

SOUTH AFRICA / JUDGMENT

Hilder v Jafta and Another (15902/05) [2008] ZAKZHC 92 (21 November 2008)

[2008] ZAKZHC 92

COURT

High Courts - Kwazulu Natal

BEFORE

Nicholson

CASE / FILE NUMBER

15902/05

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IN THE HIGH COURT OF SOUTH AFRICA

(DURBAN AND COAST LOCAL DIVISION)

Case No : 15902\05

In the matter between :

MICHELLE HILDER Plaintiff

and

DONOVAN MICHAEL JAFTA First Defendant

RENE PATRICIA JAFTA Second Defendant

J U D G M E N T

NICHOLSON J

1. In this action the plaintiff seeks relief in terms of the *actio de pauperie* alternatively, in terms of the *actio Lex Aquilia* based on the defendants' negligent actions or omissions arising out of the fact that she was attacked by a dog on or about 22 June 2005 and that she sustained serious injuries as a result.
2. From the evidence it became clear that the defendants were co-owners of a one year old Boerboel dog named Jeslin. It was also not disputed that the plaintiff was attacked by a dog on the road in front of a residence being 811 Marine Drive, which was owned by the defendants

3. The disputed facts are whether the defendants were, at the relevant time, the owners of a dog that attacked the plaintiff.
4. As I have indicated the plaintiff relies on the action de pauperie and she has to prove firstly that the defendants were the owners of the dog which attacked the plaintiff. Secondly that the said dog caused the injuries sustained

by the plaintiff.

5. As was pointed out by Mrs Askew who appeared for the plaintiff, negligence on the part of the plaintiff can break the causative

chain, however the onus is on the defendants to adduce evidence as to the fault of the plaintiff, which has not been done in this matter. See *Loriza Brahman en 'n Ander v Dippenaar* 2002(2) SA 477 SCA.

6. Thirdly the plaintiff must prove that the said dog acted contra naturam sui generis. I accept that the onus is discharged when the plaintiff proved that she was attacked and bitten by the dog, without apparent cause (See *da Silva v Coetzee* 1970(3) SA 603) and the test is an objective one based on "the reasonable dog" (*da Silva v Otto* 1986(1) SA 538). There was no dispute insofar as this requirement was concerned.
7. An action under the *lex Aquilia* would be successful if the injured party can prove that the owner negligently caused foreseeable injury to the victim by failing to take reasonable precautions to prevent the dog from attacking the victim.
8. The plaintiff testified that on the day in question at approximately 6pm she was jogging along Marine Drive with her friend Elaine Byrne when she was attacked by a dog. She described how the dog bit her and threw her to the ground. She described the dog as barrel-chested and stated its colour was sandy brown. During the attack a St Bernard dog appeared which seemed to distract the attacking dog. A person hit the attacking dog with a handbag which caused it to cease biting the plaintiff. The plaintiff got the impression that this person was a domestic servant who knew the dogs as they disappeared with her.
9. The plaintiff screamed and that brought Sharon Johnson to the scene who helped during the attack and took the plaintiff home afterwards.

Plaintiff was hospitalised for a day and underwent a procedure to treat her wounds.

10. Sharon Johnson testified that she had never met the plaintiff before but was at her gate 50 metres away when she heard the dog attack and the plaintiff's screams. Mrs Johnson knew the defendants from her church where she was employed as a religious co-ordinator and also was aware that they lived at 811 Marine Drive. She also knew the defendants owned a St Bernard and a boerbul. When she approached the scene she recognised the defendants' boerboel as the attacking dog as well as the St Bernard. She claimed to have known the dogs for months as she was a Comrades runner herself who ran past on a daily basis when she was training.

11. Mrs Johnson also recognised the domestic worker who intervened as being the employee of the defendants. She saw the domestic worker taking the dogs back to the defendants' property after the incident in question.
12. The next day Mrs Johnson and Elaine Byrne visited the first defendant and discussed the incident. First defendant told them his domestic servant and the plaintiff's husband had informed him of the attack. According to Mrs Johnson the defendant expressed concern and apologised for the attack, and took full responsibility for any medical bills. First defendant explained to them that the dog belonged to his eight year old daughter and was usually docile. Mrs Johnson stated further that first defendant said the dog was cowering under the house presumably from fear of what punishment it would receive and that he would have to put it down as a result of the attack.
13. Elaine Byrne testified and confirmed the attack without assisting in the identification of the dog. She confirmed the conversation the next day with the first defendant. The plaintiff's husband testified that the next day he went to the defendants' house where he found the domestic worker. Plaintiff's husband phoned the first defendant who acknowledged that his domestic servant had told him about the attack. He expressed remorse. The plaintiff and her witnesses were impressive and were hardly shaken despite a thorough cross-examination. Any discrepancies were the sort of errors honest people make.
14. First defendant testified and conceded that he owned a boerboel by the name of Jeslin and a St Bernard by the name of Cleo. At the time of the alleged attack he had an African maid named Happiness who had since left. He was not present at the time of the attack and he maintained that any apology he made or offer of compensation was posited on the fact that he assumed at the time that it was his dog, which took part in the attack.
15. Some time later he saw an article in a local paper which described the dog as a Staffordshire Bull Terrier and that convinced him that it was not his dog. First defendant fired Happiness for suspected theft and he has not been able to locate her to testify. First defendant denied putting down Jeslin and said he gave the dog away afterwards. He denied that a dog could leave his premises though he conceded that it could enter his property from the street.
16. The first defendant also maintained that Jeslin could not have bitten the plaintiff because she was tied up at the time. The dog was tied up because labourers who were building the garden wall were afraid of it as it frothed at the mouth. Cleo, the St Bernard was very docile and would never have harmed a soul - in fact his daughter climbed all over her with no ill effects. Given this it was strange that first defendant apologised and promised compensation, even on this conditional basis. If there was no possibility that either of his two dogs would have attacked the plaintiff it was strange that he phoned 10 - 15 times in order to apologise.

17. The first defendant was very vague on a number of features during his evidence. Firstly as to whether his domestic servant stayed on the premises or not. If this domestic could testify that his dogs definitely did not attack the plaintiff it is strange that he made no determined effort to trace her. His excuse that she was hired by his wife was singularly weak. Much of his evidence was not put to the witnesses who testified for the plaintiff.
18. It must be emphasised that the first defendant was not at home at the time and could not therefore verify that his dog did not attack the plaintiff. He was merely submitting reasons why he assumed it could not have been. His reasons for taking the boerboel Jeslin to Wentworth were unconvincing. Basically he said the wall was incomplete. The corollary of this was that the dog might escape and cause injury or damage. The proper reason seems to me to be that it had bitten the plaintiff.
19. The first defendant's explanation that his domestic servant Happiness did not tell him about the incident does not ring true. If Mrs Johnson heard the screams, Happiness must have also as she was much closer. There were other factors which convince me that it was the defendant's dog that bit the plaintiff. The role of the St Bernard, the presence of the domestic and the subsequent conversations and admissions of first defendant fortify me in the view that it was his dog. On the balance of probabilities I accept this as a fact. The defendants are therefore liable in terms of the action de pauperie.
20. Insofar as the plaintiff's damages are concerned the parties agreed that her past medical and hospital expenses were in the sum of R17 644,05. Insofar as her other damages are concerned plaintiff claims the following amounts :
 - a) Future medical and hospital expenses
R62 680,00
 - b) Future psychological and psychiatric treatment
R50 000
 - c) General damages for pain and suffering, loss of amenities of life, disability and disfigurement
R80 000.
21. Plaintiff described the attack by the dog on her. Apart from the puncture wounds caused by the bites the dog took hold of her and shook its head from side to side which must have caused severe pain. The plaintiff screamed for help and she was bleeding profusely. She was taken to Bluff Medical Centre and thereafter to St Augustines for an operation by Dr Mahomva a plastic surgeon.
22. She spent the night in hospital and was released the next afternoon. She took painkillers for the first few days and after about ten days she was able to function normally. She was off work for three weeks and wore tracksuit pants to hide the scars and bruising. She has

developed a phobia about dogs and fears visiting people with them in case she is attacked again. Plaintiff has stopped jogging because of her paranoia about dogs and initially did not like her husband to see her scarred legs. She does not want even to jog at a gym or on a treadmill. Plaintiff also described how she has become antisocial as she fears going out especially visiting friends who have dogs.

23. Plaintiff has not had psychiatric or psychological counselling but will do so if she is awarded damages to cover the cost. Plaintiff's husband Frederick testified and confirmed how the incident had affected his wife. He corroborated her evidence concerning her paranoia about dogs and her disinclination to run any longer.
 24. The plaintiff called a plastic and reconstructive surgeon Dr Oliver Mahomva to testify as to her medical treatment and prognosis for the future. He testified that her injuries consisted of two 2 centimetre long wounds which were 6 centimetres apart on the right thigh. The underlying area of skin measuring 14 centimetres by 6 centimetres was undermined.
 25. On her left thigh the doctor found three puncture wounds which were 7 centimetres apart. The undermined area measured 13 centimetres by 6 centimetres. In addition she had puncture wounds which were 5,5 centimetres apart in the peri-umbilical area undermined to the extent of 6 centimetres. There were puncture wounds of her left flank and a small superficial laceration of her right thumb. Finally she had puncture wounds on her knee with some skin undermining.
 26. The doctor performed an operation which lasted over one hour twenty minutes to debride the wounds, suture repair them and apply suitable dressings. She was given anti-rabies prophylaxis course. Subsequently the doctor noted a depression deformity in the left thigh which caused plaintiff embarrassment. The doctor suggested five sessions of corrective injections to correct the depression.
- The estimated cost of each procedure is the sum of R12 536. The total would be R62 680.
27. Although the doctor is not a trained psychologist or psychiatrist he commented on her trauma and her distress at the prospect of facing dogs on the road in future. He suggested that she required psychological or psychiatric consultations at the rate of R350 or R400 respectively per consultation.
 28. I believe that three sessions with a psychologist should be sufficient to help her over her trauma and fear of future dog bites. I therefore award R1 050 in this regard.
 29. Various photographs were handed into Court as Exh B showing the injuries at the time and on various occasions up till 26 August
2005. The latest photographs were handed in as Exh D to show the depression in the left thigh.
30. I do not believe that five sessions of fat injections will be necessary and in my view two such sessions should suffice amounting to R25 072.

31. Insofar as general damages are claimed for pain and suffering, loss of amenities of life, disability and disfigurement are concerned I have consulted the most helpful cases in The Quantum of Damages in Bodily and Fatal Injury, Corbett and Buchanan with the values updated in The Quantum Yearbook by Robert J Koch for 2008.

32 In *da Silva v Coetzee* 1970 Vol 3 Corbett and Buchanan at 163 (T) the plaintiff sustained three teeth wounds in the buttocks and a scratch on the shoulder

blade as a result of a dog bite. She experienced severe pain for two days. Hospital treatment and injections were administered and she spent one day in bed. The Court awarded an amount of R2 200,00. These injuries are considerably less severe than the plaintiff's in this matter.

33. In *Mokoena V Minister van Polisie Qwaqwa en Andere* 1993 vol 4 Corbett and Buchanan G 3-16 the plaintiff sustained multiple bites on both legs by a police dog. The injuries sustained on the left foot resulted in a loss of dorsiflexion and plantarflexion of his foot. He also sustained injuries to his fingers whilst trying to wrestle open the dog's mouth. The Court awarded an amount of R17 000,00 for general damages for bodily injuries.

34 Lastly in *Joyce v Venter* 1979 Corbett and Buchanan at 19(Z), a dangerous dog attacked the plaintiff by fastening its teeth into his genital organs. He

experienced a high degree of shock, pain and discomfort. He was unable to urinate normally and one or two operations would be

required to rectify this. A year later the plaintiff still experienced great pain and discomfort in urinating. The Court awarded an amount of R36 000,00 taking into account the pain still experienced by the plaintiff and future pain. After reviewing all these cases and those mentioned by counsel, I am of the view that R30 000 is a fair award.

32. In the premises I make the following order :

1. I grant judgment against defendants for damages in the sum of R73 766.
2. Costs of suit on the Magistrates Court scale, such costs to include the preparation and attendance fees of Dr Mahomva.

Counsel for the Plaintiff : K Askew (instructed by Tate & Nolan)

Counsel for the Respondent : J Naidoo (instructed by Clinton Short Attorneys)

Date of hearing : 22 September 2008

Date of judgment : 21 November 2008

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