

SOUTH AFRICA / JUDGMENT

Muller v De Waal and Another (15448/17) [2023] ZAWCHC 173 (24 March 2023)

[2023] ZAWCHC 173

COURT

Western Cape High Court, Cape Town

BEFORE

Fortuin

CASE / FILE NUMBER

15448/17

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OFFICE OF THE CHIEF JUSTICE

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 15448/17

MARGARETHA JOHANNA CATHARINA MULLER Plaintiff v JOHAN DE WAAL First Defendant
RINA DE WAAL Second Defendant

JUDGMENT DELIVERED ON THIS 24th DAY OF MARCH 2023

FORTUIN, J:

A.

INTRODUCTION

- [1] The plaintiff, Ms Margaretha Muller, a 51 year old dog sitter, regularly fed the pets of others in their absence. She has known Mr and Mrs De Waal, the defendants, for a while, visited their house before and also fed their dogs in the past. When they asked her to do the same during July 2015, she agreed without hesitation. During the afternoon of 11 July 2015, she fed the dogs for the second time on that day. It was during this feeding session that she was bitten by one of the dogs, injuring her hand. The owners of the dogs denied any liability, which gave rise to this litigation.
- [2] The plaintiff, while on the premises of the defendants, was attacked and injured by the defendants' dog, Bentley ("the incident"). Her hand was seriously injured during the incident. She instituted action against the defendants based on the *actio de pauperie*, alternatively in delict to recover damages for her injuries.

- [3] This was the hearing in respect of liability only as a result of the merits being separated from the quantum during pre-trial procedures. An inspection in loco was held on the first day, at the commencement of the hearing, after an earlier refusal by the defendants for an inspection in order to take photographs of the premises.

B. COMMON CAUSE BACKGROUND FACTS

- [4] A few months before the incident occurred, the defendants noticed that Max and Bentley started growling at each other and wanted to fight with each other because, according to the second defendant, Bentley was growing up and started to challenge Max. They growled at each other through the bedroom sliding door window.
- [5] As a result of this, they fed the two dogs separately; Max inside the house and Bentley outside the house.
- [6] The plaintiff met with the second defendant on 10 July 2015 to collect the keys to the house and certain aspects regarding the dogs were discussed, inter alia that Max should be fed in the kitchen and Bentley and the other dogs outside the house.
- [7] It is common cause that the two dogs involved, Bentley and Max, were owned by the defendants. Further is it common cause that the plaintiff was lawfully present on the premises on that day. The plaintiff was asked by the defendants on 10 July 2015 to:

7.1 feed their animals twice a day;

7.2 keep Bentley and Max separate and to feed them in separate areas; and

7.3 keep the sliding door, separating the bedroom and the back yard, closed at all times.

- [8] At some point Max came into the backyard, and the two dogs became embroiled in a fight. The plaintiff intervened to break them up by physically picking Max up while Bentley was still attacking him.

C. THE PLAINTIFF'S CASE

- [9] It is the plaintiff's case that, at the time of the incident, while she was lawfully present on the defendants' premises, she was injured by Bentley. On her version, the incident occurred when Bentley suddenly and unexpectedly left his area from the outside courtyard and forced his way past her into the house via the sliding door where she was positioned. In the process she was bitten and knocked backwards against the door by Bentley.
- [10] At the time of the incident, the door leading from the main bedroom to the inside passage ("the mommy door") was not closed.
- [11] It is her version that the defendants did not inform her that Bentley and Max had on previous occasions attempted to gain access to each other's territory, nor did they warn her of the possibility that they would attempt to do so. Moreover, the defendants did not inform her of what to do in the event of a dogfight.

D. THE DEFENDANTS' CASE

- [12] The defendants deny liability and contend that the plaintiff's injuries were occasioned by her own negligence and her failure to act in accordance with the alleged terms of a contract between her and the defendants.
- [13] Moreover, that she intervened in the dogfight when she ought not to have done so. She accordingly assumed the risk of the harm that befell her.

E. ISSUES IN DISPUTE

- [14] It is firstly in dispute whether the defendants instructed the plaintiff to keep the "mommy door" between the main bedroom and the passage closed while feeding the dogs.
- [15] Secondly, whether the defendants informed the plaintiff that Max and Bentley were prone to fight while protecting their own territories possibly resulting in a dogfight should they get together in the same area.
- [16] Thirdly, whether the plaintiff was bitten when Bentley forced his way past her at the sliding door, or whilst she attempted to separate them during their dogfight outside.

F. RELEVANT LEGAL PRINCIPLES

a. ONUS

- [17] The plaintiff bears the onus of showing that Bentley acted contrary to the nature of an animal of its kind. This onus is prima facie discharged once the plaintiff shows that she was bitten without apparent cause. In this regard see *Theyse v Bekker*[1]. It is trite that the onus hereafter shifts to the defendant to show that the plaintiff was bitten due to her own negligence or due to provocation or some other extrinsic cause. See *Van Meyeren v Cloete*[2].

b. DETERMINATION OF FACTUAL DISPUTES

- [18] It is trite that the manner in which factual disputes between parties should be resolved is by the court making credibility and reliability findings of the factual witnesses and the probabilities. Based on the court's findings in this regard, it will determine whether the party burdened with the onus has discharged it or not. Where the factors are, however, all equally balanced, the probabilities must prevail. In this regard, see *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others*[3].

c. ACTIO DE PAUPERIE

- [19] An owner of a domesticated animal is strictly liable for the harm they have caused to a claimant in terms of the actio de pauperie. This principle was aptly described by Wallis, JA in *Van Meyeren*[4] as follows:

“The underlying reason for the existence of the actio de pauperie is as between the owner of an animal and the innocent victim of harm caused by the animal, it is appropriate for the owner to bear the responsibility for that harm. ...”

[20] It is trite that there are exceptions to this general rule, i.e. that the defendants in a matter based on the pauperien action, is strictly liable unless they can prove that the incident was caused by the negligence on the part of the plaintiff.

[21] In addition, a further exception is to be found in the constitutional right to dignity, life and bodily integrity in the Constitution of the Republic of South Africa, Act 108 of 1996[5]. The court here differed from the view expressed by Kumleben, JA that, when considering the

“... competing interests of the owner who had not been at fault and the injured party who had a claim based on negligence against the custodian of the dog, considerations of fairness and justice favoured the owner. I am unconvinced that this was the correct balancing of interests if one takes the interests of justice into account in accordance with the Constitutional values already mentioned ...”[6]

d. NOVUS ACTUS and VOLENTI NON FIT INIURIA

[22] In casu, the defendants raise a defence of novus actus interveniens and voluntary assumption of risk. In short, it is alleged that the plaintiff's injuries were caused by her own conduct as she was the person in control of the dogs at the time of the incident. The judgment in Maartens v Pope[7] is used and, in particular, the rule that

“He who, knowingly and realising a danger, voluntarily agrees to undergo it, has only himself to thank for the consequences”.

Moreover, the idea that

“... the fundamental principle that no man can recover damages for an injury for which he has himself to thank.”

[23] The relevance of these principles in this matter will be discussed below.

e. ACTIO LEGIS AQUILIAE

[24] The position with regards to Aquilian liability in respect of the actions of dogs is trite, i.e. that the plaintiff should, in addition to the other elements, have to prove negligence and causation. The court, when dealing with Aquillian liability, should have regard to the history of the animal's interaction in order to determine whether or not the owner should

have foreseen the reasonable possibility of harm being caused to a person. The owner of a dog ought to know the character of the animal. In this regard see O'Callaghan N.O. v Chaplin[8].

G. DISCUSSION

[25] During the proceedings the plaintiff proved that she did not provoke the dogs, and that she was she bitten without any other extrinsic cause. In my view, therefore, the plaintiff discharged her onus. This then triggered the defendants' onus to show that the plaintiff was

injured due to her own negligence. The evidence by the plaintiff was that she was advised by the second respondent to keep the sliding door between the bedroom and the back yard closed. On her version, she was not told to keep the “mommy door” between the bedroom and the kitchen closed. This version is directly conflicting with the version by the second respondent. I therefore had to turn to an evaluation of the probabilities.

- [26] I find it extremely improbable that the plaintiff would obey the warning about the sliding door but decided to flout the warning about the “mummy door”, when, on the second defendant’s version, she was warned that the dogs would forcefully and violently try to get to each other when the “mommy door” was left open. It is common cause that the plaintiff fed the dogs on previous occasions, and that the dogs did not behave violently towards each other. On the probabilities therefore, I find that she was indeed warned about keeping the sliding door closed. Moreover, if she was warned that the dogs would violently attack each other if the “mommy-door” was left open, she would certainly have closed it while feeding the dogs. I find the plaintiff’s version in this regard more probable than that of the defendants.
- [27] The allegation by the defendant that the plaintiff was injured while she attempted to separate the fighting dogs, was denied by the plaintiff. No evidence was presented to gainsay the plaintiff’s version in this regard, i.e. the neighbour who advised the plaintiff while the dogs were fighting was not called. I am in agreement with the plaintiff that no novus actus was proven and the defence of volenti non fit iniuria is therefore dismissed.
- [28] In casu, the defendants foresaw or ought to have reasonably foreseen, that Bentley would try to gain access to Max. Their failure to warn the plaintiff of the full extent of the dogs’ violent behaviour towards each other was accordingly negligent. This negligence was evidently the cause of the plaintiff’s injury.
- [29] In terms of the actio de pauperie the owners of Bentley are to be held strictly liable for the plaintiff’s damages unless one of the exceptions are present. Where the owners can prove that the incident was caused by the negligence of the plaintiff, they will not be liable. I am not persuaded that the defendants (owners) established that the plaintiff was negligent.
- [30] What was indeed established was that the plaintiff was asked to feed the defendants’ animals. She did this without assuming general control over the animals. She was not warned prior to this incident of Bentley’s propensity to gain access to Max’s feeding area. As mentioned earlier, I find that the defendants’ version in this regard, that they gave her all the information of the possibility that the dogs may violently attack each other, extremely improbable.
- [31] Considering the evidence before me and the law applicable, I find that the plaintiff complied with the requirements of the actio de pauperie and that the defendants are strictly liable to compensate the plaintiff for the damages arising from her injuries incurred.
- [32] The words of Wallis J in Van Meyeren[9] reflect my sentiments in this matter:

“Many people in South Africa choose to own animals for companionship and protection. That is their choice, but responsibilities follow in its wake. Whatever anthropomorphic concepts underpin pauperien liability, the reality is that animals can cause harm to people and property in various ways. When they do so and the victim of their actions is innocent of fault for the harm they have caused, the interests of justice require that as between the owner and the injured party it is the owner who should be held liable for that harm. ...”

CONCLUSION

[33] In the circumstances, I find the plaintiff succeeds in her claim against the defendants.

1. The defendants are liable (jointly and severally, the one paying the other to be absolved) to pay to the plaintiff 100% of her yet to be quantified damages arising from the incident in which she sustained dog bite injuries on 11 July 2015.
2. The defendants are liable (jointly and severally, the one paying the other to be absolved) to pay all the plaintiff's costs of suit inclusive of all reserved costs in respect of the issue of liability in the above action on the High Court scale, which costs shall further specifically include:

2.1 The costs of attending an inspection in loco on 5 June 2019.

2.2 The costs of the plaintiff's application to compel delivery of further particulars.

2.3 The costs of opposing the defendant's application brought in terms of Rule 38.

2.4 The costs of attending an inspection in loco on the first day of trial on 1 September 2022 and any wasted costs occasioned thereby.

3. The hearing in respect of the quantum of the plaintiff's damages is postponed sine die.

FORTUIN, J

Date of hearing: 1 September 2022; 27 October 2022; 7-8 November 2022

Date of judgment: 24 March 2023

Counsel for plaintiff: Adv AD Branford Instructed by: Batchelor & Ass Ms G Theron
Counsel for defendants: Adv J Coetsee Instructed by: BDP Attorneys Ms N van Eeden

[1] 2007

(3) SA 350 (SCC).

[2]

[2020] ZASCA 100.

[3] 2003

- (1) SA 11 (SCA).
- [4] Supra.
- [5] Sections 10, 11 and 12(2), of the Bill of Rights.
- [6] Supra at para [41].
- [7] 1992
- (4) SA 883 (NPD).
- [8] 1927 AD 310.
- [9] Supra, at para [42].
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