

SOUTH AFRICA / JUDGMENT

Makhubela v Deyzel (94956/15)

[2017] ZAGPPHC 130 (28 March 2017)

[2017] ZAGPPHC 130**COURT**

North Gauteng High Court, Pretoria

BEFORE

N Nkosi

CASE / FILE NUMBER

94956/15

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****(GAUTENG****DIVISION PRETORIA)****DATE:**

30/3/2017

CASE

NO: 94956/15

In

the matter between:

JOYCE

MAKHUBELA

Plaintiff

And

S

DEYZEL

Defendant

JUDGMENT

- [1] This is an action for damages resulting from the injuries sustained by the plaintiff and her minor child who were bitten by a dog. The claim is based on *actio de pauperie* and in the alternative on *actio legis aquiliae*. The merits and quantum have been separated by agreement.

[2] It is common cause that on the 13 January 2013 at approximately 07:20, the plaintiff, carrying her baby was walking on a path towards Rooiwal Supermarket ("the shop") when a dog attacked and bit her and her child. The child was rescued during the attack and she eventually managed to escape with injuries and was taken to a hospital by an ambulance.

[3] It is further common cause that

3.1 1 The defendant was the owner of the two Boerbull dogs, redish and the other white in colour. The one was male and the other female.

3.2 One of the mentioned dogs bit the plaintiff and her minor child.

3.3 The dog acted contra naturam sui generis.

[4] I must add that, from the evidence before court, it is common cause that both dogs were domesticated.

[5] The defendant raised a defence of provocation and alleged that the dogs must have been annoyed or excited by the burglars either by doing something to them or by allowing them to exit the secured premises contrary to what they were used to.

[6] The parties agreed that the defendant has the duty to begin as she bears the onus of proving her defence. In so far as actio de pauperie is concerned, the defendant has to prove that indeed the dogs were annoyed and excited by the burglars. In so far as action legis aquiliae, the defendant has to prove that she did not Act negligently.

DEFENDANT VERSION - MS. SUSAN DEYZEL

[7] She is employed at a local supermarket as a cashier. She is the owner of two dogs, a redish and a white boerbull which are about a year and two months old. She kept these dogs at the shops in a kennel during the day and behind the 1.8 m high fence and locked gate at night. She could not keep the dogs at her house because the roof was damaged by storm and was forced to seek shelter elsewhere. Her current home does not have a fence.

[8] She has in the past bred the same type of dogs. She has a prior knowledge of the behaviour of such type of dogs. However she was not familiar with the behaviour of her dogs mentioned above because she had just had them for about a year and two months.

[9] The night before the 13 January 2013, the fence and the gates at the shop's premises were in good condition and the gate was locked. The next day she drove to work in her Toyota conquest and parked in front of the shop. The time was about 7:00 in the morning. She noticed that the dogs were outside of the yard, the fence at the gate was damaged leaving a hole to the fence.

[10] She was surprised to see the dogs outside the yard. She called both dogs intending to take them back into the kennel but they did not respond positively. The male dog then started to run pass her, when she turned to look, she saw a woman with a baby on her back. She called the dog but it did not follow the command. In the past the dogs would always obey her command.

[11] The dog jumped onto the plaintiff and started biting her. The shop owner tried to help in removing the dog from the plaintiff but it refused. The shop owner managed to remove the child from the plaintiff and away from the dog to a safe place. She fetched a chain from her car, placed it on the dog and pulled it away from the plaintiff, According to her; it was only one dog that attacked the plaintiff and her child.

[12] She thereafter tried to assist the plaintiff by taking her to hospital but the bystander refused her. The ambulance arrived and took the plaintiff to hospital. She followed the ambulance to hospital. After the plaintiff was discharged from hospital, she

contacted her and offered to help.

[13] She further testified that when she arrived at work on the day of the incident, she noticed that the dogs seemed confused. She was asked by her Counsel why she thought that way. Her answer was

"I think after I saw that the gate fence was cut. I think the people had to do with dogs' behaviour."

[14] It was established during cross examination that the size of the Kennel was 2 metres by 2 meters and both dogs were kept in it from approximately 8:00 to 20:00 daily. The thieves broke into this container the night before the 13 January 2013 and stole some goods. Although there is no direct evidence that the thieves are the ones who cut the fence, she infers from the circumstances that it must have been the thieves.

[15] According to her the dogs were not vicious and had never bitten anyone before. If the break in did not happen, this incident would not have occurred. Before the break in the fence was high enough to keep the dogs behind it. There was no other witness called to testify and her case was closed.

THE PLAINTIFF VERSION

[16] She was carrying her baby and walking on a footpath towards the shops. She saw the defendant and the shop owner opening the gate. There were two dogs with them. They walked to the shop and the dogs followed them. The dogs moved away from them running towards her. She tried to run away but tripped and fell. The dogs came and bite her and her child. The shop owner came with a spray and applied it on the dogs. The one dog ran away. She managed to get hold of the other dog and pushed it away. She managed to run to the taxi which was reversing towards her in order to assist. The defendant never took her into her (defendant' s) Car and never contacted her after the incident.

- [17] During cross examination, the contents of her statement made to the police were put to her; she admitted each and every allegation. She conceded that she did not mention in her statement that the defendant and the shop owner walked with the dogs to the gate. She further stated that she was surprised when the dogs attacked her and did not know what really happened. She was in a state of shock resulting from the attack by the dogs.
- [18] She further conceded that she does not remember well what happened on that day because she was shocked. A written statement by Solomon Chauke was put to her, she denied its contents. I shall not refer further to this statement because it is hearsay and therefore inadmissible. She was adamant that the defendant never spoke to her on that day and thereafter. She was used to going to the said shop but never at any stage saw dogs at the shop's premises, or heard them barking. She was also not aware that the gate fence was damaged. She was adamant that she remembers what happened before the attack.
- [19] It was put to her that the dogs were not aggressive and vicious. She denied and said ;
"If they were not aggressive and vicious, they would not have run to the street to attack me".
It was further and immediately put to her that:
"Except if someone did something to the dogs" She replied: yes.
- [20] She was further referred to a written statement made by warrant officer Mahlangu. She denied the contents thereof. The contents of the said statement constitute hearsay and accordingly inadmissible.

PLAINTIFF'S WITNESS - MR. WILLIAM CHARLES

- [21] He is a taxi driver operating between Hammskraal and Pretoria. He did not know the plaintiff before this incident. He normally drives pass the shop in question on daily basis and has never seen dogs on the premises. When he stops nearby the shops, it is for purposes of picking up passengers.
- [22] On the day of the incident, he was driving his taxi and was near the shop vicinity waiting for passengers. He saw the defendant and the shop owner at the stoep of the shop and two dogs were with them. He thought that they were ready to open the shop.
- [23] He then saw these two dogs running towards the tarred road. He did not focus on the dogs but on looking for passengers. Suddenly a passenger shouted to alert him that a person was being bitten by the dogs. The shop owner came with a spray and applied it to the one dog in order to repel it and the dog ran away. Another man came and took the child. There was one dog remaining but the plaintiff pushed it away and jumped into his taxi through the sliding door.

[24] During cross examination he denied that the defendant offered to assist the plaintiff. He did not know that the fence at the gate was damaged. He reiterated that the defendant and the shop owner were not taking the dog into the kennel. According to him it would not make sense because he saw both of them standing on the stoep before the dogs attacked the plaintiff. That concluded his testimony and the plaintiff closed her case.

ACTION UNDER ACTIO de PAUPERIE

[25] The essentials which need to be proved to sustain a claim based on the action de Pauperie, are[1]

- a. The defendant is the owner of the dogs
- b. The dogs were domesticated
- c. The dogs acted contrary to their nature as domesticated animals
- d. The conduct of animals resulted in damages suffered by the plaintiff.

[26] All the essentials have been conceded and are common cause. The only issue to be dealt with is the defence raised by the defendant. The defendant alleges that the dogs were annoyed or excited by the burglars who left a hole to the gate and the gate slightly open. That caused the dogs to behave the way they did. The dogs seemed confused. The defendant further claimed that the burglars were in control of the dogs at the time of the burglary.

[27] In *Lever v Purdy* [2] , the respondent had been bitten by a dog owned by the appellant. The appellant was overseas and had left C to be in charge and control of the dog. Whilst away, C invited the respondent into the house. C had prior to the arrival of the respondent given an undertaking to the respondent that he would lock the dog away because it was known to be vicious. However he failed to do so. Upon his arrival the respondent was bitten by the dog. The court held that C was at all relevant times in charge of and had control of the dog, that he knew the propensities and nature of the dog and he knew when the respondent would arrive. His conduct was held to be negligent

"The second category of texts clearly establishes the principle of law that the owner of a domesticated animal, which contra naturam sui generis harmed a victim, may successfully avoid pauperien liability by proving as a defence that the harm was caused by the controller's negligence in his control of the animal.[3] "

In the present case the defendant has alleged as a defence that, the burglars broke into the shop premises and damaged the fence and the gate. They were in control of the dogs at that time. They must have done something to annoy or excite the dogs.

In *Green v Naidoo and Another* [4] , a four year old boy was bitten by a dog. He had interfered with the dog while it was eating. The plaintiffs Action de pauperie failed because the child had provoked the dog by touching or pulling it while it was eating.

In *Thysse v Bekker*, a ten year old boy was bitten by a dog and severely injured. The defendant relied on the opinion of an animal behavioural scientist to discharge the onus of proving that the dog must have been provoked. The court held that the defendant failed to discharge the onus of displacing the inference that the dog had acted *contra naturam sui generis* by proving that it had been provoked.

[28] What distinguishes the facts of the present case from the decided case I have referred to above is the fact that, in the present case there is no direct evidence indicating that the dogs were indeed annoyed or excited, and that the cause thereof was the burglars. The defendant draws an inference from the fact that there was a burglary at the shop premises where the dogs were kept. However her evidence was that the dogs seemed confused that morning and shortly before the incident.

[29] With regards to circumstantial evidence in civil proceedings, the defendant referred me to the following

"The onus of proof in civil proceedings is on a balance of probabilities. This is a lower standard of proof than that applied in criminal proceedings. The second rule in *R v Blom* is therefore not applicable as the court need only choose the most reasonable inference that corresponds with the proved facts and not the only reasonable inference. As a result, the rule for civil cases is that: 'The proved

facts

should be such as to render the inference sought to be drawn more probable than any other reasonable inference. If they allow for another more or equally probable inference, the inference sought to be drawn cannot prevail"[5]

When I apply the enunciated principle to the facts of the present case, I cannot come to a conclusion that the inference drawn from the facts is more probable than any other reasonable inference.

[30] There is no evidence indicating where exactly were the dogs at the time of the burglary, what were they doing and whether there was anything done to them. We also do not know whether the dogs were awake or sleeping when the burglary took place shortly after 20H00. I do not know whether the dogs remained annoyed or excited the whole night and the next morning. The evidence is that the dogs were confused but not annoyed or excited as pleaded by the defendant.

[31] There mere fact that there was a burglary is not an adequate basis to draw the inference which the defendant seeks to do. There are inherent dangers in doing so more specially in the light of all the unanswered questions I referred to above (para 30). The defendant has to prove that at the time of the attack[6], the burglars were in charge or in control of the dogs. I have already expressed my reservations about the defendant's

submissions.

There is no indication of the time of the burglary. However it is common cause that at the time of the attack, the defendant was present and witnessed the attack. The burglars were nowhere to be seen.

- [32] The plaintiff's evidence is that she saw the defendant and the shop owner with the dogs at the gate. They thereafter walked to the shop with the dogs following them. The plaintiff's witness corroborated plaintiff's version when he said he saw the defendant and the shop owner standing at the door of the shop. The dogs were with them at that time. This evidence, if true, would confirm that the defendant was in charge and control of the dogs.
- [33] The defendant has disputed this evidence and insisted that the dogs were already outside the yard when she saw them that morning. However, she failed to call the shop owner as her witness to corroborate her version. In his address, defendant's counsel informed the court that the shop owner refused to come and testify. The owner of the container which was broken into was also not called to testify.
- [34] The evidence of the shop owner who was at all material times together with the defendant and also witnessed the incident would have been of great assistance. If the defendant believed that these witnesses would have advanced her defence, she would have taken all the reasonable steps to secure their attendance by at least issuing subpoenas. The inference to be drawn from her failure to call the witnesses is that they would most probably not have supported her defence.
- [35] I am not persuaded that the defendant has succeeded in discharging the onus of proving that the dogs were provoked by the burglars. I find that the plaintiff has succeeded on a balance of probabilities to prove the liability of the defendant based on *Actio de Pauperie*.
- [36] In so far as the plaintiff's claim which is based on *actio legis aquiliae* is concerned, I do not wish to burden the record

unnecessarily in light of my findings based on the *actio de Pauperie*.

[37] I therefore make the following order

(I) The defendant is liable to pay 1003 of the proven or agreed amount of damages in respect of the plaintiff's claim in her personal capacity and in her representative capacity on behalf of her minor child.

(ii) The defendant is liable to pay plaintiff's costs.

N. NKOSI

ACTING JUDGE OF THE GAUTEN, PRETORIA

HEARD ON: 13 MARCH 2017

FOR THE PLAINTIFF: P.J COETSEE

INSTRUCTED BY: PHUKUBYE ATTORNEYS (PRETORIA)

FOR THE DEFENDANT: HS GOOSEN

INSTRUCTED BY: MOLDENHAUER ATTORNEYS (PRETORIA)

[1] Thyse v Bekker 2007 (3) SA350, Lever v Purdy 1993

(3) S 17 (AD

[2] Lever v Purdy 1 993

(3) SA 17 AD per Joubert ACJ

[3] Lever v Purdy (subra) at 22 G-H

[4] Green v Naidoo and Another 2007 (6) SA 372

[5] The Law of Evidence in South Africa Basic Principles, Adrian Ballenger etal ,Oxford University Press 2013, p 203; Macleod v Reuns

1 997

(3) SA 1039 (E) p 1049

[6] Neetling , Potgiter , Visser - Law of order Delict 6 ed

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