

SOUTH AFRICA / JUDGMENT

Schmidt and Smith and Another (85495/2016) [2018] ZAGPPHC 318 (2 May 2018) [2018] ZAGPPHC 318

COURT

North Gauteng High Court, Pretoria

BEFORE

C Pretorius

CASE / FILE NUMBER

85495/2016

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Policy

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

(1)

NOT REPORTABLE

(2)

NOT OF INTEREST TO OTHER JUDGES

(3)

REVISED.

Case number: 85495/2016

Date: 2/5/2018

In

the matter between: MERVYN
JOHN SCHMIDT
PLAINTIFF
And
LLEWELLYN
SMITH
FIRST DEFENDANT
V COMM
CC
SECOND
DEFENDANT

JUDGMENT

PRETORIUS J.

- (1) In this action the plaintiff claims damages from the defendants after the defendants' dog had allegedly attacked him. The plaintiff claims damages, based on the actio de pauperie, in the alternative, that the defendants had been negligent in failing to control the animal.
- (2) At the commencement of the trial, the court was requested to order that the court in terms of Rule 33(4) of the Uniform Rules of Court deal only with the merits of the case. The court did make an order that the court would only deal with the merits.

THE PARTIES:

- (3) The plaintiff is Mr MJ Schmidt, an adult 71 year-old male.
- (4) The first defendant is Mr L Smith, an adult business man and owner of the second defendant and working at the second defendant's premises at [...], Centurion.
- (5) The second defendant is V Comm CC, a closed corporation with registered address at [...], Centurion ("the premises").

THE ISSUES:

- (6) Plaintiff claims damages in terms of the actio de pauperie, alternatively, that the owner of the animal was negligent in not controlling the dog, a boerbull.
- (7) The defendants' defences are fourfold, namely that the animal was provoked, that the defendants were indemnified, volenti non fit injuria and that the plaintiff had also been negligent.
- (8) During argument counsel for the defendant abandoned the defences of indemnification, volenti non fit injuria and contributory negligence.

BACKGROUND:

- (9) Mr Schmidt had attended the premises of the second defendant two and half to three months prior to the date of the incident. At that stage he saw the dog, a boerbull, lying in the sun close to the gardener,
- when he stopped at the gate, before entering the premises. He pressed the button at the gate as the gate was closed. The gardener took the dog to the garage where he left it and closed the garage door. The plaintiff describes the dog as a large boerbull. The gardener then met the plaintiff at his car. On that day, after he had concluded his business in the office, the gate was opened for him and he left in his car, without seeing the dog again.
- (10) On 15 April 2015 at approximately 10h15 he returned to the business premises of the second defendant to purchase a two-way radio. As he got there the gate was open and he entered the premises in his motor vehicle. He saw the boerbull lying in the sun. He did not alight from his car and the gate closed behind him. According to him Mr Viviers, an employee of the second defendant, came out and put the boerbull in the garage, before the plaintiff alighted from his motor vehicle. They then entered the business together.
- (11) He bought the radio from Mr Viviers. Mr Viviers then said that they could tune the radio to the correct band width if the plaintiff had the correct information. The plaintiff told Mr Viviers that he had the paper with the information in his motor vehicle and would fetch it. He left the business' office, descended the stairs and the next minute he was on his hands and knees. The dog had jumped up from behind with his front paws on the plaintiff's shoulders, causing him to fall on his hands and knees. The dog, the boerbull, bit him, causing an avulsion of the scalp, numerous lacerations on his right arm and right hand. Mr Viviers rescued the plaintiff by taking the dog away. The plaintiff did not hear or see the dog before he was attacked from behind. He further injured his right arm and left knee when falling.
- (12) The owner of the dog, the first defendant, when the plaintiff was taken back into the office, uttered foul language and asked who had let the dog out. One of the ladies, an employee of the second defendant, apologised and said she had thought that the plaintiff had already left. It was thus clear that the dog had to be locked up when clients visited the premises.
- (13) The plaintiff denied that there was a notice at the premises, cautioning people that there was a dog on the premises. This was not proved by the defendant in any event and therefore indemnification was not argued. He further denied that he had left the office at a trot ("op 'n drafstap"), but reiterated that he walked normally to his motor vehicle to fetch the paper, as he was in no hurry on that particular day.
- (14) Mr Viviers, the only witness for the defendant, confirmed the plaintiff's version in almost all aspects. His evidence was that whilst he was busy with the plaintiff's radio in the office, the plaintiff exited the office, going outside at a trot. He did not know where the plaintiff was going at the time and why. He only saw the plaintiff leaving the office out of the corner of his

eye, as he was busy with the radio. He did not see the dog attacking the plaintiff. According to him the boerbull had never before attacked anybody. According to Mr Viviers the dog was locked up when clients entered the premises and until the clients had left the premises as everybody did not like dogs.

- (15) Defendant's counsel argued that the manner in which the plaintiff left the office, according to him, at a trot, provoked the boerbull to attack him and therefor the action should be dismissed. After all the evidence had been led, that is the plaintiffs evidence, and Mr Viviers' evidence on behalf of the defendants, counsel for the defendant abandoned the other three defences during argument.

LEGAL PRINCIPLES:

- (16) The liability of the owner of the domesticated animal, the boerbull in this instance, is independent of any fault on the owner's part. Therefore, as stated in Amler's Precedents of Pleadings[1] , it is advisable to base the plaintiffs claim in the alternative, on the action legis Aquiliae. This would be advisable should the plaintiff be unable to prove ownership of the dog or that the dog had acted contra naturam suam. It may then be possible to prove negligence on the defendants' part where the defendants failed to control the animal. It was already found in O'Callaghan NO v Chaplin[2] that the owner of a domestic animal is guilty should the animal cause any damage without the owner being at fault.
- (17) In Loriza Brahman en 'n Ander v Dippenaar[3] Olivier JA discussed the relevance of the actio de pauperie and held at paragraph 16:

"Die tyd om die actio de pauperie, ondanks sy eerbiedwaardige ouderdom, grafwaarls te dra, het nog nie aangebreek nie. Byna 75 jaar gelede het Kotze AR in O'Callaghan, N.O. v Chaplin, supra, op 365 gese :

'It is satisfactory to find that the action de pauperie still forms part of our law ... I think the conclusion is a sound and just one, for if a man chooses to keep an animal, and injury or damage is caused by it to an innocent person, he must make adequate compensation. The owner of the animal and not the person injured must bear the loss. ... After all, the result arrived at is but the natural development of a doctrine which, as we learn from eminent jurists, such as Wesenbeck,

Vinnius, Matthaeus, Huber and others, had already been accepted in most places, notwithstanding the reception of the Roman law. These masters and expounders of the law rightly saw nothing unjust in the view that, as the Roman law regarded noxae deditio as merely an alternative mode of solution at the election of an owner, that is of discharging his liability for pauperies, the fact of its disappearance did not deprive an injured plaintiff of his right to full compensation to be paid him by the defendant. The doctrine, therefore, which they state was observed in actual practice in their time, has since been accepted by the more modern and maturer jurisprudence, and still prevails as existing law in several civilised European countries as well as in our own.'

Niks wesenliks het sedertdien verander nie."

The same applies 16 years after this judgment of Loriza Brahman[4] had been delivered.

- (18) If I apply this dictum. I find that the first defendant had admitted to being the owner of the dog; that the dog was a domesticated animal; and that the dog acted contrary to the nature of domesticated animals generally.
- (19) I have considered all the evidence by both the plaintiff and the defendant. I cannot find that the plaintiff provoked the dog in any way, as he had not even seen or heard the dog before he was attacked. The attempt by counsel for the defendants to blame the plaintiff for leaving the office at a trot, thus provoking the dog, is dismissed as highly improbable. There was no evidence tendered by the defendants that, even had the plaintiff left the office at a trot, that it would

have provoked the dog to such an extent that it would attack. In any event, to all intents and purposes, the dog had been locked in the garage when the plaintiff entered the premises and by the mistaken belief of an employee that the plaintiff had already left the premises, the dog was let out of the garage.

- (20) I find that on a balance of probabilities that the behaviour and attack by the boerbull caused the injuries and subsequent damages to the plaintiff.
- (21) In the alternative the plaintiff alleged that the owner of the boerbull was negligent in the following aspects:

21.1 He left the dog under the supervision and control of an employee of the first defendant, who was not properly trained to supervise and control the dog;

21.2 The employees did not ensure that the gate, giving access to the premises, was properly closed at all reasonable times;

21.3 The employee released the dog from his leash at a time when it was not safe to do so;

21.4 The employee did not take steps, alternatively did not take reasonable steps to ensure the safety of the plaintiff.

- (22) In *Green v Naidoo and Another*[5] Satchwell J dealt with foreseeability of harm at paragraphs 37 and 38. She found that in all cases dealing with Aquilian liability for the dog's actions, "our courts have had regard to the history of the animal's interaction with humans, other animals and the world in deciding whether or not the owner of the animal ought to have foreseen the reasonable possibility of harm".
- (23) Wessels JA remarked in *O'Callaghan's case*[6] that "If a person keeps a dog he ought in law to be held to know the character of the animal".

- (24) There has been no evidence in this regard, as Mr Viviers' evidence was that it was the first time that the dog had attacked somebody in four years. His further evidence was that the dog was not vicious or aggressive. I find this improbable due to the defendants' actions by locking up the dog when strangers entered the premises, but there has been no proof of the history of the boerbull's actions with humans or at all.
- (25) In these circumstances, if I apply the dictum in Green's case[7] I cannot find that the defendants were negligent as alleged in the particulars of claim, as it has not been proved on a balance of probabilities.
- (26) Counsel for the defendant further argued that no finding should be made against the second defendant and that the plaintiff should pay the costs of the second defendant. Although I find that no case has been proven against the second defendant, there could have been no extra costs incurred by the second defendant. At all times the same attorney and counsel conducted the case where the first defendant was the owner of the second defendant. No extra costs could have been incurred in this instance as the case was pleaded exactly the same for both defendants.
- (27) I find that the plaintiff's claim on the actio de pauperie against the first defendant has to succeed as the plaintiff has proved its case on a balance of probabilities.
- (28) In the result the following order is made:
1. The first defendant is declared 100% liable to compensate the plaintiff for the damages he had suffered as a result of the first defendant's boerbull attack on 15 April 2015.
 2. The quantum portion of the action is postponed sine die.
 3. The first defendant is ordered to pay the plaintiffs costs.

Judge C Pretorius

Case number

: 85495/2016

Matter heard on

: 25 April 2018

For the Plaintiff

: Adv JP Greyilng

Instructed by

: Shayne White Incorporated

For the Respondent

: Adv HP West

Instructed by

: Louwrens Coetzer & Partners

Date of

Judgment

: 2 May 2018

[1] 7th Edition, LTC Harms

[2] 1927 AD 310

[3] 2002(2) SA 447 (A) op 482G-H

[4] Supra

[5] 2007(6) SA 372 (WLD)

[6] Supra

[7] Supra

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