IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: A223/24

In the matter between

THEEWATERSKLOOF MUNICIPALITY	APPELLANT
AND	
ROMANDA MARAIS	1ST RESPONDENT
JADE BEUKES	2ND RESPONDENT
BEVERLI KATZ	3RD RESPONDENT

Date of Hearing: 23 July 2025

Date of Delivering: 19 August 2025

JUDGMENT

THULARE J

ORDER

(a) The appeal is upheld with costs, such costs to be paid by the first respondent on scale A.

(b) The order of the court of first instance is set aside and replaced with the following order:

(i) The first respondent is directed to deliver the three dogs, to wit, Pirelli, Bud Light and Knight, which form the subject matter of this application, to the Municipal Pound situated at the corner of R406 and N2 on or before Tuesday 26 August 2025 and to comply with all the instructions of the authorized officer of the appellant as set out in the notice of motion.

(ii) If the first respondent fails to comply with the order of delivery and the instructions of the appellant's authorised officer, the appellant is authorized to impound the dogs as set out in the Impoundment By-Law and to process the dogs in accordance with the law.

(iii) The first respondent to pay the costs on scale A.

[1] This is a full court appeal against the whole of a judgment of the court of first instance, which court refused an application for leave to appeal, and leave was granted by the Supreme Court of Appeal to the full court. The court of first instance dismissed the appellant's urgent application and made no order as to costs. The relief sought by the appellant, a municipality, ran up to eight pages. The appellant sought an order directing the respondents to deliver dogs which the respondents owned or were in possession of, to its pound for evaluation. The evaluation was to determine whether those dogs posed a threat to public safety or whether they could be safely impounded according to standards and procedures of its by-laws, to wit, Impoundment of Animals By-Law 2015 and the Nuisances Resulting from the Keeping of Animals By-Law 2015. The appellant sought the respondents to pay the costs of the evaluation and to deposit an amount of R5000-00 for this purpose to its attorneys. The evaluation was to be performed by a qualified veterinary surgeon and/or the pound keeper or their authorized

representatives. The evaluators were to be appointed by the appellant in its sole discretion and were to assess the health, behaviour and temperament of the dogs to determine whether they could be safely impounded or whether they were too dangerous to be rehomed or rehabilitated and should therefore be humanely euthanized. The evaluation was to be conducted in accordance with a criteria with attention to behaviour, history of aggression, medical examination, likelihood of rehabilitation, risk to public safety and quality of life. If the veterinary surgeon determined that the dogs posed an unacceptable risk to public safety and had poor prospects for successful rehabilitation humane destruction may be recommended.

[2] In the event that the respondents failed to comply with the order to deliver the dogs or to pay the deposit for the costs of evaluation, the appellant sought an order which authorized it to forthwith and without further notice to the respondents, to enter the premises where the dogs may be found and to seize the dogs, to impound the dogs, cause the dogs to be evaluated at the respondents costs and if it was determined that the dogs were dangerous, wild, uncontrollable or malicious to be returned to the owner, to destroy the animals upon written notice to the respondents. The appellant sought the voluntary delivery of the dogs or the siezure thereof to have an interim effect pending the report from the veterinary surgeon and to be kennelled at the municipal pound and for the respondents to pay the costs thereof including those of the veterinary surgeon. The veterinary surgeon or pound keeper were to report on the evaluation to all the parties detailing the findings and the recommendations.

[3] The first respondent was the owner of the three dogs, to wit two Pit Bull Terriers and a mixed breed dog which were kept at […] N[…] R[…] Street, Caledon (the property) where she resided with her boyfriend, the second respondent. The second respondent was the co-owner of the dogs and the third respondent was in possession of the dogs. The first respondent raised a *point in limine*, and submitted that on a proper interpretation of the provisions of the Impoundment By-Law, an authorised municipal official or their agent could only detain her dogs in terms of that By-Law if the alleged incidents involving the dogs occurred whilst the dogs were straying unattended upon

any street, road reserve or other public place and not if the incidents, as was alleged by the appellant, occurred within the confines of private property. On this score, the first respondent submitted that this was a procedural defect prevalent in the application and rendered the relief sought by the appellant unenforceable as the incidents did not occur when the dogs were straying unattended upon any street, road, road reserve or other public place, but occurred within the boundaries of private property which belonged to her parents in circumstances where the victims were bitten by her dogs as a result of their provoking and/or harassing and/or teasing the dogs.

[4] The appellant was a municipality in Caledon, Western Cape and Wilfred Schrevian Solomons-Johannes (SJ) was its Municipal Manager. The municipality sought orders which according to it had the effect of nullifying the threat posed to the community by the dogs which the municipality deemed dangerous. The municipality had a constitutional duty to enforce the law including the municipal bylaws and to ensure the safety of all people who found themselves within its area of jurisdiction. The first respondent was a businesswoman and owner of a nail salon on the property. The dogs were ordinarily kept secure behind gates and fencing in the backyard with access to the front garden through a gate between the main dwelling and a wendy-house where the first respondent operated a salon. The dogs attacked and seriously injured three people. The injuries necessitated hospitalisation of the victims for an extended period.

[5] Earlier in 2023 Lizaan Brandt had collected maize meal for dogs at the property as part of her regular assisting with animal welfare through donations of food and foster care for cats. First respondent was a member of the Caledon Animal Care and a registered inspector of the SPCA. Brandt had previously received six cats from her in October 2023 for foster care until their permanent homes were found in November 2023. Upon arrival she proceeded to the front door where a housekeeper informed her that the first respondent was busy with a client in her salon. She walked past the dogs behind the fence to reach the salon. She noticed the dogs barking aggressively and took a wide detour around them. She went inside the salon and informed the first

respondent of the purpose of her visit. The first respondent went behind the house to collect the bag of maize, passing the still barking dogs.

[6] Brandt visited the property on 17 November 2023 at around 5:30pm to pick up a cat for weekend foster care as arranged earlier that day. As she waited on the porch the first respondent came to unlock the security gate, with the dogs already barking and seeming excited. The first respondent instructed the dogs to say hello to the lady and their behaviour appeared consistent with Brandt's first encounter. Suddenly the first white dog jumped on her and began biting her left shoulder. As she attempted to descend the stairs to escape, the dogs continued to bite and pull her, preventing her forward movement. The first respondent yelled 'my dogs have never hurt anyone before', as Brandt fell on the stairs multiple times due to the dogs jumping and pushing her. She used her arms to protect her face and neck from their bites. During that struggle she dropped her car keys and scraped her knees on the ground. She managed to get down a few steps and proceeded towards her car, but the dogs persisted in their attack, biting, pushing and barking at her. Fearing for her life she called out the first respondent who was behind her, wondering why the dogs were still attacking her and why the first respondent was not intervening effectively. Despite the first respondent's attempts to yell at the dogs, they did not obey her commands. Brandt's shoulders, arms, elbows, and right calf and shin were bitten and scratched. Her lower left arm and upper right thigh were bitten and her left side and back were scratched.

[7] On 22 January 2024 at about 18H00 Christi De Villiers (De Villiers) visited the property, she specifically had gone to the first respondent's salon for nail treatment. The salon is located in a wendy-house on the side of the main dwelling on the front part of the garden. The first respondent's mother arrived at the property and wanted to enter the main dwelling through the back door. She had to open the gate between the main dwelling and the wendy-house to gain access to the back yard where the back door was located. The backyard is where the dogs were kept. If that gate was opened the dogs would gain entry to the front garden where the wendy-house was, that is into the salon. The first respondent asked De Villiers if she minded that she open that gate. De Villiers

protested out of fear of the dogs. The first respondent nevertheless opened the gate. De Villiers assumed that first respondent would then close the wendy-house door to prevent the dogs entering the salon, which she did not. The dogs were released into the front garden, entered the wendy-house and attacked De Villiers. First respondent could not control the dogs as they bit De Villiers. It was after some time during the attack that first respondent and her mother managed to subdue the dogs. De Villiers phoned a friend, whose mother took her to the local doctor. The doctor referred her for treatment at Hermanus Medi-Clinic where she was hospitalised for five days. She was bitten on her right arm from the elbow to the top, her left arm under the elbow to the hand, her left leg and her buttocks.

[8] On 7 March 2024 at about 9H20 Victor Engelke (Engelke) attended to the first respondent's residence. Engelke was a building contractor and attended to some paint work on the property at the instance of the first respondent. He was aware of the dogs and the danger they posed and thus arranged with first respondent that the dogs be locked away in the house during the day in order for him and his workforce to work in all outside areas of the house without any threats from the dogs. Earlier that morning he had already dropped some of his workers at the property and the dogs were secured away in the house. He left the property to drop other workers elsewhere and returned to the property to take a picture of the paint container to order additional paint. He presumed that the workers were in the backyard painting, and entered the backyard, secure in the undertaking that the dogs were in the house. As he entered the backyard, the three dogs attacked him in unison. He fought them off, reached the back gate and escaped to the front garden. He left the property to seek medical attention. he was bitten on the left upper leg, both wrists, both forearms and right calf. After the attack, he had to abandon the project as he felt that the danger posed by the dogs was too severe.

[9] Isaac Daniels (Daniels) was a law enforcement officer in the employ of the appellant. He became aware that the dogs had attacked Brandt at the property of the respondents on 22 November 2023. The next day he met the first respondent at his offices and interviewed her. The first respondent assured him that the dogs were not dangerous

and that the attack had occurred because the dogs had been provoked. Daniels imposed on the first respondent a fine of R1000-00 and the first respondent undertook to keep the dogs locked up, under control and to ensure that they would not in future pose a danger to any person. Upon learning of the second attack, Daniels also imposed a fine of R1000 on the second respondent on 16 February 2024. Second respondent also undertook to control the dogs and avoid future attacks. The first respondent paid both fines but denied that she thereby admitted liability. Given the severity and repeated nature of the attacks, the municipality concluded that the dogs did not appear to be ordinary but instead were dangerous and liable to be destroyed and sought to impound them.

[10] Marius Hendriks was a senior inspector employed by the appellant. He became aware of the dog attack on Brandt at the property on 22 November 2023. He also became aware of the attack on De Villiers on 22 January 2024 and on Engelke on 7 March 2024. He received instructions to serve a compliance notice on the first respondent on 8 March 2024 in terms of the Municipal By-Law on Public Nuisances promulgated on 11 September 2015 in the provincial Government Gazette 7488. He served the notice on the same day and also informed the respondent, on the same day, that she must implement the necessary steps to restrain and control the dogs to prevent further incidents and ensure safety to the public. He also advised her that he was to remove the dogs to the municipal pound for evaluation and possible destruction. The first respondent informed him that she had the dogs removed to a kernel owned by the third respondent. Hendriks subsequently visited the kennel where an employee of third respondent, Michael Scott, advised Hendriks that he was not authorized to release the animals to Hendriks.

[11] The first respondent disputed that the dogs were dangerous. According to the first respondent she had requested that an animal behaviourist specialising in dogs, with 35 years experience, conduct an evaluation of the dogs, and instead the appellants launched the urgent application. On 2 April 2024 the first respondent's specialist conducted an evaluation of the dogs and found that the three dogs did not display any

aggressive behaviour, and that the owner had done security upgrade measures at their property. An isolated kennel, every gate, wall, fence etc had warning signs on them. The first respondent disputed that the dogs could be described as dangerous and regarded this description as an unfounded allegation. According to first respondent one dog jumped on Brandt and placed its paw on her shoulder in an attempt to greet her on the porch. Brandt was startled and began screaming and gesticulating by throwing both hands in the air, which provoked the dogs. The dog then nipped Brandt on the calf and first respondent immediately pulled it back inside the house and shut the door. She told Brandt to stand back but she instead began to run down the stairs to the front yard which further provoked the dogs and prompted the other two dogs to chase her and nipped at her whilst she was running. As Brandt ran down the stairs to the front yard first respondent commanded the two dogs to heel and they duly obeyed. She denied that Brandt fell down the stairs and denied that her dogs caused Brandt to fall down the stairs. According to first respondent the dogs bit Brandt because she provoked them by screaming and running and thus the incident could not be described as an attack due to the fact that her dogs did not intend to cause harm to Brandt, but to ward off a perceived danger and acted as any animal would in the circumstances. Second respondent made an offer to Brandt not because she admitted liability or wrongdoing but in a bid to settle the matter amicably.

[12] The first respondent denied that De Villiers protested against her letting the dogs out and alleged that De Villiers agreed to her letting them out as De Villiers stated that she was not scared of the dogs. According to first respondent, De Villiers and her boyfriend frequented the house and were thus familiar with the dogs. First respondent's case was that when she opened the gate, one of the dogs walked into the salon where De Villiers was seated and placed her paw on De Villiers knee and De Villiers reacted by pulling her knee away, shouting at the dog "that's enough: as she was standing up, and gesticulated by throwing both hands in the air, which in turn provoked the dogs and then the other two dogs nipped De Villiers. First respondents mother was present in the salon and both first respondent and her mother were able to command the two dogs to heel and they duly obeyed. According to the first respondent, the dogs bit De Villiers

because she provoked the dogs by shouting, standing over them and gesticulating. The incident could not be described as an attack or a mauling due to the fact that her dogs did not intend to cause harm to De Villiers but wanted to ward off a perceived danger and acted as any animal would in the circumstances.

[13] First respondent denied that she undertook but failed to keep the dogs locked away in the house during the day. According to her, she had undertaken to keep the dogs locked away in the house when Engelke's workers were on site and would let them into the backyard which was secured and fenced, when the workers left the site during their tea and lunch breaks. A protocol was established where Engelke or his workers would knock on the kitchen window on the left side of the house which was accessible from the front yard at the commencement of their shift in the morning and/or their tea break and/or lunch breaks in order the alert her, her mother or the housekeeper to lock away the dogs in the house. On the day of the incident the workers left the site during their tea break during which time Engelke returned to the site. He failed to knock on the window. First respondent, her mother and/or housekeeper were thus unaware of his presence, and the dogs were in the backyard. According to first respondent, the surrounds of the house were fairly open in that if one were to walk around the house one would have an unencumbered view and thus Engelke could easily see if any of his workers were on site. At that time they were not. Engelke walked to the backyard without knocking on the window to alert about his presence, and walked to the backyard when his workers were not in site. According to first respondent, the workers were still plastering and had not yet commenced painting. The dogs bit Engelke to ward off a perceived danger and acted as any animal would in the circumstances as at the time the dogs perceived Engelke as an intruder as he was in a place where he was not entitled to be, that is, the backyard, which was a secure and fenced in.

[14] The first respondent admitted having been prompted to submit the dogs. According to her she did not resist the removal of the dogs until the issues had been resolved. What she found objectionable was having the dogs detained in the municipal pound which according to her did not meet the minimum requirements for dog keeping. She

elected to have the dogs kept at a boarding kennel and according to her, Hendriks did not have any problems with that. She admitted receiving the compliance notice on 8 March 2024. According to her, she complied with the notice in that by 15 March 2024 she had installed further security enhancements to the outer perimeter gates of the property, constructed specialized secure demarcated quarters for the dogs comprised of vibracrete walls, steel fencing and gates and increased visible signage on the property cautioning visitors that there were dogs on the premises. According to her, the appellant and her officers did not have the requisite authority to detain the dogs in terms of the Impoundment By-Law. All the alleged incidents involving her dogs occurred within the confines of private property which belonged to ger parents and accordingly did not occur whilst her dogs were straying unattended upon any street, road, road reserve or other public place, which was a prerequisite of detaining any dogs in terms of the Impoundment By-Law. The first respondent also relied on the report by Yvonne Wurster (Wurster). To avoid being tedious on Wurster, I will deal with her statement in my analysis.

POINT IN LIMINE

[15] In judgment, it is necessary to allow oneself to walk the path of travel of reasoning that an applicant for relief walks, and to allow oneself to be at the window where you are asked to look through, to fairly express oneself on the view outside the window, in the determination of the relief sought. The notice issued to the respondents by the appellants on 8 March 2024, as well as what Hendriks told the first respondent on his visit to the property, was clear that the appellant was following the path of travel as envisaged in the Public Nuisances and Nuisances Resulting from the Keeping of Animals By-Law of the municipality. This is not only clear from Hendriks affidavit but also from the notice itself. In the determination of the issues between the parties, it was necessary for this By-Law to be the starting point for the court of first instance. In my view, the court of first instance started on a wrong footing, by starting with the Impoundment of Animals By-Law of the Municipality, and this point of departure accounts for its misdirection.

[16] The other path of travel, which was necessary to follow, was the approach to the affidavits of the appellants. Ordinarily in applications the first affidavit filed is termed the founding affidavit, and the following affidavits are confirmatory affidavits. Generally, the first affidavit is detailed and where hearsay evidence is added, it is confirmed by the following affidavits. The appellant did not follow this usual path, and it is something that the court of first instance missed. Had the appellant followed that path, it would have been guilty of what the Supreme Court of Appeal called sloppy [*Drift Supersand (Pty) Limited v Mogale City Local Municipality and Another* (1185/2016) [2017] ZASCA 118; [2017] 4 All SA 624 (SCA) (22 September 2017 para 31]. All the witnesses of the appellant deposed to affidavits in relation to the events they were involved in under oath, which evidence was crucial as a constituent part of the whole case of the appellant. The court of first instance did not appreciate the evidence of Daniels and Hendriks, amongst others, as a crucial built-up to the evidence of Solomons-Johannes in consideration of the cogency of the appellants case. Individually, the affidavits filed by the appellant in its case were founding affidavits in relation to the crucial part played by each deponent distinct from the others, and it was wrong to determine the case primarily hinged on the affidavit of Solomons-Johannes as the only founding affidavit.

[17] The salient parts of the notice reads as follows:

> Subject: Notice of Breach of Public Nuisance and Animal Keeping By-Law
> Dear Ms Romando Marais
> It has come to the attention of the Theewaterskloof Municipality that recent incidents involving aggressive attacks by dogs belonging to you on the premises at N[…] street 0[…], Caledon have resulted in injuries to three individuals. These incidents pose a clear threat to human safety and necessitate immediate action from the Municipality to mitigate potential risks and further danger to the public.
>
> As per section 3 of the Public Nuisance and Nuisances Resulting from the Keeping of Animals By-Law of Theewaterskloof Municipality, it is stated that:

(1) No one may cause a public nuisance

(2) Situations or actions leading to or considered a public nuisance include, but are not restricted to,

(iii) creating a nuisance or to give offence on public or private land, or becoming a danger to other animals, adjacent property owners or the general public.

(3) In the event of a transgression of the provisions outlined in subsection 3(2) of this By-Law, the Municipality has the authority to serve a notice on the owner or occupant of the premises to terminate the activity within a specified time or remove the nuisance created.

Additionally, section 10 of the By-Law places responsibility on the owner or keeper of the animals. It stipulates that the owner or person in charge of an animal must prevent it from disturbing the convenience, comfort, peace, and quiet of other persons and must exercise control over the animals to prevent them from damaging other property or gardens.

It is clear from the complaints lodged by the victims that the dogs have become a public nuisance as per the definition of public nuisance in the by-law and a danger to the general public. The Municipality is therefore exercising its right in terms of the abovementioned bylaw to remove the dogs from the owner and placing it in a place of safety. The Municipality further gives notice to the owner of the dogs to remedy the breach within seven (7) calendar days of receiving this notice by taking the necessary steps to restrain or control his/her dogs to prevent further incidents and ensure safety to the public. Failure to comply may result in the Municipality implementing necessary measures to remove the source of the nuisance and recovering any costs incurred from you as the responsible party.

The Municipality further reserves the right to invoke section 12(1)(a) of the abovementioned By-Law.

It is imperative that immediate action is taken to address the situation and ensure the safety of the public.

Should you have any questions or require further clarification, please do not hesitate to contact us.

Sections 3(1) and 3(2)(b)(iii) of the Nuisance By-Law read as follows:

“3. PUBLIC NUISANCES

(1) No one may cause a public nuisance.

(2) The following situations or actions may cause a public nuisance or shall be considered to be public nuisance, when proof thereof have been provided, and include, but is not restricted to –

(b) any person who allows any animal, reptile or dog –

(iii) to create a nuisance or to give offence in public or private land, or become a danger for other animals, adjacent property owners or the general public.”

Section 3(3)(a) reads:

“When a transgression occur of any of the provisions of subsection 3(2) of the by-law, the Municipality may-

(a) serve a notice on such owner or occupant or alleged transgressor, to terminate the activity within a specified time or remove the nuisance created; and …”

In fairness to the respondents, I did not understand the point *in limine* to suggest any affront to the Nuisance By-Law as authority for the notice issued by the appellants, and the consequential conduct of the appellants officials and officers. In my reading of the papers and the arguments presented, the point *in limine* was limited to the Impoundment By-Law. The essential enquiry as I understand the papers and on the specific facts of this case, was whether the first respondent allowed the dogs (a) to create a nuisance or (b) to give offence on private land or (c) to become a danger for the general public. Provision of proof of any of the three was sufficient to conclude that the situation or action caused a public nuisance. This enquiry, to determine whether the first respondent caused a public nuisance, would be a public nuisance as envisaged in section 3(1) read with 3(2)(b)(ii) of the Nuisance By-Laws, in the jurisdiction of the municipality.

[18] Section 10(1)(a) and (d) of the By-Law provides:

> “10. RESPONSIBILITIES OF THE OWNER OR KEEPR OF ANIMALS
> (1) The owner of an animal or the person in charge of an animal –
> (a) may not cause or allow that an animal disturb the convenience, comfort, peace and quiet of other persons; and
> (d) shall exercise control over the animals in his or her custody, and …
> Section 11(2) and (4) of the By-Law provides:
> 11. THE KEEPING OF ANIMALS
> (2) The Municipality may dictate steps to be implemented or work to be undertaken, to address or resolve or mitigate or prevent the nuisance concerned.
> (4) When the owner of an animal fail to implement the measures required in terms of subsection 10(1) of this by-law, the Municipality may implement the required steps to rectify the situation or may impound such an animal in terms of the provisions of the Impoundment of Animals By-Law of the Theewaterskloof Municipality and recover the costs therefore from the owner of the animal concerned.:
> Animals may be impounded in terms of the Impoundment By-Law, when the preliminary processes leading up to the impoundment were in accordance with the Nuisance By-Law. Where the owner of a dog failed to exercise control over the dog in his or her custody, or allowed a dog to disturb the convenience, comfort, peace or quiet of other persons, the Municipality may impound the dog in terms of section 11(4). Impoundment is not the only avenue available. The delivery of the dogs for evaluation to determine whether the dogs are a nuisance, give an offence on private land or have become a danger to the general public, in that they pose a threat to public safety amounts to steps to be implemented, or work undertaken to address or resolve or mitigate or prevent the nuisance as envisaged in section 11(2). The procedural structure of the Nuisance By-Law suggests that impoundment is the last resort. I am unable to agree that the provisions of the Nuisance By-Laws, read with the Impoundment By-Laws, do not

clothe the appellant with the powers and/or authorisation the appellant required necessary for the relief it sought in the notice of motion.

[19] When interpreting legal prescripts, it is necessary to remind oneself of the purpose of that prescript as a factor to consider. The Impoundment By-Law sets out two purposes in its preamble. The first is to provide for facilities for the accommodation and care of animals which are astray, at large or lost. This purpose is not applicable to the facts before us. The second, which is important for purposes of this judgment, is to provide for procedures, methods and practices to manage the impoundment of animals. The Impoundment By-Law defines impounding of animals as follows:

> "impounding of animals", means to remove an animal to a pound for safe-keeping, with the specific intention: to impose the stipulations of this by-law with regard to the impoundment of animals, causing public nuisances; or to remove a vicious, injured, intracable, dangerous or wild animal, who may cause injury to other animals and / or people or damage property, to a place of safekeeping; or to remove an animal, whose owner can be traced or cannot be traced, from a public road, before such animal cause an accident; or to remove a stray animal to a place of safety and care, until the owner of such animal can be found or such animal can be accommodated fultime elsewhere at a place of care or a new owner;"
>
> The first part of the definition, until the expression 'causing public nuisances,' refers to the impoundment of animals causing public nuisances and includes the removal of such animals to a pound for safekeeping and the imposition of the provisions of the Impoundment By-Law to such animals. In simple terms, the same procedures, methods and practices applicable to animals impounded in terms of the Impoundment By-Law are applicable to animals which cause public nuisances in terms of the Nuisance By-Laws where impoundment is necessary. Section 20(2) of the By-Law, as regards dogs, makes this very clear and it reads:
>
> 20. CONTROL OVER AND THE LICENSING OF DOGS

(2) The Municipality may impound any dog found on a public road or a public place, or who contravenes the provisions of this by-law by creating a nuisance, in terms of the stipulations of the Impoundment of Animals By-law of the Theewaterskloof Municipality.

For these reasons, I would have dismissed the point *in limine.*

SECTION 3(2)(b)(iii) OF THE NUISANCE BY-LAW

"[20] The preamble to the Nuisance By-Law sets out the purpose of the By-Law and reads:

"The purpose of this by-law is –

(i) to protect and promote the constitutional rights of each member of the public, for an environment of general peace and harmony, which is not a threat to his or her health or welfare; and

(ii) to overcome the services delivery, welfare and economic inequalities of the previous local government dispensation, by striving to achieve the new envisaged objectives for local government as contemplated in section 152 of the Constitution of the Republic of South Africa, 1996."

The applicable subsection of section 152 of the Constitution is 152(1)(d) which reads as follows:

"152. Objects of local government.

(1) The objects of local government are –

(d) to promote a safe and healthy environment;"

The expression public nuisance, which we find in section 3(2) of the By-Law is interpreted by the By-Law. The interpretation reads:

" "public nuisance", means any action, omission or condition, on or at any premises or public place or public road, including any reference to any building, structure or growth on such premises, public place, or public road, which can put the safety of persons or property in jeopardy or which is unsightly, annoying, offensive or a disturbance for other persons, and includes "nuisance";"

The By-Law also interprets premises, as:

""premises", means any portion of land situated within the area of jurisdiction of the Theewaterskloof Municipality, of which the outer boundaries are demarcated on a general plan or diagram or sectional title plan, registered in accordance with applicable legislation;"

Section 3(2)(b)(iii) relates specially to situations like the present, where a person kept a dog on any premises within the area of jurisdiction of the municipality. The property is premises as defined in the By-Law. Dog is not interpreted in the By-Law. The Concise Exford English Dictionary, Tenth edition, revised, Edited by Judy Pearsall, 1999, Oxford University Press (the dictionary), defines a dog as a domesticated carnivorous mammal probably descended from the wolf, with a barking or howling voice, an acute sense of smell and non-retractable claws. It defines carnivorous as feeding on flesh.

[21] In *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 (6) SA 182 (CC) at para 49 it was said:

"[49] In ***Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd*** this court reiterated that the Constitution must be interpreted purposively. In the context of Schedules 4 and 5 functional areas, this court has held that the purposive interpretation must be conducted in a manner that will allow the spheres of government to exercise their powers ' fully and effectively' " [referring to ***Western Cape Provincial Government and Others: in re DVB Behuising (Pty) Ltd v North West Provincial Government and Another*** 2001 (1) SA 500 (CC) at para 17]." There is no reason why a different approach should be applied to section 156 (1)(d) of the Constitution as well as the provisions of the two By-Laws under consideration.

NUISANCE

[22] Nuisance is not defined in the By-Law. Accordingly, the common law meaning must be applied. In **Joubert: LAWSA**, 2 ed vol 19 at p 151 it is defined as: essentially a nuisance of which the harmful effect is so extensive as to affect the general public at large or at least a distinct class of person within its field of operation". In the article by **A Samuels: Note on the use of public nuisance doctrine in 21st century South African Law** [2015] DEJURE 13, the author conducts a review of the relevant authorities and how the concept has evolved. He writes (bottom 2nd page) that "Paramount to this investigation (ie in analysing the facts of each case) are two requirements inherently connected with the presence of a public nuisance. These characteristics normally associated with public nuisance are (a) the health or wellbeing of the general public would be affected; and, importantly, b) the nuisance must have originated on public as opposed to private land or space". He later (from bottom of 6th page to top 7th page) quotes an article from the **Albany Law Review** in which it is stated that " public nuisance does not necessarily involve an interference with the private enjoyment of property; rather the interference is with a public right, usually relating to public health and safety or substantial inconvenience or annoyance to the public".

[23] The comments of the authors must be understood in the context of the By-Law and the facts, which deals with the situation when a person kept a dog in premises within the municipality. The By-Law itself addressed the public or private land debate. If it is established that a person allowed a dog to create a nuisance in premises within the area of jurisdiction of the municipality, the By-Law would apply. For certain public nuisances in terms of the By-Law the question whether it was on public or private land was irrelevant for purposes of the By-Law. The respondents reliance on *Victoria & Alfred Waterfront (Pty) Ltd and Another v Police Commissioner of the Western Cape and Others* 2004 (4) SA 444 (C) was misplaced. What remained to be established was whether the health or wellbeing of the general public or at least a distinct class of person within its field of operation, would be affected. Once proof is provided, of situations or actions that may cause a conclusion that the health or wellbeing of the general public or a distinct class of persons within its filed would be affected, on any

premises within the municipality, such situations or actions are a public nuisance in terms of the By-Law. The By-Law leaves no room for doubt that it treats a dog as a special category of animals kept in premises within the municipality. A whole part of a chapter and section of the By-Law covers a dog within the municipality, to wit Part 2 of Chapter 3, section 20. It reads:

> "20. CONTROL OVER AND THE LICENSING OF DOGS
>
> (1) Nobody who is the owner of a dog may –
>
> (a) keep a dog, without paying a license fee for dogs as required when imposed by the Municipality, and when the licensing of dogs are applicable, the owner of a dog shall provide proof of the payment for a dog license on request of an authorized official;
>
> (b) allow any lewd bitch on a public road or a public place, without being under any type of control or without a lease or a harness;
>
> (c) incite any dog to attack or to inconvenience or to chase any person or other animal;
>
> (d) keep any dog for the use of such animal for dog fights;
>
> (e) keep a dog on a premises which is not properly fenced in;
>
> (f) allow a dog to –
>
> (i) trespass on private property;
>
> (ii) be a danger for traffic and pedestrians on any public road;
>
> (iii) be a danger for persons outside the premises on which such dog is kept; or
>
> (iv) be a danger for officials of the Municipality who must enter the premises concerned in the execution of their duties;
>
> (g) neglect to post notices on conspicuous places on a premises, that a vicious dog is kept on such a premises; and
>
> (h) allow that any dog kept on a premises –
>
> (i) by continuous barking, yapping , whining or howling, and exceeding the maximum sound level of eighty five (85) dBA;
>
> (ii) by charging out of habit at vehicles, other animals, poultry, birds or persons outside the premises where the animal is kept; or

(iii) by revealing any other bad habits,

disturb the convenience, comfort, peace and quiet of adjacent neighbours.

(2) The Municipality may impound any dog found on a public road or a public place, or who contravenes the provisions of this by-law by creating a nuisance, in terms of the stipulations of the Impoundment of Animals By-law of the Theewaterskloof Municipality.

(3) A dog impounded in terms of subsection 20(2) of this by-law, may only be released in the care of the owner or the person responsible for such dog, on payment of the prescribed amount determined by the Municipality and on submission of reasonable proof of ownership."

In the context of the By-Law, the actions or situations set out amongst others in sections 20(1)(b); 20(1)(c); 20(1)(d); 20(1)(e); 20(1)(f); and 20(1)(h) would be a public nuisance as envisaged in the By-Law. The dictionary defines nuisance as a thing causing inconvenience or annoyance. The provisions are meant to mitigate substantial inconvenience or annoyance to the public. Ordinarily, the biting of clients (Brandt and De Villiers) in the presence of the first respondent for whose services the clients had visited the premises, and a service provider (Engelke) who attended to the premises at the instance and request of the first respondent, all of them having attended to the property for legitimate purposes, should amount to the dogs revealing bad habits. If the Municipality intended for the By-Law to cover the instances like the present where the dogs were ordinarily kept in the backyard but had attacked Brandt in the main dwelling or De Villiers in the salon in the front yard, then the Municipality was let down by its choice of terminology in the definition of 'premises'. The current definition does not lend itself to refer only to the restricted area of the backyard where the dogs are kept, in relation to control over the dogs especially as regards the danger for from persons outside the premises on which such dog is kept as envisaged in section 20(1)(f)(iii).

GIVE OFFENCE IN PUBLIC OR PRIVATE LAND

[24] A contravention or failure to comply with the provisions of this by-law, or failure to comply with a notice served in terms of this by-law, or failure to comply with an instruction of an authorized officer or posted on a noticeboard, is an offence. Section 27 provides:

> "27. OFFENCES AND PENALTIES Any person who contravenes or fails to comply with the provisions of this by-law, or fails to comply with a notice served in terms of this by-law, or fails to comply to an instruction of an authorized officer or posted on a notice board, is guilty of an offence and is liable on conviction, for –
> (a) a fine or imprisonment, or to such imprisonment without the option of a fine, or to both such fine and such imprisonment;
> (b) in the case of a successive or continuing offence, to an additional fine or additional period of imprisonment, or such additional imprisonment without the option of a fine, or to both such additional fine and such additional imprisonment, for every day such offence continues; and
> (c) any further amount as an order of court for costs, equal to any costs and / or expenses, deemed by the Court, to have been incurred by the Municipality as a result of such contraventions."
>
> A closer reading of the subsections of section 20 reveals that some of the situations or actions would be offences in public and others on private land, in relation to control over dogs. What the provisions cumulatively also fortify, is that section 3(2)(b)(iii), in relation to dogs, includes situations or actions on private land. On balance of probabilities, the facts sustain a conclusion of a failure by the first respondent, to comply with an instruction of an authorized officer. First, it was the instruction by Daniels to keep the dogs locked up, under control and to ensure that they would in future not pose a danger to any person. This was after the first attack on Brandt, and after the attack on De Villiers. The first respondent failed to ensure that the dogs do not charge out of habit at her client, De Villiers and a service provider, Engelke, who both subsequently, on different dates, entered the premises for a legitimate purpose. Secondly the first respondent failed to comply with the instruction of Hendriks to deliver the dogs to the

Municipality or its officers for evaluation. The dogs could not be removed because first respondent placed them in the care of the third respondent who refused to release them which then prompted the application to court. In the failure to keep the dogs locked up, under control and to ensure that they would not pose a danger to Brandt, De Villiers and Engelke, and the failure to deliver the dogs to the Municipality, as instructed by the Daniels and Hendriks respectively, the first respondent committed offences on private land, as envisaged in section 3(2)(b)(iii) read with section 27 of the By-Law.

BECOME A DANGER FOR OTHER ANIMALS, ADJACENT PROPERTY OR THE GENERAL PUBLIC.

[25] The facts of the matter narrowed down the enquiry in this matter to the question as to whether the dogs became a danger for the general public. The term ‘general public’ is not defined in the By-Law. One of the factors that should guide our understanding of what was meant by the term would be the purpose of the By-Law and the object of the Municipality’s constitutional obligations. The relevant purpose of the By-Law for purposes of this judgment was set out above and refers to the protection and promotion of the constitutional rights of each member of the public. The ‘environment’, in the context of the By-Law, is the premises within the municipality where the dogs were kept. A person who attends to such premises at the specific instance of the owner or occupier of the premises or anyone authorized by them, or attends to provide services or official duties, enhances the general peace and harmony and is deserving of the reciprocal enhancement of the general peace and harmony and must be protected from a threat to their health or welfare from the dog within those premises. Against the background of the reasons why people generally keep dogs in the premises, from the provision of comfort, companionship, to support during times of stress, distress, anxiety as well as during security threats, a dog remains one of the animals that is able and likely to cause harm or injury to members of the public. In terms of the objective nature of a dog, it is susceptible to bite strangers especially in the area in which it is ordinarily kept. The breed of a dog kept in the premises is generally carefully selected to serve the purpose

for which it is kept. A person who keeps a dog in the premises within the municipality, regard being had to the objective nature of that dog and the purpose for which it is kept, attracts the responsibility of the municipality to cascade down to the premises and becomes the Municipality's extension, at the premises, to promote the premises as a safe and healthy environment for the members of the public. This explains why there are specific provisions in the By-Law, which provisions are specific to the keeping of dogs on premises.

[26] On the undisputed facts, Ms Brandt was a visitor for the specific purpose of collecting a fostered cat, Ms De Villiers was a customer of the nail salon business conducted on the property, and Mr Engelke a person attending there for purposes of work. In this sense, all were members of the public who attended the premises. The three victims of the dog attacks were at the premises on different dates respectively for legitimate reasons. The three victims suffered grievous bodily harm inflicted by the dog bites. The photographs annexed to these three victims' affidavits show the severity of the injuries of each of the victims and is supported by the undisputed evidence of the treatment they received. The injuries were surely not that of dogs that nipped at the victims. A victim nipped by dogs would not spend five days in hospital nursing injuries from the dog bites. The use of a private dog behaviourist to ward off constitutional obligations by a municipality is a plan devised using skill and artifice. The failure of the alleged specialist to commit their qualifications and facts upon which they relied under oath, exposed the expedient tricks to deceive the municipality. It is not for Wurster to conclude that she was a qualified dog handler, a dog trainer and an animal behaviourist. She had a duty to set out a proven scientific path of academic or skills training and experience, for the court to make such conclusion. The failure of the alleged specialist to deal with the injuries sustained by the three victims in the report, providing a scientific path of travel of the facts towards a conclusion exposed the haste to formulate an opinion with conclusions based on incomplete information. Worster did not set out why injuries that caused De Villiers to spend five days in hospital were simply 'nips' of a dog.

[27] Wurster did not explain what informed the decision for her to do an assessment, and why her assessment was necessary and not that of the Municipality. For instance, in her first report she made the commitment that no visitors will be coming into the home without the dogs being removed to the kennel on the premises and no strangers allowed in the back space. An expert intent of assisting a court would explain why she would make these recommendations and why they were necessary if there was no reason for concern for the public visiting the premises for legitimate reasons. Wurster provided a partisan report which was based only on the version of the first respondent. This is evident not only from the totality of her report, but in her justifications that in the case of Brandt and De Villiers the dogs were protecting their owner and themselves and in respect of Engelke they were protecting property. This was not the first respondent's case. Private wealth cannot be used to buy one's way out of the constitutional obligations of a municipality, which is what Wurster and the first respondent sought to achieve. In her answer, first respondent did not deal with the Nuisance By-Law, which is in the main the By-Law upon which the appellants processes were unfolding. It is difficult, against the background of her contrived version, to conclude that this was an oversight and not by design.

[28] The first respondent's dogs are ordinarily kept secure, in the backyard. They do however from time-to-time attack members of the public and/or visitors to the first respondent's property. The grounds advanced for the relief sought were (1) public safety; (2) prevention of further incidents; (3) responsibility and accountability on the part of the dog owner(s); and (4) health concerns in that dog bites can lead to serious injuries and infections such as rabies. It was further stated that the purpose of the relief was, in the first instance, to have the dogs evaluated to determine whether they pose a threat to public safety or can be safely impounded. In the compliance notice first respondent was advised the dogs had become a public nuisance as per the definition in the Nuisance By-Law and a danger to the general public. She was told the dogs were being removed and she was put to terms to remedy the breach within 7 calendar days by taking the necessary steps to restrain or control the dogs to prevent further incidents and ensure safety to the public failing which the Municipality might implement measures

to remove the source of the nuisance. Accordingly, the Municipality followed the required steps in terms of the Nuisance By-Law. The dogs could not be removed because Ms Marais placed them in the care of the third respondent who refused to release them which then seemingly prompted the application to court. The court of first instance did not have regard to section 3(3) of the Nuisance By-Law when it found that section 3(2)(b)(iii) was not an empowering provision. Furthermore, impounding of animals includes to remove a dog causing public nuisances to a pound for safe-keeping with the specific intention to impose the stipulations of the Impoundment By-Law and section 11(2) of the Nuisance By-Law allows the Municipality to take steps which may include an evaluation of the dogs. For these reasons I would have made the order.

[29] The First respondent has acknowledged that she was the owner of the dogs. A cost order against second and third respondent is unwarranted. For these reasons the above order is made.

DM THULARE
JUDGE OF THE HIGH COURT

I agree

J CLOETE
JUDGE OF THE HIGH COURT

I agree.

ZL MAPOMA
ACTING JUDGE OF THE HIGH COURT

Appearances

For applicant:	Adv. P Tredoux
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For respondent:	Adv. M Holland
Instructed by:	Parker Inc nazeer@parklaw.co.za