

SOUTH AFRICA / JUDGMENT

Grobbelaar v P.K (4962/2017) [2018] ZAECHGC 73 (21 August 2018)

[2018] ZAECHGC 73

COURT

Eastern Cape High Court, Grahamstown

BEFORE

M.J. Lowe

CASE / FILE NUMBER

4962/2017

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

CASE

NO: 4962/2017

Date

heard:

30 July

2018

Date

delivered:

21

August 2018

In

the matter between: CHARL
GROBBELAAR Applicant
/ Defendant a
quo
and
P
K Respondent
/ Plaintiff a
quo

JUDGMENT

APPLICATION FOR LEAVE TO APPEAL

LOWE, J:

- [1] This is an Application for Leave to Appeal against the whole of my judgment on the Merits, in Plaintiff's favour.
- [2] I shall refer to the Applicant in this Application for Leave to Appeal as Defendant and to Respondent as Plaintiff as they were in the trial proceedings.
- [3] The matter proceeded on the agreed facts set out in a Rule 37 Minute neither party leading any evidence and argument on the agreed

facts.

- [4] In this matter Plaintiff's minor son R was attacked by a dog owned by Defendant, (a Bull Mastiff crossbreed) when R sat on a brick wall separating Defendant's property from a third party neighbour's property.
- [5] R was seriously injured and Plaintiff seeks recompense herefor in the actio de pauperie, and separating merits from quantum agreed on a Rule 37 Minute for trial as follows:

"1. The Plaintiff and the Defendant agree to the following:

1.1 the legal question to be determined by the above Honourable Court is whether the minor "R" was doli incapax (doli et culpae incapax) at the date of the dog attack on him and whether the Defendant, as owner of the Bull Mastiff crossbreed dog, is liable as owner for the injuries caused by his dog to the Plaintiff's son, R, an infans at the time;

1.2 if it is found that R was doli incapax (doli et culpae incapax) and Defendant liable as owner of the dog, then judgment be entered in favour of Plaintiff in respect of the merits of the claim and that the issue of quantum will stand over for determination at a later date.

- 2. The parties agree that the legal questions in issue between the parties can be decided by the above Honourable Court on the following

facts:

2.1 that the Plaintiff sues in her personal and representative capacity as mother and natural guardian of her minor child, R, who was born on [...] December 2010;

2.2 that the Defendant was/is the owner of a dog which is a brown Bull Mastiff crossbreed (the Bull Mastiff);

2.3 that the Bull Mastiff attacked R on 3 July 2016 (the attack);

2.4 that at the date of the attack, R was 5 years and 7 months old;

2.5 that the attack occurred when R climbed and sat on a brick wall bordering the premises of the Defendant and third party (the border wall);

2.6 that, prior to the attack, the Defendant:

2.6.1 repeatedly told R not to:

2.6.1.1 come into Defendant's property if the Defendant was not present to control the Bull Mastiff; and

2.6.1.2 climb the border wall on account of the Bull Mastiff;

2.6.2 fenced his property on three sides with wire mesh and the fourth with a brick wall;

2.6.3 Defendant was asleep, having returned from working night shift as a security guard.

3. The following documents, which are annexed hereto, will be used in support, to enable the above Honourable Court to decide upon the question of law:

3.1 the birth certificate of R K;

3.2 the photographs of Defendant's premises as contained in pages 23 – 28 of Defendant's trial bundle; and

3.3 a photograph of Defendant's dog."

[6] Both parties were thus in agreement that the matter should be adjudicated on the above.

[7] It was subsequently agreed in respect of the wall height:

"On the Defendant's side of the wall, the wall, from bottom to top, at its lowest point, at the entry gate, depicted at DTB26, is 1,2m high, and at its highest point, is 1,45 m high."

[8] Whilst the Minute appeared to put in issue whether R was doli et culpae incapax (paragraph 1.1), in fact in argument it was accepted, and correctly so, that this was indeed the case and that the only issues in reality were:

[8.1] Whether R's presence on the boundary wall of Defendant's property was such that the dog did not act contra naturam this constituting provocation such that in biting the child it did not act contra naturam (such provocation not needing to be accompanied by fault on the child);

[8.2] Whether the child was lawfully present on the wall at the location where the attack and infliction of damage took place.

[9] In respect of the above, I concluded:

[9.1] That on the Provocation issue, the dog acted contra naturam satisfying the first basis for Plaintiff's successful action.

[9.2] That as to lawful presence, the child on top of a boundary wall was not unlawfully present on Defendant's property.

[10] The above findings alone on the agreed facts satisfy the requirements for a successful action.

[11] I continued however to find that if incorrect on the lawful presence issue, and in any event, the child would necessarily succeed being culpa et doli incapax.

[12] This final foundation was not a necessary founding to Plaintiff's success.

[13] On Leave to Appeal Defendant argued that:

[13.1] I had correctly utilised the "reasonable dog" test but had incorrectly found the dog to have acted contra naturam, the child's position on the wall being the causa causans of the dog attack, applying *Green v Naidoo*[1].

[13.2] On the agreed facts the child was unlawfully present on Defendant's property by being on top of the boundary wall having "no legal right" to be there and that my finding of "consent by the third party amounts to a misdirection", and in any event was unlawful presence, the brick wall being a common boundary wall, Defendant being a co-owner thereof.

[13.3] It mattered not that the child was doli et culpa incapax.

[13.4] There was a reasonable prospect of success before another Court (the Full Bench of the Eastern Cape Division of this Court).

[14] I have given careful thought to each of the above arguments in turn, and find myself unable to agree therewith.

[15] I am of the view that I correctly applied the reasonable dog test applicable and cannot agree that I reached an incorrect conclusion or that there is a reasonable prospect that another Court would differ hereon.

[16] Further on the facts and conclusions set out in the judgment I am not satisfied that there is a reasonable prospect that another Court would conclude that R was unlawfully present on the wall and further unlawfully on Defendant's property.

- [17] This I fully dealt with and articulated in my judgment and I am unconvinced that there is a reasonable prospect that another Court would find otherwise on the agreed facts.
- [18] In my view co-ownership of the boundary wall, if found to exist on the facts, takes the matter no further.
- [19] Finally the issue of the child being culpae et doli incapax and thus in my view not being capable of being a trespasser and was thus not unlawfully on the wall, was not a necessary finding to success but a finding only in the alternative, and is in any event not one in which there is in any event a reasonable prospect of success.
- [20] In the result the Application for Leave to Appeal is dismissed with costs.

M.J. LOWE

JUDGE OF THE HIGH COURT

Obo the Applicant: Adv S Rugunanan

Instructed by: Enzo Meyer Attorneys, Grahamstown

Obo the Respondent: Adv JJ Bester

Instructed by: Wheeldon Rushmere & Cole, Grahamstown

[1] 2007 (6) SA 372 (WLD)

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Prepared on 9 October 2026 · Esheria