

SOUTH AFRICA / JUDGMENT

H obo H v Gungapursat (55619/14) [2015] ZAGPPHC 1129 (10 December 2015)

[2015] ZAGPPHC 1129

COURT

North Gauteng High Court, Pretoria

BEFORE

C.P. Rabie

CASE / FILE NUMBER

55619/14

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

SAFLII

Note: Certain

personal/private details of parties or witnesses have been
redacted from this document in compliance with the law
and SAFLII

Policy

HIGH

COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

REPORTABLE:

NO

OF

INTEREST TO OTHER JUDGES: NO

REVISED:

OK

CASE

NUMBER: 55619/14

DATE:

10/12/2015

In

the matter between:

A.
H. obo R.
H.
FIRST PLAINTIFF
A.
H.
SECOND PLAINTIFF
and
K.K.
GUNGAPURSAT
DEFENDANT

JUDGMENT

RABIE J:

1. The plaintiff claimed damages from the defendant in her capacity as mother and natural guardian of her minor son, to whom I shall refer as "R", as well as in her personal capacity. I shall herin refer to the two plaintiffs in the singular.

The claims arose as a result of damages suffered arising from injuries sustained by R when he was bitten by a dog which was,

according to the plaintiff, owned and/or under the control of the defendant. By agreement the trial before this court related only to the issue of liability with the issue of quantum being postponed sine die.

2. The background facts leading to the aforesaid claims were briefly the following: On 2 May 2014 the plaintiff and her husband lived with their son, R, then approximately 3 years and 4 months of age, in the security complex Aquarius which was part of the bigger security complex of Cosmos Estate, in Centurion. Aquarius is in the form of a rectangle with a wall all around the boundary lines. There are housing units along all four boundary walls separated by a paved road from a block of housing units on the inside of the road. The plaintiff and her husband and R lived in the unit on the north-western corner of the complex. Each unit has a garden wall separating the units on the side as well as in front facing the road. All the housing units look the same and has a small driveway leading up to a single garage. On that part of the garden wall leading from the part facing the road, to the garage, a small iron garden gate gives access to the front door of the unit.
3. On Friday afternoon of the 2nd May 2014, at approximately 17:15, R was riding on his little bicycle in the street in front of unit 30, which was the house where he lived with his parents. The plaintiff was sitting outside on a chair at the corner of the garden wall in front of the garage. From this position she could fully observe the surface of the roads leading from the east and the south towards their house. She was also waiting for her husband to return from work.

4. At approximately 17:15 the plaintiffs husband, Mr H., arrived in his motor vehicle. He and R greeted each other and as he was parking his vehicle on the designated parking space next to their unit, R again rode his bicycle up the road in a easterly direction.
5. Mr H. greeted the plaintiff and went through the garage door into the house. At that moment, with her attention away from the road, the plaintiff heard R's bicycle fall on the road. She immediately turned around and saw R off his bicycle and on the road being mauled by a dog. She started to scream and ran towards R and the dog. Mr H. came out of the house running and passed the plaintiff. He immediately kicked the dog between the legs but it had no effect on the dog. He was biting R on his right thigh and shaking him around in the process.
6. Mr H. kicked the dog a second time which resulted in it releasing its grip on R. At that moment the plaintiff, who had arrived at the scene, immediately picked R up. The dog went for R again and jumped up in order to get to him. The plaintiff had to hold R above her head to avoid him being bitten again. She started to run in the direction of their house.
7. At the same time Mr H. succeeded in grabbing the dog by his throat and tail and threw him against the garden wall of the unit next to where the incident occurred. The dog then ran further up the road and jumped the fence into the yard of unit number 34, the unit of the defendant.
8. The plaintiff testified that back at the house, when she lifted R's sweatpants, pieces of his flesh and skin fell to the ground. The large open gashes in his thigh are evident from the pictures of R's injuries which were presented to the court. The injuries were extremely serious and he was terribly mutilated.
9. The plaintiff and her husband rushed R to the closest medical centre from where he was soon transferred per ambulance to the closest hospital. He was committed for four days during which he found himself in theatre on two occasions. R still has to undergo plastic surgery to lessen the effect of the scarring caused by the bites of the dog. According to the plaintiff R also suffered from psychological sequelae as a result of the incident. According to the plaintiff she also suffered damages in her personal capacity, inter alia, as a result of a loss of income due to the fact that she had to stay home to care for R after he returned from hospital.
10. The first claim of the plaintiff was based on the *actio de pauperie*. The defendant for all practical purposes denied all the allegations made by the plaintiff in her particulars of claim. One of his denials related to the allegation that he was the owner of the dog.

11. The plaintiff based an alternative claim on the *actio legis Aquiliae* alleging negligence on the part of the defendant who was at all relevant times co-lessee of house 34 and in control of the dog. In the alternative to denying the allegation that the dog acted *contra naturam suam* and the allegation that he was negligent, the defendant pleaded that the plaintiff and R were contributory negligent in that (i) the plaintiff failed and/or neglected to supervise the minor child; and (ii) the dog was provoked and aggravated by the minor child.
12. Shortly after the commencement of the cross examination of the plaintiff and when it appeared that every aspect of the case was being placed in dispute, the parties agreed on an *inspectio in loco*. The parties and their legal representatives and myself visited the area where houses 30 and 34 are situated. The individual premises could not be entered but sufficient information was gathered to satisfy the parties. I made notes of my own observations as well as aspects pointed out on behalf of the respective parties. A summary of same was compiled by me and the parties agreed that the summary presented a fair reflection of what was found. The following are the notes of the inspection which was also read into the record of proceedings:
 1. Aquarius is 'n ommuurde kompleks binne die grater ommuurde kompleks van Cosmos Estate. Aquarius is in die vorm van 'n reghoek met een pad wat in die rondte tussen die wooneenhede loop. Daar is huise teen die grensmure en 'n dubbel stel huise aan die binnekant. Die twee stelde huise word deur die pad geskei.
 2. Die Eiser se huis, nr 30, is op die noord-westelike hoek van die kompleks gelee en grens dus aan die noordelike en westelike sy-mure van die kompleks. Die Verweerder se huis, nr 34, is verder in 'n oostelike rigting gelee maar is aan die selfde kant van die pad as die Eiser se huis en grens dus ook agter aan die noordelike grensmuur van die kompleks.
 3. Twee huise deel telkens 'n grensmuur en tussen elke tweede huis is daar 'n parkeerruimte vir twee motors.
 4. Elke huis is, behalwe vir die motorhuisdeur wat oop is na die straat, ommuur deur wat ek as 'n tuinmuur sal beskryf. Langs die motorhuisdeur is daar 'n ysterhekkie wat toegang tot die voordeur van die huis verleen.
 5. Die afstand van waar Mev H. se sy op die hoek van haar tuinmuurtjie gesit he!, tot by die brandkraan verder af in die pad in die rigting van die Verweerder se huis, is ongeveer 40 meter.
 6. Van die brandkraan na die punt van die tuinmuur van die Verweerder se huis langs die motorhuisdeur, is ongeveer 31 meter.
 7. Die area agter die tuinmuur en die ysterhekkie voor die voordeur van Verweerder se huis, nr 34, is met bakstene plavei. Die paveisel is ongeveer 3,84 meter lank teen die tuinmuur aan die straat se kant en bedek die gedeelte van die tuinmuur tot teenaan die huis.

8. Die tuinmuur, gemeet aan die binnekant van die perseel, is op hierdie plavei-gedeelte ongeveer 1,39 meter hoog. Dit geld vir beide die gedeeltes wat aan die straat front sowel as die sy-gedeelte waarin die yster tuinkekkie langs die motorhuisdeur is. Die muurpaneel van die tuinkekkie na die huis is ongeveer 1,395 meter.
9. Die erf se helling val ietwat in die rigting van huis 30 en in die middel van die erf is die muur ongeveer 1,51 meter hoog en op die punt van die erf is die tuinmuur sowat 1,57 meter hoog. Die tuinmuur wat aan die straat front is ongeveer 12,2 meter lank.
10. Die yster tuinkekkie is 1,29 meter hoog. 48 cm van bo is daar 'n dwarsstaaf wat die vertikale rondesters ondersteun. Die skarnier van die hekkie is sowat 20 cm van die bokant van die hekkie.
11. Die tuinmuur wat aan die straat front bestaan uit vier enkelgeboude baksteen panele. Die boonste 19cm van die tuinmuur is gepleister en geverf. Die res van die muur is ongepleister met groewe tussen die bakstene van gemiddeld 1 cm diep.
12. Die muurpaneel is aan die bokant 12,5cm breed behalwe die klein gedeeltes waar die paneel oorvleuel waar dit 25cm breed is.
13. Die erfgedeelte begin sak vanaf die plaveisel voor die voordeur na die hoek van die erf waar daar gras geplant is. Soos die erf sak is daar eers een, dan twee en dan drie en dan 4 lae baksteen aan die onderkant van die muur wat sowat 10cm na die erf se kant uitsteek.
14. Op die plaveisel voor die voordeur staan 'n klei kruik teen die tuinmuur aan die straat se kant. Dit is sowat 91cm hoog en die vierkantige borand is 3cm breed. Die vierkantige bokant van die kruik is 41cm.
15. Op die plaveisel is daar ook die tipiese plastiese munisipale asblik. Dit is 108cm hoog en aan die bokant 65cm lank en 56cm breed. Aan die een bokant daarvan is 'n handvatsel.
16. Die agtermuur van die huis, dws die noordelike muur van die kompleks, is ongeveer 1,8 meter hoog of hoer.
17. Die tuinmuur se bakstene en een laag semen!is gemeet op 9cm.
18. Die symuur van die erf is ongeveer 1,63 meter hoog.
19. By aankoms is opgemerk dat op twee plekke baie klein kindertjies in die straat gespeel het. Twee van hulle het met die bekende plastiese skopfietsies gery. Op een plek het 'n stuk speelgoed in die pad gele.

Die enigste ander oop area in Aquarius is 'n taamlik verwese gras area in die noord-oostelike hoek.

20. Van waar Mev H. se dat sy op die stoel gesit het, is die hele straat sigbaar tot in die noord-oostelike hoek.

21. Oilis aangedui dat Mnr Haltingh arriveer he! vanuit 'n suidelike rigting en toe langs Nr 30 se tuinmuur aan die suidelike kant daarvan parkeer he!. Di! is een van die genoemde parkeerplekke tussen die huise.
22. Die pad tussen die huise is, met die blombeddings aan weerskante daarvan, 6,2 meter, en, sander die blombeddings, 4,9 meter.
23. Huis 34 is ongeveer in die middel van die straat waarin huis 30 en 34 gelee is.
13. With reference to certain of the measurements it appears, firstly, that the fire hydrant close to which R was attacked according to the plaintiff, was approximately 40 metre from the entrance of plaintiff's house and that the defendants house was approximately 31 metre further along the road. Secondly, the garden wall around the premises of house 34 was approximately 1,39 metre high and not plastered except for the top fringe of approximately 19 cm. I shall refer below to other aspects which I regard as relevant.
14. Me Monique Erasmus, a neighbour of the plaintiff, also testified. She testified that at approximately 15:00 on 4 May 2014, the plaintiff approached her. He informed her that he wanted to visit the plaintiff's son to extend his sympathies but that they were not at home. He informed her that he did not know how the incident happened and only later realised what had happened. He never denied that it was his dog who bit the child and also did not indicate that the child teased or aggravated the dog. He left a message with Me Erasmus containing his contact numbers should the plaintiff require any assistance.
15. Mr H., the husband of the plaintiff, also testified. He confirmed the evidence of the plaintiff in all material respects except that his recollection was that the attack occurred somewhat closer to their own house and approximately halfway between their house and the fire hydrant. He testified that when the dog again went for R after the plaintiff had picked him up, he kicked the dog again. After he had thrown the dog against the wall the dog got up and ran towards house 34 where he jumped the wall into the yard. When he approached the garden gate the dog was still extremely violent and tried to attack him through the gate and was actually biting the iron bars of the gate. He described the dog is being of knee height and being extremely powerful.
16. Mr H. testified that when he was at the garden gate of house 34 he saw a male figure through the window. He shouted "help your dog attacked my child" but there was no response from the inside and the person did not come out of the house.
17. At that point he saw that his wife was running to their vehicle holding R in her arms. He realised that the injuries must have been serious and he went to them and accompanied them to the hospital.
18. Mr H. testified that he came home a little later to fetch his wallet which he had forgotten in the rush and saw the defendant coming from the garage of house 34. He stopped and got out of the vehicle and informed the defendant that his dog had ripped his child apart and that the child was still at the clinic and on his way to the hospital. The defendant expressed his

sympathies. Mr H. told the defendant that he should get rid of the dog before he returns home otherwise he would do so himself. Mr H. testified that the defendant never denied that it was his dog that had been involved and had bitten his child. He also did not suggest that the child provoked the dog in any manner.

19. Mr H. testified that he had seen the dog before. He described an occasion where he and his neighbour was standing in the street when they saw the dog hanging with its front legs over the top of the garden wall looking up and down the street. The dog wasn't aggressive on that occasion.
20. The defendant testified on his own behalf. He said that the dog, an American pitbull terrier, belonged to his fiancée, Me Chetty. The dog was approximately 18 months old and she got him when he was a puppy. The dog's name was "Chaos". He and Me Chetty had been living together for 10 years. They had moved into house 34 on 2 March
2014. They gave the dog away approximately two weeks after the event.
21. As to the issue of ownership the defendant denied that he was the owner and said that Me Chetty was the owner and was the one who bought its food and took it to the vet.
22. As to the event on the day in question the defendant testified that he was at home but was unaware of what had happened. He testified that he heard a loud frantic scream and went out through the garage door. All he could see was that Mr and Mrs H. was putting the child in the car before they drove off. He admitted the later conversation with Me Erasmus and said that it was out of concern for the child's well-being. He had heard of the incident from a neighbour. He further testified that later on the same day he was approached by a person asking him for the dog's inoculation papers.
23. The defendant admitted that he wrote a note which he placed on the garden gate of the plaintiff's premises. In this letter he indicated that he was from house 34, that he wanted to find out how the boy was doing and that they were very sorry for what has happened and that he would like to visit him.
24. The defendant also admitted that prior to the event he had received a notice written on behalf of the Body Corporate of Aquarius dated 12 March 2014 and addressed to "the Owner/ Resident". It is necessary to quote this letter in full. It reads as follows:

" RE - REMOVAL OF DOGS

Dear Sir/Madam,

We write on the instruction of the trustees following numerous complaints received regarding the dog at your unit (34).

We refer the resident to the conduct rules: 'ANIMALS, REPTILES AND BIRDS

An owner or occupant of a section shall not, without the consent, in writing of the Trustees, which approval may not be unreasonably

withheld, keep any animal, reptile or bird in a section or any part of the common property.

When granting such approval, the Trustees may impose reasonable conditions.

In the event of the breach of any condition, the Trustees may withdraw their approval.'

It has been noted that approval was not granted for this dog to be kept on the premises.

The trustees hereby request that you seek alternative arrangements for the dog by no later than the 31 March 2014, based on the below complaints received:

I want to stress that the quality of living in our houses has been seriously disrupted as a result of this dog. Members of Aquarius

complex are now worried, scared and irritable because of the daily and sometimes continuous barking.

The dog is scary and noisy. Whenever we go out to our yard, it keeps barking as long as it can see or hear us.

On numerous times, the dog attempted to jump the wall.

We trust we can rely on your cooperation in this regard. Kind Regards" (sic)

25. According to the defendant the dog only made a noise when somebody approached the gate. He then testified that children were

continuously coming to the gate and asking for the dog. By doing so, and continuously wanting to see the dog, they were tormenting it. He couldn't say, however, that R had ever been to the house.

26. When asked whether he did anything after receiving the aforesaid notice, the defendant responded by saying "it is not my dog". When asked whether Me Chetty did anything, he said that he was not sure.

27. In chief examination he testified that he never saw the dog jump over the fence. He only jumped up against the fence and hung at the top with his front legs over the top of the wall and barked towards the street.

28. The defendant was a very poor witness and it was clear that he was not truthful. I shall merely refer to some of the aspects in this regard. It was clear that his evidence that Me Chetty, and not he, was the owner of the dog, was forced, especially when, during cross-examination, he offered that as the reason why he did or didn't do certain things. When confronted with the fact that after the event he acted as one would have expected an owner to act, his response was inadequate and forced. He couldn't explain why Me Chetty had done nothing and eventually said that she was with him when he spoke to the neighbour. This evidence was never put to Me Erasmus when she testified.

29. The defendant could also not adequately explain why it was alleged in his pleadings that R had aggravated and provoked the dog when, on his evidence, he could not say that. In fact all of his evidence relating to children coming to the gate and aggravating the dog by asking "where is the dog, where is the dog", as testified by him, totally lack credibility. For that to have occurred, he or Me Chetty would have had to be present and the dog had to be absent. If not, the children would not have asked for the dog. And, if the dog was absent, it can hardly be said that the children tormented the dog and caused it to "bark and growl" at the children as testified by him. It would also not have been necessary for him and Me Chetty to then tell the children to go away. He admitted that the dog barked and growled at the children but his attempts to show that same were caused by the children in the area, failed dismally.
30. The defendant admitted that he received the notice written on behalf of the body corporate but said that he did not know whether Me Chetty received it. This can hardly be the truth. It is simply impossible to imagine that after receiving such a notice, especially if Me Chetty was the owner of the dog, they would not have discussed the contents of the letter and their reaction to it.
31. The defendant testified that he replied to the aforesaid notice by sending an email to the estate agent and that he confronted him by saying that they had been told when they rented the property that the complex was "pet friendly". He said that he also enquired from his neighbours whether they had a problem with the dog and that they told him that they didn't. When asked whether he did anything else, his response was that he did not because it was not his dog.
32. Firstly, this last mentioned response did not ring true. Secondly, if he distanced himself from the dog because he wasn't the owner thereof, it remains inexplicable why he, and not Me Chetty, confronted the estate agent. I should add that the alleged email to the estate agent was not discovered or presented to court by the defendant.
33. The evidence by the defendant that he did nothing further because he received no response from the estate agent and thought that everything was all right, did not appear to be credible. The manner in which the defendant answered these questions raised serious questions regarding his truthfulness.
34. The attempt by the defendant to rely on a veterinarian's inoculation certificate for the dog which indicated the owner as Me Chetty, was not very successful. He was constrained to admit that in all probability the person who took the dog to the veterinarian would find his/her name written in as the "owner".
35. The defendant's denial of any knowledge of the incident and his allegation that he heard of it from a neighbour, is hard to accept. Firstly, Mr H. testified that he saw the figure of a male person through the window and shouted at him. That evidence was not denied. Secondly, according to the defendant he heard a scream and immediately went out of the house through the garage door and saw the plaintiff and her husband getting into the car with the

child. This cannot be the truth. The screaming occurred during the attack by the dog. Thereafter the plaintiff went into the house with the child and her husband went to the defendant's house. Then he returned to his house and car which was some 70 yards away. There was no screaming or any reason for anybody to scream while they were getting into the car to go to the hospital.

36. The defendant also failed to testify as to where Me Chetty got the dog, and generally the surrounding circumstances from which one could understand why she, and at least not both of them, was the owner of the dog. After all, they have been living together for the past 10 years. The evidence of Me Chetty to confirm her alleged ownership was also not presented by the defendant. Having regard, *inter alia*, to the lack of any actions on the part of Me Chetty which one would have expected from an owner subsequent to the formal notice from the trustees and subsequent to the event when R was attacked, I am of the view that a negative inference could be drawn from the failure to call Me Chetty to support the evidence of the defendant.
37. Having regard to all the evidence and the surrounding circumstances I find that on the probabilities the defendant was indeed the owner, or at least the co- owner, of the dog. It has also been proven by the required measure that the dog Chaos bit the child R and caused the damage and damages pleaded by the plaintiff in both her capacities. I also find that the dog acted *contra naturam sui generis* when he caused the damage and that there is no defence to the claims of the plaintiff.
38. If I were to be wrong in my aforesaid finding that the defendant was the owner of the dog, I nevertheless find the defendant liable on the alternative basis pleaded by the plaintiff in both her capacities. I shall briefly refer to the reasons for this finding.
39. It is common cause that the defendant, as co-leasee of the property at number 34, was at all relevant times in control or in co-control of the dog. The dog had a tendency to become aggressive towards people, and also small children, legitimately going about their business in the road outside the premises. The defendant admitted that this particular breed of dog was renowned for their aggressiveness and generally for being dangerous. The mere fact that the defendant and Me Chetty tied the dog to a leash at the back of the house when they were not at home is not only indicative of their awareness of its aggressiveness but also of their awareness of the possibility that it might escape the property and cause harm.
40. The formal notice issued to the defendant and Me Chetty reinforced the notion that the dog was "scary", that people were afraid of the dog, and that it was trying to get over the wall. There can be no question that the defendant should have realised and in fact did realise that the dog posed a serious threat to the well- being of at least the other inhabitants of the complex.

41. It was also common cause that children play in the open areas, including the road, throughout the day and that they were in serious risk of being bitten should the dog get out of the premises at number
34. The defendant in fact admitted the dog's aggressiveness towards children. He also admitted that the dog became aggressive when he saw people walking in the road.
42. The height of the garden wall is such that a reasonable person would have realised that this particular dog would have been able to get over it if it wanted to do so. It was common cause that the dog was able to get its front paws over the top of the wall and to hang there watching the street. Once there, and with the grooves between the bricks, it would not have been difficult to push itself over with its hind legs finding sufficient grip in the grooves. This whole issue was in fact shown to be beyond doubt, firstly by the evidence of the defendant that it was not uncommon for the dog to hang over the wall by its front paws barking at those on the outside, and, secondly, by the evidence of Mr H. confirming that he had in fact seen this, and, thirdly, by the evidence of Mr H. that after the incident the dog jumped back over the wall into the yard of number 34. This evidence found support in the evidence of the defendant which testified that after the event, when he left the house, the dog was in the yard.
43. In summary, the defendant knew that the dog was at times vicious and likely to bite strangers going about their ordinary business should it get out of the property. Furthermore the defendant knew, alternatively, should have known that the dog would be able to get over the wall if it wanted to do so and that it was only a matter of time before the dog would actually do so. In these circumstances the defendant was negligent in keeping the dog on this specific premises and/or by not tying the dog down and/or by not increasing the height of the wall or fixing something on top of the wall and the gate in order to ensure that the dog would not be able to get out of the property. The defendant thus failed to take reasonable or any steps to safeguard persons lawfully walking or cycling on the roads in the complex from any possible attack on them by the dog.
44. Lastly, I find no fault whatsoever on the part of the plaintiff nor of R and thus no contributory negligence on their part.
45. As far as costs are concerned, there is no reason why costs should not follow the event.
46. In the result, the following order is made:
 1. The defendant is liable for any damages which the first plaintiff and second plaintiff may prove as resulting from the biting by the dog of R on 2 May 2014.
 2. The defendant is ordered to pay the costs of the action relating to the issue of liability.

C.P. RABIE

JUDGE OF THE HIGH COURT

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPPHC/2015/1129.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/h-obo-h-v-gungapursat-unknown-topic-agpphc-2015>

Prepared on 10 October 2026 · Esheria