

SOUTH AFRICA / JUDGMENT

Mostert v Jones (61617/2016) [2019] ZAGPPHC 63 (8 March 2019)

[2019] ZAGPPHC 63

COURT

North Gauteng High Court, Pretoria

BEFORE

Barnes

CASE / FILE NUMBER

61617/2016

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IN THE HIGH COURT OF SOUTH
AFRICA
(GAUTENG DIVISION, PRETORIA)

(1)

NOT

REPORTABLE

(2)

NOT

OF INTEREST TO OTHER JUDGES

(3)

REVISED.

Case No: 61617/2016

8/3/2019

In

the matter between:

SUSANNA

ELIZABETH JOHANNA MOSTERT

Plaintiff

and

GEORGE

ARTHUR JONES

Defendant

Date

of Hearing: 30, 31 October 2018, 2 November 2018

Date

of Judgment: 8 March 2019

JUDGMENT

BARNES AJ

Introduction

1. The plaintiff sues as a result of an attack upon her by a Boerboel dog owned by the defendant. The plaintiff suffered serious injuries as a consequence of the attack and was hospitalised for 33 days.
2. The plaintiff contends that the attack was caused by the negligence of the defendant.
3. The plaintiff pleads inter alia that the defendant failed to take steps to safeguard persons lawfully present on his property from any possible attack on them by the dog.
4. The defendant denies that he was negligent in any way and contends that the plaintiff voluntarily assumed the risk of injury by the dog, alternatively that the attack was the result of the plaintiff's negligence.
5. The parties agreed to separate merits and quantum and the sole issue for determination before me is accordingly the question of negligence.

The Evidence for the Plaintiff**The Plaintiff, Ms Susanna Mostert**

6. The plaintiff, Ms Susanna Mostert, is a retired nurse, mother and grandmother.
7. At the time of the Boerboel attack, the plaintiff was a tenant on the defendant's property , together with her extended family.
8. The defendant's property is located in Andean, in the North West of Pretoria. It is sizable, some 2 hectares in extent, and houses the defendant's horticultural business as well as two large residential homes. One of these is occupied by the defendant and his wife. The other is rented out by the defendant. On 7 November 2015, the plaintiff and her extended family ("the Mosterts") concluded a rental agreement with the defendant in respect of the second home and moved onto the defendant's property.
9. The plaintiff testified that while signing the rental agreement, the defendant informed her that he kept a Boerboel, named Rocky, as a guard dog. The defendant told her that he kept Rocky caged from 06:00 in the morning to 19:00 in the evening, when he was let out in order to guard the property. Rocky was then caged again at 06:00 every morning. The defendant told the plaintiff that while Rocky could be intimidating, he was not aggressive and would not bite. Nevertheless, said the defendant, if the Mosterts had any problems with the dog, they should let him know.

10. The Mostert's house had an enclosed back garden, while the front of the house abutted the common property. The space between the Mostert's house and the defendant's house was unfenced and the two houses shared a driveway. This meant that, when not caged, Rocky had access to the entire property including the front of the Mostert's house, with the exception only of the Mostert's back garden.
11. The plaintiff understood that Rocky's cage was located near the back door of the defendant's house. The plaintiff had not seen the cage.
12. The plaintiff testified that soon after her family's arrival on the property, the defendant's wife, Mrs Terry Jones, befriended them. It was common cause that Mrs Jones visited the Mosterts on a regular basis and accompanied them to church on occasion.
13. Tragically, in 2004, Mrs Jones had suffered a diabetic coma and had been left mentally disabled as a result. It was accepted by both parties that Mrs Jones was not fit to testify in the trial as a consequence.
14. The plaintiff testified that Mrs Jones told her that she had been bitten by Rocky and was terrified of him.
15. The plaintiff gave evidence about her and her family's encounters with Rocky during their first few weeks on the property in November
2015. The plaintiff testified that early on Friday mornings, she would wheel the dustbins down the driveway to the main gate for garbage collection. She did so before 06:00 when Rocky was uncaged . The plaintiff testified that Rocky would "mock charge" her. She would command him to "lie down" and he would obey, briefly, only to resume the "mock charge" thereafter. This pattern would repeat itself. The plaintiff testified that she felt that she could control Rocky on these occasions and was
not afraid of him.
16. The plaintiff testified that she had had a great deal of experience with dogs was not afraid of them.
17. The plaintiff testified, however, that the other members of her family were afraid of Rocky and that their fear intensified as Rocky increasingly displayed aggressive behaviour.
18. The plaintiff related three incidents in this regard: one in which Rocky had attempted to bite her son and another in which Rocky had attempted to bite her husband. Both had narrowly escaped being bitten by the dog. In the third incident, Rocky had effectively held the plaintiff's daughter-in-law and another family member hostage in their home, by snarling and charging at them when they had attempted to leave the house in order to go for a jog.
19. The plaintiff testified that by early December 2015, a little under a month after they had moved onto the property, her family felt that the situation with Rocky had become intolerable. The plaintiff testified that while she personally was not afraid of Rocky, she

agreed with her family that something needed to be done. Accordingly, on Friday 4 December 2015, the plaintiff spoke to the defendant in the presence of her daughter-in-law, Ms Jessica Mostert. The conversation took place at the Mosterts' home. The plaintiff relayed the above incidents involving Rocky to the defendant and said that her family was afraid of the dog and that something had to be done about the situation. The plaintiff testified that the defendant responded by giving an undertaking that he would keep Rocky caged until he could find a permanent solution. I will refer to this as "the Friday conversation."

20. The plaintiff testified that she and her family did not see or hear Rocky on the night of Friday 4 December 2015 as they usually did, and therefore assumed that he had been caged in accordance with the defendant's undertaking.
21. Prior to the week-end of 4 and 5 December 2015, Mrs Jones had accompanied the Mosterts to church on two Sunday evenings.
22. On the evening of Saturday 5 December 2015, Mrs Jones accompanied the plaintiff and members of her family to a church function. They all returned at about 21:00, in the church mini-bus which the Mostert family drove. The Mosterts usually dropped Mrs Jones near the front door of the defendant's house. On this occasion, Mrs Jones told the plaintiff that the defendant had instructed her to use the back door. This entailed a walk round the defendant's house of some distance in semi-darkness. Mrs Jones was agitated and anxious and told the plaintiff that she was afraid of Rocky. The plaintiff assured Mrs Jones that Rocky would be caged but Mrs Jones remained anxious. The plaintiff accordingly accompanied Mrs Jones round the defendant's house to a point near the defendant's swimming pool, several metres from the back door. Rocky was caged and Mrs Jones entered the house without incident.
23. On the evening of Sunday 6 December 2015, Mrs Jones accompanied the plaintiff and members of her family to church. On their return in the church mini-bus, at around 21:00, Mrs Jones again told the plaintiff that the defendant had instructed her to enter the house via the back door. Again, Mrs Jones was anxious and told the plaintiff that she was afraid of Rocky.
24. As she had done the night before, the plaintiff assured Mrs Jones that Rocky would be caged, but nevertheless accompanied her round the defendant's house.
25. The plaintiff testified that it was dark. At a point near the defendant's swimming pool, the plaintiff stumbled and Mrs Jones caught her arm. The plaintiff recovered her footing, looked up and saw the dog.
26. Rocky stood in front of them, barking aggressively. The plaintiff instructed Mrs Jones not to move. They stood dead still.
27. The plaintiff saw the outside lights at the back of the defendant's house come on. The defendant walked out of the back door and stood behind a tree.

28. The plaintiff shouted at the defendant to call his dog or it would bite one of them. The defendant's response was to yell at them to go into the side gate. The plaintiff asked where it was. She got no response.
29. The plaintiff again shouted at the defendant to call his dog. He did not. Rocky attacked the plaintiff, biting her several times on her right leg. The plaintiff shouted that Rocky was biting her and again yelled at the defendant to call him. He did not.
30. Rocky let go of the plaintiff and moved off, only to return and lunge at the plaintiff's throat. The plaintiff put up her right arm to protect herself and the dog bit it several times. The plaintiff hit Rocky over the head with her cell phone. Finally, he let go and moved off.
31. The plaintiff and Mrs Jones retreated to the Mosterts' home. The defendant phoned the plaintiff's husband and asked that his wife be sent home. The defendant made no attempt to find out exactly what had happened or to establish how serious the plaintiff's injuries were. Nor did he offer any apology for the incident.
32. The plaintiff was taken to hospital where she spent 33 days. She underwent 4 operations.
33. In cross examination, it was put to the plaintiff that the defendant had told her that Rocky was dangerous and had instructed that his home was not to be approached after 19:00 in the evenings without prior arrangement. The plaintiff denied this. She testified that said the defendant had consistently told her that while Rocky could be intimidating, he was not aggressive and would not bite. She denied that she or her family had been instructed not to approach the defendant's house after 19:00 without prior arrangement. She testified further that, in any event, she had believed that Rocky would be caged on the night of Sunday 6 December 2015, by virtue of the defendant's undertaking on Friday 4 December 2015 that he would keep the dog caged until he could find a permanent solution.
34. It was put to the plaintiff during cross examination that the Friday conversation had not taken place and, in particular , that the defendant had given no undertaking to keep Rocky caged. The plaintiff maintained her version regarding the Friday conversation.
35. It was put to the plaintiff that the defendant had not kept Rocky caged on the night of Friday 4 December 2015 and had let him out at 19:00 as usual. The plaintiff responded that she and her family had not seen or heard Rocky on the night of Friday 4 December 2015, as they usually did, and had therefore assumed that he had been caged in accordance with the defendant's undertaking given earlier that day.
36. It was put to the plaintiff that the reason Rocky had been caged on the night of Saturday 5 December 2015 was because the plaintiff had sent the defendant an SMS asking if Mrs Jones could accompany them to a church function that evening and if Rocky could be kept caged until after their return. The plaintiff denied this. She testified that she had sent the defendant an SMS much earlier in November 2015 asking if Mrs Jones could accompany the family to church and that thereafter Mrs Jones had done so on her own accord. The plaintiff denied that she had specifically requested the defendant's permission for Mrs Jones to

accompany them to the church function on Saturday 5 December 2015. The plaintiff maintained that the reason Rocky was caged on the night of Saturday 5 December 2015 was because of the defendant's undertaking made on Friday 4 December 2015.

37. Finally, it was put to the plaintiff that on the night of Saturday 5 December 2015, the defendant had left the front porch lights on and the front door unlocked for Mrs Jones and that she had entered through the front door. The plaintiff denied this. She repeated her testimony that Mrs Jones had said that the defendant had instructed her to use the back door and that she had accompanied Mrs Jones round the defendant's house to a point near the swimming pool, several metres from the back door, through which Mrs Jones had entered.

Ms Jessica Mostert

38. The next witness for the plaintiff was Ms Jessica Mostert, the plaintiff's daughter-in-law and a member of the Mostert family living on the defendant's property.
39. Ms Mostert testified that she was afraid of Rocky. She confirmed the incident during which she and another family member had effectively been held hostage in their home by Rocky, who had snarled and charged at them each time they had attempted to leave the house to go for a jog. Ms Mostert was also aware of the incidents in which Rocky had attempted to bite her husband and her father-in-law.
40. Ms Mostert confirmed the Friday conversation between the plaintiff and the defendant and confirmed that she was present. Ms Mostert testified that the plaintiff had relayed the incidents involving Rocky to the defendant and that the defendant's response had been that Rocky was just trying to intimidate them and would not bite, but since they were uncomfortable he would keep Rocky caged until he could put up a fence.
41. Under cross examination, Ms Mostert conceded that the defendant may not have stated that he would put up a fence. He may have said that he would find a permanent solution and she may have assumed that, by that, he meant put up a fence
42. Ms Mostert testified that she did not attend the church function on Saturday 5 December 2015. She could therefore give no direct evidence pertaining to whether Mrs Jones had entered the defendant's house via the front or back door on her return.
43. Ms Mostert did attend the church service on the evening of Sunday, 6 December 2015. She testified that on their return in the church mini-bus, Mrs Jones told them that the defendant had instructed her to enter the house via the back door. Ms Mostert testified that Mrs Jones was unhappy about this and told them that she was afraid of Rocky.

44. That concluded the case for the plaintiff.

The Evidence for the Defendant

The Defendant, Mr Jones

45. The defendant testified that there is a high crime rate in the Andean area and that there had been a number of break-ins on his property. For this reason, said the defendant, he kept Rocky as a guard dog. He testified that Rocky is aggressive and dangerous and that in order to protect the workers he employs in his horticultural business as well as the tenants on his property, he keeps Rocky caged during the day.
46. The defendant testified that he informed all his tenants, including the Mosterts, that Rocky was a guard dog, not a pet, and that he was aggressive and not to be approached. The defendant testified that he informed the Mosterts that Rocky was caged from 6:00 in the morning to 19:00 in the evening when he was let out in order to guard the property. He informed them that his home was not to be approached after 19:00 in the evenings without prior arrangement and that they should let him know if they required him to keep Rocky caged after 19:00 for any reason.
47. The defendant testified that he had received a request to keep Rocky caged during Ms Mostert's wedding which was due to take place at the Mostert's home in early December 2015 and that he had agreed to do so. This was common cause between the parties.
48. The defendant testified that he received an SMS from the plaintiff on Friday 4 December 2015 asking if his wife could accompany them to a church function on the evening of Saturday 5 December 2015 and asking if he would keep Rocky caged until after their return. The defendant testified that he had responded that that was in order and that he would keep Rocky caged as requested.
49. The defendant testified that he was not aware of any incidents where Rocky had behaved aggressively towards the Mosterts. If they had happened, they had not been brought to his attention. The defendant denied that the Friday conversation had taken place or that he had given the plaintiff an undertaking to keep Rocky caged.
50. The defendant gave evidence about his wife. He explained that she had gone into a diabetic coma in 2004 which had left her permanently mentally disabled. The defendant testified that, on a good day, she has the mental capacity of a 10 year old. He testified that she had been in two different homes for a year and six months respectively but had to be removed because of her aggressive behaviour. The defendant testified that he takes care of his wife. This entails preparing all her meals and ensuring that she is fed, bathed and clothed every day. Their relationship, said the defendant, is like that between a parent and a child. The defendant testified that his wife sometimes roams the streets and that while this concerned him, there was little he could do about it. He could not lock his wife up, said the defendant.
51. The defendant denied that his wife was afraid of Rocky. He testified that he and his wife have a loving relationship with the dog. As for the contention that his wife had been bitten by Rocky, the defendant sought to play this down. He testified that his wife had been holding a kitten and that Rocky had snapped at it and broken the skin on his wife's arm. The defendant had taken his wife to hospital for a tetanus shot.

52. The defendant confirmed that his wife had befriended the Mosterts and visited them regularly. He also confirmed that his wife had accompanied the Mosterts to church on two Sunday evenings prior to the weekend of 4 and 5 December 2015. On a third Sunday evening, his wife had gone to the Mosterts' house as if to accompany them to church, but had returned home shortly afterwards for reasons unknown to him.
53. The defendant testified that his wife would not always tell him that she was going to church with the Mosterts. She would simply start getting ready and he would deduce that she was going out with the Mosterts and make sure that she was properly dressed and presentable.
54. The defendant testified that on the nights that his wife went to church with the Mosterts, he left the front porch lights on and the front door unlocked for her. Furthermore, he kept Rocky caged until after his wife had returned from church. This was not to protect his wife, said the defendant, but to protect the Mosterts.
55. The defendant gave the following evidence pertaining to the events of the week-end of 4 to 6 December 2015.
56. On the night of Friday 4 December 2015, he let Rocky out at 19:00 as usual.
57. On Friday 4 December 2015, he had received a request from the Mosterts that his wife accompany them to a church function on Saturday night. He had acceded to the request. Accordingly, on Saturday 5 December 2015, the defendant kept Rocky caged until after his wife had returned at around 21:00. He also, as he usually did when his wife went out with the Mosterts, switched the front porch lights on and left the front door unlocked for her. The defendant testified that his wife entered the house through the front door when she returned on Saturday 5 December 2015.
58. On Sunday 6 December 2015, the defendant woke early, prepared his wife's meals for the day and left them in the kitchen for her.
59. The defendant left the house at 06:00 and went to play golf. The defendant had no communication with his wife all day. The defendant returned home at 18:00.
60. When the defendant returned home, his wife's bedroom door was closed. The defendant testified that his wife usually went to bed at 17:30 and closed her bedroom door when she went to sleep. The defendant therefore assumed that his wife was in her bedroom, asleep. He did not check.
61. The defendant had supper. At 19:00 he fed the dog and let it out. He then watched a little television. At about 19:30 the defendant went to bed.
62. At about 21:00, the defendant was woken by Rocky's aggressive barking. He went to the back door and switched the outside lights on. This lit up only a small area outside the back door. The defendant could not see into the garden where the barking was coming from. He could however hear his wife's voice and that of the plaintiff. He then heard the plaintiff shouting that she was being bitten by Rocky. The defendant shouted that they should go in the side

gate. This was a reference to the pedestrian gate at the swimming pool. The plaintiff shouted back, "where is it?" The defendant testified that he then realised that they would not find the side gate, it was too dark.

63. The defendant testified that he called Rocky. Rocky came to him but then ran back to the plaintiff. The defendant then realised that he would not be able to keep Rocky with him so he went into the kitchen to get some bones. He used them to lure Rocky into his cage.
64. The defendant testified that he had not attempted to approach Rocky during the attack as this would have made him more aggressive.
65. Asked why he had not gone to the Mosterts home to find out exactly what had happened and how seriously the plaintiff had been injured, the defendant answered that he had been very angry. He could not believe that someone would do as stupid a thing as the plaintiff had done, he said. He added that he had no medical training so there was nothing he could have done in any event.
66. Asked what he would have done had he known that his wife was not home on Sunday evening, 6 December 2015, he answered that he would have assumed that she had gone to church with the Mosterts. He would have turned the front porch lights on and unlocked the front door for her; and he would have kept Rocky caged until after their return.
67. During cross examination, the defendant accepted that he had a duty to those lawfully on his property, including the Mosterts, to take reasonable steps to ensure that they were not harmed by Rocky.
68. During cross examination, the defendant was asked about his ability to control Rocky. He testified that he had full control over Rocky in normal circumstances. He conceded, however, that once Rocky went into attack mode, he had no control over him whatsoever.
69. The defendant was asked to elaborate on why he kept Rocky caged until after his wife's return when she went out with the Mosterts and whether this was to protect his wife. He answered that it was not. His wife had a loving relationship with the dog, said the defendant, and he did not believe that it would harm her. The defendant testified that he kept Rocky caged on these occasions because the Mosterts were at risk of harm from the dog. It was them, said the defendant, that he sought to protect.
70. Under cross examination, the defendant could offer no explanation for why he had not checked that his wife was indeed at home on the evening of Sunday 6 December 2015, save to state that she always closed her bedroom door when she went to bed.

Analysis

71. It is apparent from the above that there are two diametrically opposed versions pertaining to whether Rocky ought to have been caged on the night of Sunday 6 December 2015. The plaintiff contends that by reason of the defendant's undertaking on Friday 4 December 2015 that he would keep Rocky caged until he could find a permanent solution, the dog ought to have been caged. The plaintiff contends that in the circumstances she did not foresee and could not reasonably have been expected to foresee that Rocky would not be caged.
72. The defendant, on the other hand, denies that he gave the undertaking and states that since he received no request to keep Rocky caged beyond 19:00 on 6 December 2015, he let him out at 19:00 as usual. The defendant contends that the plaintiff ought to have known that Rocky would not be caged and in approaching his house after dark in these circumstances she voluntarily assumed the risk of an attack, alternatively, acted negligently, which negligence caused the attack.
73. Ordinarily, in these circumstances, I would assess the credibility of the witnesses, as well as the probabilities, in order to determine which version ought to be accepted. In the matter at hand, however, it is not necessary for me to make these determinations. This is because, in this case, I am of the view that the answer to the negligence question emerges clearly from the common cause facts and the defendant's own version.
74. The salient facts, either common cause or part of the defendant's version, are in my view, the following:
- 74.1 The defendant kept Rocky, a Boerboel, as a guard dog on his property. Rocky was aggressive and dangerous. Furthermore, the defendant conceded that if Rocky went into attack mode, he had no ability to control him.
- 74.2 The defendant accepted that he had a duty to take reasonable steps to ensure that persons lawfully present on his property, such as his workers and tenants, were not harmed by Rocky.
- 74.3 It was in furtherance of this duty that the defendant kept Rocky caged during the day.
- 74.4 It was also in furtherance of this duty that, on the nights that his wife went to church with the Mosterts, the defendant kept Rocky caged until after their return. Importantly, the defendant testified that he did so not in order to protect his wife, whom he did not believe would be harmed by the dog, but to protect the Mosterts, who were at risk of being harmed by the dog by virtue of being in the vicinity of the defendant's home after dark.
- 74.5 To the defendant's knowledge, his wife had accompanied the Mosterts to church on two Sunday evenings prior to 6 December 2015, and had attempted to do so on a third Sunday evening.

74.6 Most importantly, the defendant testified that his wife did not always tell him that she was going to church with the Mosterts. She would simply start getting ready and he would deduce that she was going to church with the Mosterts and make sure that she was properly dressed and presentable. It is clear from this that, on the defendant's own version, the Mosterts did not specifically request his permission each time his wife accompanied them to church.

74.7 The defendant had had no communication at all with his wife on Sunday 6 December 2015. He therefore had no way of knowing whether or not she had gone to church with the Mosterts as she had done previously.

75. In these circumstances, I am of the view that the defendant ought to have foreseen that his wife might have gone to church with the Mosterts on the evening of Sunday 6 December

2015. I am of the view that a reasonable person in the position of the defendant would have foreseen this possibility.

76. The defendant testified that had he known that his wife was not at home on Sunday 6 December 2015, he would have assumed that she had gone to church with the Mosterts and he would have kept Rocky caged until after their return.

77. It follows that a reasonable person in the position of the defendant would have checked that his wife was indeed at home before letting the dog out. He did not do so. Had the defendant checked whether his wife was in her bedroom, he would, on his own version, have kept Rocky caged and the attack on the plaintiff would not have occurred.

78. For the above reasons, I am of the view that the attack on the plaintiff was caused by the negligence of the defendant.

79. In the circumstances, I make the following order:

1. The action succeeds with costs.
2. The attack on the plaintiff by the Boerboel dog owned by the defendant was caused by the negligence of the defendant.
3. The defendant is liable for 100% of the plaintiff's proved or agreed damages.

BARNES AJ

Appearances:

For the Plaintiff: Adv M Coetzee instructed by Alet Uys Attorneys

For the Defendant: Adv H Greet instructed by Ludick Attorneys

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