one was that of *Heynecke v Visagie*.[6] In that matter a boy aged ten at the time of the incident and 12 at the time of trial had been bitten by a dog in the face. He was screaming and somewhat hysterical and was hospitalised for a few days. After 24 days, he was examined. He had severe irregular scarring in the left cheek area stretching from the base of the left nostril to the hairline above the left ear. There was also a loss of function of the superior branches of the left facial nerve resulting in an inability to raise the left eyebrow and to close the eyelids on the left side tightly. He also had severe persistent swelling in the injured area, especially of the left lower eyelid, causing a slight introversion of the eyelid with resultant irritation of the left eye and excessive weeping. By the time of trial, the scarring had improved and the excessive weeping had disappeared. He had been left with a twitching of the left eye due to faulty regeneration of the severed nerve ends leading to intermittent spasms of the muscle, probably permanent. The loss of function in the lifting of the left eyebrow was a serious cosmetic blemish. Future plastic surgical operations were indicated. As general damages for pain and suffering, shock, disability and disfigurement he was awarded a present day equivalent of R44 000.

17]The next case relied on by the plaintiff was *Martin v Union and South*

5 Loc cit. See also *Capital Assurance Co Ltd v Richter* 1963 (4) SA 901 (A) at 906A-G.
6 1980 3 QOD 102 (W). (All references to QOD are to various volumes of Corbett & Buchanan: *The Quantum of Damages in Bodily and Fatal Injury Cases*, in its later volumes referred to as Corbett and Honey. The volume number appears after the date.)

West African Insurance Co Ltd (2)[7] where a woman lost her nose which needed to be stitched back, cracked her sternum and suffered contusions of her left hand, back and both legs. It was determined that plastic surgery would remove all blemishes from her nose but she suffered back pains which required pain medication and impacted on her enjoyment of playing tennis, in particular. The present day value of the general damages awarded to her is R83 000.

18]In *Mather v President Insurance Co Ltd*,[8] an 11 year old girl had sustained a severe fracture of the nose and bruising and abrasion of her whole face when she collided with a lorry while riding her bicycle. She sustained two rounded hypertrophic scars in the region of the left hip which were unsightly when wearing her swimming costume. She had been left with a broad flat deformity of the nose and difficulty in breathing through the nose. Increased fluid secretion from her nose would probably continue for the rest of her life. A nasal graft and nasal correction were recommended for when she reached 17 years of age but it would not achieve a full cosmetic result although normal breathing might be restored. The scarring on her thigh would eventually probably not trouble her but her sense of attraction for the opposite sex would be adversely affected by the nasal appearance, at least until the deformity could be corrected. Damages for psychological trauma were included in the award of general damages of a present day value of R103 000. The judge hearing the matter stated that he had not been referred to any comparable awards. The facts in the last case relied on by the plaintiff, that of *Strauss v Santam Insurance Co Ltd*[9] are so different as not to be of material assistance.

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7 1971 2 QOD 227 (E).
8 1969 2 QOD 9 (W).
9 1976 2 QOD 562 (N).

19]The defendant referred to the case of *Bandle v Bonhomme*.[10] A 31 year old male had been assaulted with a broken beer bottle in his face. He suffered a severely lacerated upper lip and oral commissure involving full thickness of both lips, and severance of the tip of his nose accompanied by a degloving of the nose. He also sustained a trapdoor-type laceration of the anterior right neck. Excellent reconstructive surgery had improved the initial 'horrific' extent of the disfigurement to a moderately severe result, but his face still displayed significant hypertrophic scars and variations in colour due to skin pigmentation. His upper lip was not as mobile as before but the scar on it was covered by a moustache. The right hand side of his mouth was insensitive and had a scar running from the corner of the mouth to the jaw. Two operations had already been performed and three were to follow. Future surgical revision would improve but not eradicate his disfigurement. He was awarded general damages, including for *contumelia*, in a present day value of R53 000.

20]The closest comparable cases are those of *Heynecke, Mather* and *Bandle*. None of them is even close to identical as regards the injuries or their *sequelae*. In all three of these cases the disfigurement at the time of trial was, and the likely future disfigurement was likely to be, more severe than that of N. In the first, the nerve damage was serious and in the third the plaintiff would be left with disfigurement. None of them took place on a 2 year old. Of them, only in *Mather* were psychological consequences suffered and it is difficult to compare them meaningfully with those which N has experienced. N suffered confusion at the time of the incident, uncomprehending pain in the days and weeks that followed and the impact on his social life through avoidance of dogs has been

10 1992 4 QOD G3-6 (D)

reasonably severe. Granted, the latter appears to have been prolonged and even to an extent exacerbated by the response of his parents but this is not something for which he can be blamed. With the proposed therapy, it should be resolved. The psychologists agreed that, whilst the scars are visible, they are not disfiguring. Dr McGarr is confident that the proposed scar revision surgery will result in what plastic and reconstructive surgeons refer to as acceptable scars. In N's case this will mean that the scar through his right eyebrow will be less than 2mm in width and the one on his right cheekbone will have consistency of contour and colour. It is so, however, that, as both psychologists agreed, adolescent boys are generally self-conscious, especially about their physical appearance where it deviates from a perceived norm. Mrs Visser testified that N is already fastidious about his appearance. Although the defendant is correct in his submission that N has no experience of a body image without scarring, this does not mean that he is not, or will not become, aware of how his scarring distinguishes him from his peers. It is likely that this will be exacerbated in the years of adolescence which he will need to traverse before the recommended time arrives for the surgical revision of the two scars in question. Whilst this should not be unduly exaggerated given the already successful initial surgery, it is a factor which affects the question of general damages and without which a lesser award would have been made. In all the circumstances, I am of the view that an award of R70 000 for general damages, taken as a globular sum, is appropriate in the circumstances.

21]This means that the plaintiff has proved total damages in the sum of R150 051.59. This is made up of past medical expenses of R36 490.59, future medical, psychological and hospital expenses of R43 561 and general damages of R70 000.

22]This would be my award, based on the damages proved at the trial. However, the plaintiff submitted that I am obliged to award general damages in at least the sum of R110 000. The reasoning was as follows. On 15 January 2010, the defendant served on the plaintiff a notice in terms of Rule 34(1) of the Uniform Rules of Court in the following terms:

'Kindly take notice that the Defendant unconditionally offers to pay the sum of one hundred and twenty six thousand six hundred and eleven rand and twelve cents (R126 611.12) in settlement of the Plaintiff's claim, which offer comprises R110 000.00 in respect of general damages and R16 611.12 in respect of special damages, and also tenders to pay the Plaintiff's party and party costs up to the date of delivery hereof.'

The plaintiff submitted that, because this was an unconditional offer, it constituted an acknowledgment of liability for general damages in the sum of R110 000 and that, accordingly, I am not at liberty to award any less under that head.

23]In support of this submission, the plaintiff could not refer me to any direct authority nor was I able to find any. The plaintiff relied on the commentary to Rule 34(1) in Erasmus: *Superior Court Practice* and the cases cited in support thereof. There the learned author says the following:

'An unconditional offer is designed for the case where the defendant admits liability on the plaintiff's claim, in whole or in part, entitling the plaintiff to accept the offer and to sue for the balance of his or her claim at his peril.'[11]

These words are a slight adaptation of, and presumably rely on, what was said in a case cited as authority for the proposition and also referred to by the plaintiff, *Van Rensburg v AA Mutual Insurance Co Ltd*,[12] to the following effect:

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11 At B1-240B.
12 1969 (4) SA 360 (E) at 364E-F.

'Rule 34(1) is thus designed for the case where the defendant admits liability on the plaintiff's claim, in whole or in part, entitling the plaintiff to uplift the money paid in…and to sue for the balance of his claim, if any, at his peril.'

24]At the outset, it should be noted that neither of these *dicta* bears directly on the proposition advanced by the plaintiff. This is because, unlike what is dealt with there, the offer was not accepted. Whether, if it had been accepted, the plaintiff would have been entitled to sue for the balance of his claim need not concern me. What is in issue in the present matter is the effect of an unaccepted unconditional offer to settle, made under the Rule, of a sum less than that claimed by the plaintiff. The plaintiff contends that it fixes liability in at least the amount offered. A further issue is whether, if this is the case, it fixes liability for general damages in the sum of R110 000 when an overall sum was offered and was said to comprise 'R110 000 in respect of general damages and R16 611.12 in respect of special damages'. Neither of these questions was addressed in argument by the parties.

25]The offer made by the defendant in the present matter must be interpreted in order to determine these issues. The law as to how to go about interpreting documents was recently analysed and helpfully summarised by Wallis JA in the following terms: [13]

'The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the

13 In *Natal Joint Municipal Pension Fund v Endumeni Municipality* (920/2010) [2012] ZASCA 13 (15 March 2012) para 18.

ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.' (reference omitted)

26]The first circumstance which gave rise to the offer was that the parties were litigating the present claim. The offer was made pursuant to Rule 34. The effect of the offer, which was also its probable purpose, was to place the plaintiff on his mettle in that, if he rejected the offer, this placed him at risk of paying the costs incurred after the time the offer could reasonably be considered unless he was able to prove damages in excess of the sum tendered. The offer was stated to be open for acceptance for the time period specified in the Rule. If it was not accepted within the given time, it fell away and required either the consent of the defendant or the imprimatur of the court before it could be accepted later. The offer was in a sum less than that sued for by the plaintiff.

27]As regards the context afforded by the Rule, this is of critical importance. In *Klein v City Council of Johannesburg*[14] Centlivres JA said the following:

'In this connection I may at once say that there was no procedure in Roman-Dutch law whereby a defendant could, *without admitting liability*, pay a sum of money into Court.' (my emphasis)

Immediately after this dictum, Centlivres JA went on to deal with a passage in *van der Linden*[15] which, he held, dealt with a case where it was clear that the defendant owed the plaintiff part of what was claimed. This passage he translated from the Dutch as follows:

14 1948 (3) SA 296 (A) at 301.
15 *Judicieele Praktyk* Vol 1. Book 2, 4, 9.

'The defence of non-liability is further taken either simply or with the addition of a "declaratoir" or "praesentatie". When, for example, the claim of the plaintiff cannot indeed be admitted as it stands, but still is well-founded in one or more points, it is not appropriate to contradict the claim entirely by plea of non-liability, but the defendant acts carefully in offering his opponent in the suit *whatever he truly owes him*…
The form of praesentatie which *van der Linden* gives shows that the defendant contends that the plaintiff should be denied any award over and above the amount admitted by the defendant.'[16]

It will be recognised that the present offer was made in precisely the context where liability for damages was acknowledged in the plea but the quantum of the claim denied. However, although Roman-Dutch law recognised such a procedure, it is settled that, as Centlivres JA went on to hold, 'the legal results flowing from a payment into Court depend not on the law relating to tender but on the construction of the rule of Court'.[17]

28]The history of this Rule derives from English law via the Cape. Order 30 of the English Judicature Act of 1875 formed the basis of Cape Rule of Court 332 promulgated in 1879 which was 'apparently the first Cape Rule of Court dealing with payment into Court'.[18] This gave rise to Cape Rule of Court 576 and, thereafter, Cape Rule of Court 24 which was dealt with in *Ngwalangwala*. This in turn, along with other provincial division rules to similar effect, gave rise to Rule 34 which was brought into effect when the Uniform Rules of Court were promulgated (the old Rule). In English law, Order 30 was replaced with Order 22 and, thereafter, by the current rule, Part 36 of the Civil Procedure Rules (CPR). The current English rule[19] differs totally from the new Rule and deals only with

16 *Klein* at 301-302 (his emphasis). It appears, with respect, therefore, that Cameron J overstated the position when he said that the 'procedure for paying a sum of money into Court was unknown to the Roman-Dutch law' in *Turbo Prop Service Centre CC v Croock t/a Honest Air* 1997 (4) SA 758 (W) at 762C-D where he dealt with *Klein*.
17 At 305.
18 Per Williamson JA in *Ngwanlangwala v Auto Protection Insurance Co Ltd* (In liquidation) 1965 (3) SA 601 (A) at 607B-C.
19 Part 36.13 of the CPR provides, in subparagraph (1), 'A Part 36 offer will be treated as 'without

without prejudice offers. It can therefore afford no guidance as to how to interpret the present offer which is an unconditional one.

29]*Van Rensburg*[20] dealt with the old Rule prior to its amendment in 1987[21] when it was substituted in its totality by the present Rule 34 (the new Rule). Under the old Rule, a payment of money was made into court whereas under the new Rule a written offer to settle must be made. The old Rule was headed 'Payment into Court' and the material parts of Rules 34(1) and (2) read as follows:

'(1) In any action for payment of a sum of money the defendant may at any time pay unconditionally into court the sum so claimed or any part thereof, and the registrar shall, upon the application of the plaintiff, pay such sum to the plaintiff's attorney…

(2) In any action in which a sum of money is claimed either alone or with any other relief, the defendant may, at any time without prejudice, pay an amount into court by way of an offer of settlement of the plaintiff's claim.'

The new Rule is headed 'Offer to Settle' and the material parts are Rules 34(1) and (6) which read as follows:

'(1) In any action in which a sum of money is claimed, either alone or with any other relief, the defendant may at any time unconditionally or without prejudice make a written offer to settle the plaintiff's claim…

6) A plaintiff or party referred to in subrule (3) may, within 15 days after the receipt of the notice referred to in subrule (5)… accept any offer or tender….'

Rule 34(5) sets out the requirements with which an offer under the new Rule must comply.

30]In *Ngwalangwala,*[22] the plaintiff claimed damages for injuries suffered

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prejudice (GL) except as to costs'.'

20 Footnote 12 above.

21 By way of GN2164 of 2 October 1987 and by GN2642 of 27 November 1987.

22Footnote 18.

by his minor daughter in a vehicle collision. The plea admitted an obligation to pay only 'such damages as have been suffered by his said minor daughter', denied that these amounted to what had been claimed and further pleaded that 'the damages suffered by the plaintiff's said minor daughter do not exceed the sum which it has this day paid into Court in full satisfaction of the plaintiff's claims, in terms of Rule of Court 24.' The amount paid pursuant to the Rule was R6 000. This was not accepted and the defendant company then went into liquidation whereupon the liquidator withdrew the offer of settlement. The plaintiff applied for relief entitling him to accept the R6 000 and to uplift that sum from the Registrar of the Court. The liquidator resisted the application and applied for an order allowing him to uplift the amount paid in. He also sought to amend the plea to remove reference to the offer and to submit to judgment in whatever amount the plaintiff proved had been suffered as damages. In dealing with that issue, the court said the following:

'There can really be little doubt that, apart from the supervening liquidation, the Court in the exercise of its discretion in this case would have ensured that the R6,000 would have stayed in the hands of the Registrar until the amount actually due by the company was ascertained and would then have ordered that any amount of damages or costs due by the defendant to the plaintiff be paid therefrom. To the extent to which any portion of such sum was in excess of the amount of damages eventually found to be due to the plaintiff, together with any balance of costs which may have been payable by the plaintiff, the Court would have authorised the Registrar to repay any balance to the defendant.'[23]

Although the last sentence of this is *obiter*, it is apposite to the present matter.

31]More direct support for this approach is to be found in two cases cited

23 At 609G-H.

with approval in *Klein*.[24] The first of these, *Michau v Ashe*[25] was decided under Cape Rule 332 where, in response to an action for defamation claiming damages of £1 000, the defendant paid into court £100 by way of satisfaction and amends. Judgment was entered for £5, despite the payment into court having exceeded that sum. The second is *Versfeld v The South African Citrus Farms Ltd.*[26] In this matter, damages for breach of contract were claimed, the defendant admitted liability for the breach and paid into court the sum of £600. The court held that damages of only £500 had been proved and Gardiner JP said the following:

'Defendant paid £600 into Court, but plaintiff did not choose to take that sum in satisfaction of his claim, and he is entitled only to the damages he has proved.'

These cases bear directly on the present matter where the amounted offered in settlement of the claim was not accepted. In such a circumstance, the plaintiff cannot then fall back on the offer even though it was said to be unconditional. He is entitled only to the damages he has proved.

32]This is all the more so since the present matter concerns an offer to settle rather than a payment into court which could be accepted and the balance sued for.[27] Taking into account the context afforded by the new Rule and according to the wording of the offer, it was made in settlement of the plaintiff's claim. Whereas, under the old Rule, only payments made

24 Footnote 14.
25 19 SC 517.
26 Cited in *Klein* as CPD, January 7,1930. The matter was taken on appeal in *Versfeld v South African Citrus Farms Ltd* 1930 AD 452. On appeal the defendant consented to judgment being increased to the sum of £600 but asked for costs of the action from the date of the original payment into court and costs of the appeal from the date of the tender of the consent to judgment. The judgment was increased accordingly and the costs order sought by the defendant was granted. The reasoning on appeal does not in any way deal with or detract from the dictum of the trial court cited with approval in *Klein*.
27 As was said in *Van Rensburg*. In *Harris v Pieters* 1920 AD 644, the court held that where a payment was made into court with an attempt to attach a condition, the condition could be rejected and the money retained and the balance claimed. If, however, a tender which had been accompanied by money was refused, the money had to be returned. This followed *Odendaal v du Plessis* 1918 AD 470 where a tender was made in full settlement, the court holding that this amounted to its acceptance being conditional on the creditor abandoning the balance of his claim.

without prejudice were said to be made 'in settlement of the plaintiff's claim', under the new Rule both unconditional and without prejudice offers are said to be made 'to settle the plaintiff's claim'. Boiled down to its essence, what the plaintiff contends for is a situation where, having rejected the offer and despite not having proved damages exceeding the offer, he seeks to hold the defendant liable for at least the amount contained in it relating to general damages. Although said to be unconditional, it is not an unconditional payment, it is an unconditional offer. It does not amount to an acknowledgment of debt, which seems to be the meaning contended for by the plaintiff. In other words, it does not, without acceptance, create a cause of action as would an acknowledgment of debt.[28] The offer therefore does not amount to an acknowledgment of liability if it is not accepted. Nor does it fix the minimum liability for general damages in the amount offered. The whole purpose of the new Rule would be defeated if, despite not accepting such an offer, a plaintiff could, in effect, enforce it if unable to prove damages in excess of the sum offered.

33]In addition, the offer was of a sum of R126 611.12 in settlement of the claim as a whole. This was the amount which the defendant acknowledged he was liable to pay if the offer was accepted. It was a single, indivisible, offer to settle the entire action. The breakdown

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28 I leave aside the issue that the plaintiff does not rely on the offer as giving rise to liability in its cause of action. The nature of liability where an offer to settle has been accepted need not detain me but is not uncomplicated. In *Orton v Collins & another* [2007] 3 All ER 863 (Ch) the issue arose whether an offer accepted under Part 36 of the CPR brought into being a contract which could be enforced. It was held that parties before the court who chose to employ machinery prescribed by the court's rules in order to settle their dispute were to be taken to submit to the consequences, namely that if the offer were accepted the court could enforce it. A party who made a valid CPR Pt 36 offer, or one who accepted it, had to be taken to be binding himself to submit to those consequences. The obligation that arose was not primarily contractual but was *sui generis*. It was part of the court's inherent jurisdiction regulated and clarified in Pt 36 to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner and the administration of justice included addressing the settlement of disputes.

between special and general damages gave no more than an indication as to how the amount offered had been calculated. Even if it were held that the offer amounted to an acknowledgement of liability, therefore, there is no basis to construe the offer as three offers; one to pay the total damages mentioned, one to pay special damages in the mentioned amount, and one to pay general damages in the sum of R110 000.

34]In the result, the submission of the plaintiff must therefore be rejected. The plaintiff is only entitled to the damages proved at the trial and arrived at as set out above.

35]As regards costs, the plaintiff has succeeded in his claim. The amount to be awarded exceeds that offered in settlement and no factors were brought to my attention which might influence me to exercise my general discretion against awarding costs to the plaintiff or otherwise ameliorating a costs order against the defendant. On the contrary, the defendant conceded that, if I found that damages were proved in excess of the sum offered in the Rule 34(1) offer, the plaintiff would be entitled to the costs. I agree that the costs must follow the result. The plaintiff requested various specific orders for costs and these were not opposed by the defendant and are in any event appropriate in the circumstances.

In the result, the defendant is directed to pay to the plaintiff:

1. The sum of R150 051.59;
2. Interest on that sum at the rate of 15.5% per annum from 6 February 2007 to date of payment;
3. Costs of suit, such costs to include:

(a) The qualifying and attendance costs relating to Dr McGarr and

Mr Swanepoel;

(b) The qualifying costs relating to the actuary utilised by the plaintiff;

(c) The costs arising from the attendance of Mr Swanepoel at the examination of the minor child N Visser by Dr Bustin;

(d) The costs of the attendance at the trial of the plaintiff's Pretoria attorney.

DATE OF HEARING:	12 and 13 March 2012
DATE OF JUDGMENT:	29 March 2012
FOR THE PLAINTIFF:	GF Heyns, instructed by BEYERS & DAY INC. locally represented by AUDIE, BOTHA & CO.
FOR THE DEFENDANT:	MA Oliff, together with Z Oliver, instructed by JOHNSTON & PARTNERS.