

SOUTH AFRICA / JUDGMENT

L.M v Tati (1111/16) [2018] ZAECHMHC 10 (20 February 2018) [2018] ZAECHMHC 10

COURT

Eastern Cape High Court, Mthatha

BEFORE

Z.M. Nhlangulela

CASE / FILE NUMBER

1111/16

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IN

THE HIGH COURT OF SOUTH AFRICA

[EASTERN

CAPE LOCAL DIVISION, MTHATHA]

CASE

NO: 1111/16

Heard

on: 31/01/18

Delivered

on: 20/02/18

In

the matter between:

L.
M.
Plaintiff
and
SABELO
TATI
Defendant

JUDGMENT

NHLANGULELA DJP

- [1] The Plaintiff's child, a boy aged 16 years, was bitten by four dogs on 22 March 2015 at Nothcrest, Mthatha. The son sustained some serious bodily injuries. As a result the Plaintiff instituted a claim for damages against the Defendant, it being alleged that the Defendant was the owner of the dogs.
- [2] The Plaintiff bears the overall onus to prove the elements of action de pauperie, namely: (a) that the Defendant is the owner of the dogs; (b) the dogs were domesticated animals; and (c) the dogs acted contrary to the nature of domesticated animals generally in causing damage to the son of the Plaintiff. The case of *Loriza Brahman En 'n Ander v Dippenaar* 2002 (2) SA 477 (SCA) is in point.
- [3] In this case only element (a) is in contention, elements (b) and (c) being conceded in the oral evidence that was adduced. In the plea the Defendant denies that he is the owner of the dogs that attacked and injured the boy. The basis for the denial is alleged to be that the Defendant's dogs would not have left the premises of Defendant's house as they were securely fenced with a gate that is remotely controlled and always locked.
- [4] The Plaintiff testified that on 22 March 2015 he only received a report from his wife that their son had been bitten by dogs belonging to the Defendant. On 26 March 2015 the Plaintiff thereupon visited the Defendant at his place of employment in Mthatha to report the incident. That he did after having laid a charge against the Defendant and seeing that the Defendant was not being neighbourly in not making an effort to make contact with the parents of the victim. Later on the same day the Defendant visited the Plaintiff at his house. The Plaintiff stated that the Defendant tendered an apology for what had happened. The Defendant denied this when he testified.
- [5] Plaintiff's son, A. M., testified that he resides at No. 12 Raziya Street near the house of the Defendant at No. 16 Noah Street. It is common cause that both streets are situated in Northcrest Township. A. knew the Defendant and his dogs. On 22 March 2015 and between 4 pm and 5 pm whilst walking on Noah Street from a shop known as Nolusapho heading towards home he had to walk past the gate of the Defendant's house. He saw a dog as he was about to walk past the gate. It was standing on the street opposite the gate. It barked at him. At that juncture he saw three other dogs standing on the gate line of the open gate, also barking at him. He identified the four dogs as those of the Defendant which he had known over a period of approximately two months. The gate was wide open at that time. Unsuspecting any danger to himself he went on but as he passed the gate all four dogs attacked him aggressively causing him to flee to safety. The dogs gave chase until he felled down to the ground of the pathway of an open erf that is between house No. 13 and side of the Defendant's house. That pathway was a route that he frequently used to get home

whenever he was sent by his parents to go to the shop. The dogs bit him as he lay down, causing him injuries on the left leg and his body.

- [6] The Plaintiff's witness, one Mr Mfana Mqina, testified effectively corroborating the version of A. concerning the identity

of the dogs and their attack upon A.. According to Mr Mqina, he is the neighbour to both the Plaintiff and the Defendant.

His house is situated near the pathway that was referred to by A., and within a visible distance of the place where A. had fallen.

Seeing the attack he decided to intervene using a garden spade that helped him chase the dogs away then they would without it.

According to Mr Mqina the dogs that he chased away ran back on a route going towards the house of the Defendant. He had known

that the dogs he saw were those owned by the Defendant.

- [7] A. described the four dogs as big animals of approximately 0,8 metres in height, with the exception of one of the dogs which was shorter. Mr Mqina described the same dogs as the type of dogs which bark at humans most of the time and that they were of a peculiar breed. Both witnesses told the Court that those dogs were well known to the local people, who had been attracted to the scene of attack, as being the animals belonging to the Defendant.

- [8] During cross-examination it was put to A. and Mr Mqina that the Defendant had 5 dogs comprising two big dogs, the parents, and their progeny of three smaller dogs. There was a suggestion that the dogs that attacked and injured the boy belonged to someone else. It was also put to witnesses that the gate was locked, the house was fenced on all sides and the height of the fencing wall was high enough to have prevented the Defendant's dogs to jump over the fence and attack any person. The witnesses re-iterated their evidence in chief.

- [9] The Defendant testified that in the two meetings he had with the Plaintiff on 25 March 2015 he did not admit liability but sympathised

with the fact that A. had been attacked and injured by some dogs. The version he put before the Court was that on 22 March 2015 he left his house at about 8 am to go to another house of his in Tshandu Street that he used as a shebeen. He returned to the Noah Street house at 4 pm to feed his dogs with bone meal and, without entering the house, went back to the Tshandu Street house where he stayed until 7 pm. He told the Court that he left the gate locked with his dogs being inside the premises. At 4 pm he opened the gate, and again locked it after feeding the dogs. When he finally came back to retire for the day after 7 pm he still found the gate locked as he had left it. He stated that his nephew, one Mbasa, had remained in the house where he left it at 8 am, leaving him with a house and a gate remote control gadget that he (Mbasa) used when he left the house after 2 pm of that day and delivered those keys to the Defendant at Tshandu Street house. He told the Court that Mbasa had been a visitor in his house and he did not return to the Noah Street

house after delivering the keys. According to the Defendant he never received a report from anyone about A.'s ordeal until the Plaintiff made a report on 26 March 2015. Having been informed, he later on investigated the facts from certain children who were used to play in Noah Street and found out that no child was ever seen being attacked by his dogs. He stated under cross-examination that the allegation that his dogs had bitten A. was a lie.

[10] Mr Sixolile Ayanda Gift Ludidi was called by the Defendant to testify. Mr Ludidi told the Court that alternatively, he knew the Defendant but had no relationship with the Defendant. He would meet him in Northcrest, but infrequently. He told the Court that seeing the Defendant at shops and in the streets of Northcrest in his motor vehicle driving, and at some instances

greeting him as an elder and respectful "big brother" of the area provoked interest in him to tell about the dogs he had seen attacking a child.

[11] Mr Ludidi told the Court that the dogs he saw were occupying Noah Street near the Defendant's house. According to him he saw the dogs just after he had turned the corner of Noah Street and a street that runs opposite Nolusapho Shop. He saw the dogs on the Street in front of him, barking and charging at the child approaching from the opposite direction of Noah Street. The child turned and took to his heels. The dogs followed the child to an open erf that is situated at Noah Street. He could not see if the dogs did catch up with the child because, fearing that the dogs might turn towards him, he decided to proceed down Noah Street and passing the bushy area hurriedly. However, he noticed that certain people intervened to rescue the child who had ran and fell into the bushy area of the open erf.

[12] When asked in chief about how and what he knew about this case Mr Ludidi answered that one friend of his asked him to explain to the Defendant the events that he witnesses at Noah Street. Asked further to describe the house of the Defendant he stated that it is a different house that stands out from others in that the grounds are covered in paving brick, well fenced, and having a beautiful sliding gate that is "different from the rest."

[13] Mr Ludidi stated under cross-examination that he did not know the date when he witnessed the dogs attacking a child in Noah Street in

2015. When confronted with the version of the Plaintiff the witness conceded that his version of events is a different one.

[14] It is difficult to tell which of the conflicting versions of the parties should prevail. In the circumstances the guiding

principles as laid down in the case of Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie And Others 2003 (1) SA 11 (SCA) must be applied. They are stated as follows at para [6]:

"To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities..."

- [15] It is common cause that the Defendant did have dogs on 22 March 2015 which he kept in his premises. It is not disputed that the Defendant's house was situated on the route that many children from Raziya Street sent to Nulusapho Shop used frequently. The house of the Defendant was as described in the evidence. It is also not disputed that A. was attacked by dogs as described by him and Mr Mqina. The Plaintiff's case that the dogs came from the premises of the Defendant and were owned by him the Defendant is disputed.
- [16] A. is the only person who gave account that the dogs that attacked him came from the premises of the Defendant. Mr Mqina only saw the dogs attacking A. as he lay down on the ground of the open erf adjoining the house of the Defendant. But those dogs were identified by Mr Mqina as being the properties of the Defendant which he had seen before the date of the incident. He even stated that the same dogs had attacked another child in the recent past, the evidence that was not challenged pertinently under cross-examinations as well as when the Defendant and his witness testified. A. had known the dogs for some time. There are no factual basis for disbelieving the evidence that A., Mr Mqina and other local people who intervened on behalf of A. knew that the Defendant was the owner of the dogs.
- [17] The Defendant was not present at his house or scene of the attack. Mr Ludidi cannot be said to have witnessed the incident of 22 March 2015 as he himself conceded under cross-examination that the version he gave about dogs that attacked a child at Noah Street was different in material respects from the version of A.. Mr Mqina may be regarded as an objective witness in that he did not seize an opportunity, which was available to him, to say that the dogs he saw emanated from the premises of the Defendant. I find the analysis of the entire evidence to be supportive of the conclusion that Mr Ludidi's version differs from that of A..
- [18] A.'s evidence as a whole rests on direct evidence. A. was able to give a clear and straight forward account, he showed understanding that he had to speak the truth and he did not contradict himself when he testified. He came across as a reliable witness who spoke about the events that he knew very well. His power of observation is not in doubt. Although he broke down in tears in the witness box he still did not give me the impression that he was fabricating facts in order to prejudice the Defendant, or to please his mother who was sitting at the gallery. Neither did he give the impression that he was seeking the sympathy of the Court. He maintained a proper eye contact with the Court.
- [19] The evidence of the Defendant may be described as indirect to the extent that he was not present when A. was attacked by dogs, or as re-constructed evidence premised on improbable factual account. In accepting the version of A., the Defendant's evidence, becomes comparatively improbable. Mr Mqina's evidence that I regard as reliable, does corroborate A.'s evidence on the issue that the Defendant is the owner of the dogs. Mr Ludidi's evidence is woefully imaginative to the extent that he could not make out if the dogs he saw were those that belong to the Defendant or not. Showing biasness, he displayed readiness to disconnect the dogs that bit A. from the dogs of the Defendant. Most unfortunately for him he was failed by his own admission that his version related to the date

that he could not even remember. This factor and many others that emerged from his evidence result in his version being improbable.

[20] Much as I do believe that fencing of the premises and the automated lock system of the gate of the Defendant are the necessary

precautions taken by him to restrain the movement of his dogs and to protect the members of the public from attacks such precaution

cannot, without more, be elevated to certainty that the gate did not open to release the dogs from the premises on 22 March 2015 between 4 – 5 pm. I say these things because the version of the Plaintiff is neutral nor presumptuous. It is rooted on hard and probable facts that carry a strong force of persuasion that it is the truth.

[21] On the consideration of all the evidence the Plaintiff has succeeded to prove that the Defendant is liable to pay damages as claimed. The costs of these proceedings shall follow the outcome of the hearing.

[22] In the result the following order shall issue:

1. The Defendant is held liable to compensate the Plaintiff with such quantum of damages as may be proved in due cause.
2. The Defendant to pay the costs of the proceedings on the issue of liability.

Z. M. NHLANGULELA

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

MTHATHA

Counsel for the Plaintiff : Adv. D.C. Botma

Instructed by

: Mdledle-Malefane & Ass

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