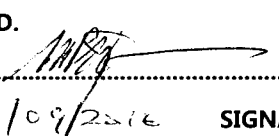




**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 68230/2014

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO.	
(2) OF INTEREST TO OTHER JUDGES: YES / NO.	
(3) REVISED.	
DATE 22/09/2016	SIGNATURE 

22/9/2016

In the matter between:

MARLENE JULIA BROWN obo

JAY-DREW ROMEO MICHAEL BROWN

Plaintiff

and

MONICA PHUTI SELANE

Defendant

JUDGMENT

MBONGWE, AJ:

INTRODUCTION

1. This is an action for damages claim arising from an incident wherein the plaintiff's minor son was bitten by dogs allegedly belonging to the defendant

while walking on the street. The plaintiff based the claim on the Common Law principle that, in attacking and biting her son, the dogs acted contrary to the nature of domesticated dogs. In the alternative, the plaintiff grounds the claim on alleged negligence on the part of the defendant for her failure to have and maintain reasonable measures to prevent the dogs from attacking her son. The defendant denies liability on both the main and alternative claims.

THE FACTS (appear from the evidence)

2. The plaintiff's son, Jay-Drew Brown (hereinafter referred to as "the victim") was the first witness to give evidence. He was eight years old when he and his friend, Zweli, were walking on the street passing the defendant's house on the 6 January 2013 when a BMW motor vehicle approached the plaintiff's entrance gate. The plaintiff's daughter, whom he described as a child, opened the gate for the car to drive in. Zweli ran on seeing the car approaching the gate. The victim was told by the plaintiff's daughter, as she opened the gate, not to run otherwise the dogs will chase him. Two dogs, one black and one white, came out of the open gate as the car drove in and attacked and bit him. The defendant's daughter had closed the gate once the car drove in, leaving the dogs outside. Describing the dogs, the witness stated that the black dog was bigger than the white one which had lots of hair. Both dogs had full length tails.
3. The witness testified that he walks past the defendant's house daily on his way to school or the stores. His home is approximately 100 to 150 metres away from defendant's. He has previously observed these dogs chasing other children as they walked past the defendant's house and that him and his friends have been chased by these dogs before. He has no recollection of the dogs having bitten anyone. The witness testified that the white dog bit him on the thigh and the black one on the inner part of his upper arm. He was rescued by his friend, Zweli, who also helped him walk home. He denied that he or his friend had provoked the dogs thus causing the attack. He described the defendant's dogs as dangerous.

4. Getting home, he related the incidence to his mother who then took him and his friend in a bakkie and drove to the defendant's house. On arrival he noticed the two dogs lying in front of the gate outside the premises. His mother hooted and the defendant's daughter opened the gate. The dogs got in and his mother spoke to the defendant's daughter before the defendant was called. He was later taken to hospital by his parents. He denied that the defendant accompanied him and his parents to hospital stating that the defendant came to visit in hospital a few days later.

5. The second witness, Zweli, echoed the evidence of the victim, save that he was able to see that the defendant was the driver of the BMW as it approached entrance the gate. This witness knew both the defendant and her daughter and pointed them out in court. He ran as the car stopped because he anticipated that the dogs would come out and chase them. He had previous experience of the defendant's dogs chasing children walking on the street. He saw the plaintiff's daughter opening the gate and heard her telling the victim not to run. He stopped a few metres away, looked back and saw the defendant's dogs emerging from the defendant's gate and attacking the victim. The latter screamed as the dogs were biting him. The witness picked a stone, walked towards the victim and the dogs and threw the stone at the dogs and also kicked them to chase them away. He managed to rescue the injured victim and walked with him to his (victim's) home.

CROSS EXAMINATION

6. The aspects relevant to the case in the cross examination of the two witnesses mainly pointed to either a denial that it was the defendant's dogs that attacked and bit the victim and, alternatively, that the dogs had been provoked by the victim and his friend by throwing stones at them . The witnesses denied that they provoked the dogs. Describing the dogs, the witnesses maintained that one was black and the other white. The cross examination of the witnesses about the colour of the defendant's BMW at the time was extensive. The defendant had admitted having owned a BMW at the

time, the only difference being the particular colour of her car at the time. This little detail was insignificant in the bigger scheme of the case.

EVIDENCE OF VICTIM'S MOTHER

7. Ms Brown testified that the victim was her son. She was at home on the 6th January 2013 when she heard children screaming on the street. She went to Investigate and saw children bringing her son who was bleeding and crying. Having established what had transpired and that the dogs concerned belonged to the defendant who lived in the same street at the corner house, she took the victim and his friend on her bakkie and drove to the defendant's house. She hooted at the gate and noticed two dogs lying opposite the defendant's gate on the other side of the street. The defendant's daughter opened. The witness enquired if the defendant was present. The defendant was then called.
- 8 On her arrival the defendant called the dogs into the premises. The witness told her that her dogs had attacked and bitten her son. Both the defendant and her daughter seemed surprised by her report. The defendant asked what she was going to do about it. She told the defendant that the child needed to be taken to hospital. The defendant responded by telling her that she would follow in her car. The witness drove back to her house where she took another vehicle, a BMW, and was joined by her husband driving to hospital. At the hospital the defendant and her daughter remained outside the emergency room while the victim was being examined. The victim was eventually admitted to hospital late that night.

COSS EXAMINATION

9. The cross examination of this witness revealed the following: she did not witness the incident and could, therefore, not tell which dog bit her son; she denied that her husband had accompanied her to the defendant's house; she had seen the defendant's dogs before as she as drove past the defendant's

house daily on her way to and from work ; she had previously seen the dogs chasing passing children and cars, including hers; that the defendant had admitted to her that it was her dogs that bit the victim; she disputed her son's version that the dogs were lying in front of the defendant's gate when she went to report the incidence to the defendant.

APPLICATION FOR ABSOLUTION FROM THE INSTANCE

- 10 The defence counsel applied for an order for absolution from the instance at the close of the plaintiff's case. Guided by the principle in **OOSTHUIZEN v STANDARD GENERAL VRESEKERINGS MAATSKAPPY BPK 1981 (A) at 1035H – 1036A**, namely, that “ If at the end of the plaintiff's case there is not sufficient evidence upon which a reasonable man could find for the him or her, the defendant is entitled to absolution”. In the present case there is reasonable evidence in favour of the plaintiff which calls for responses from the defendant. On this basis the application was refused whereupon the defence called its witnesses.

DEFENDANT'S EVIDENCE

- 11 The defendant testified that on the 6 January 2013 she spent the day at home with her daughters. At about 16h00 she drove out to take one of her daughter to her house. Her daughter, Nthabiseng, had opened the gate as she drove out and then closed it. On her return around 18h00, Nthabiseng came to open the gate and the defendant drove in. She rushed to the bathroom. While there she heard a hooter and the dogs barking. Her daughter went to investigate and shortly returned to tell her that the plaintiff was at the gate and wanted to talk to her.
- 12 The defendant proceeded to the gate where she found and greeted the plaintiff. She asked the plaintiff how she was and the plaintiff said she was not okay because the defendant's dogs had attacked and bitten her son. The plaintiff had arrived in a BMW car. Upon enquiring where the injured was, the

plaintiff told her that her husband will be bringing the boy in a bakkie. The bakkie arrived and the defendant was able to see the victim. The defendant, after establishing that the plaintiff did not have medical aid cover, offered to take the victim to her doctor in Vosloorus, but the plaintiff refused insisting that the victim be taken to hospital. The defendant suggested that they first go to pharmacy as there was a doctor there, but her suggestion fell on deaf ears.

- 13 The defendant and her daughter, Nthabiseng, followed the plaintiff to hospital where they remained while the victim was receiving medical attention. At about 24h00 the victim's father suggested that the defendant and her daughter go home. She exchanged contact numbers with him before leaving.

SUBSEQUENT EVENTS

14. The day after the incident the defendant telephoned the victim's parents to find out how the victim was doing. She was advised that the victim was admitted to hospital. She subsequently sent her daughter to deliver a "sorry and get well soon" card as well as a chocolate to the victim's home. The defendant testified that she attempted to make further contact with the victim's parents with the view "to assist with medical care", but they did not take her calls. This led to her concluding that the victim's parents "*did not want to come to the party*". She was shortly contacted by the police regarding the matter and, subsequent thereto, the plaintiff commenced these proceedings.

IDENTIFICATION OF THE DOGS AND THE DEFENCE

15. With regards to the dogs, the defendant testified that she had two female dogs at the time of the incident; one was black and the other fawn. Male dogs frequented her house as a result. The big male dogs were able to jump over the boarder wall and into her premises while those that could not jump over mainly remained in front of her entrance gate which was made of solid steel and prevented sight of the premises from the street and vice versa. She had to open the gate for the visiting big dogs to leave her premises.

CROSS EXAMINATION

16. The defendant disputed the plaintiff's allegation that she had called her dogs in when she went to meet the plaintiff at her gate stating that "*I do not know which dogs she was referring to. There is no way I could have closed the gate while the dogs were outside*". She testified that the address purporting to be hers and contained in the plaintiff's statement to the police was not hers. She admitted that her dogs do run to the street and that the colour of the fawn dog can also be described as dirty white. She never allowed her dogs to stray. No strange dogs had jumped over the wall and into her premises on the day of the incident. There were other dogs in her neighbourhood that roamed the street. She had seen children provoking her dogs and at times she would find stones in the premises – an indication that stones had been thrown at her dogs.

EVIDENCE OF NTHABISENG

17. She was the second witness for the defence and the daughter of the defendant, Nthabiseng. She was 21 years old at the time of the incident, despite the victim and Zweli repeatedly referring to her as a child in their evidence. This witness testified that she opened the gate on the afternoon of the 6 January 2013 when the defendant drove out to take her sister to her house and closed it completely thereafter. Her mother phoned her a couple of hours later for her to open the gate. She did so. Her mother drove in and she closed the gate. Before she could get back to the house she had to remove items from the boot of the car. It was at that stage that she heard someone hooting at the gate. It was the plaintiff who requested to talk to the defendant. She heard the plaintiff saying she was not fine as the defendant greeted her. A few minutes later the defendant asked her to accompany her to hospital. She insisted that the dogs were inside the premises when she opened the gate on the return of her mother. As the latter drove in, the dogs followed the car. She denied Zweli's evidence that the dogs ran out when she opened the gate for the defendant to drive in. She also denied the allegations that the

dogs were outside the yard when the plaintiff came to report the dogs' attack of the victim. She testified that her friend who came to visit had advised her that she had seen the gate slightly opened and boys provoking the dogs. It is noted that this friend was never called as a witness.

18. In response to a question, the witness testified that she had seen the victim in the neighbourhood and knew that he lived about five to six houses away from her home. She has never had any form of encounter with the victim. She did not see anyone outside the gate when she opened it and did not tell the victim to stand still and did not know when the dog attack occurred. The witness testified that she always ensured that the dogs were inside whenever she closed the gate.

PROOF REQUIRED AND THE BURDEN OF PROOF

19. For the plaintiff to succeed, she needed to prove that the defendant was the owner of the dogs concerned and that the dogs either acted contrary to the nature of domesticated dogs or the dogs' attack of the victim was due to the negligence of the defendant. In **DA SILVA v COETZEE 1970 (4) All SA 46 (T)** it was held that an allegation and proof that a dog attacked a person was sufficient to establish that the dog acted contrary to its nature. Proof of ownership of a dog and that the dog attacked a person has been held to be sufficient to establish the liability of its owner (Strict liability). No fault on the part of the dog's owner plays a role or need be proved. A third basis for a dog owner's liability is the owner's knowledge of the vicious propensities of his animal.
20. It is trite that the plaintiff bears the burden of proving its claim against the defendant on a balance of probabilities. Where there are mutually destructive versions, as it seems to be the situation in this case, the courts generally look into other factors that may assist in arriving at a decision. *Factors such as the credibility of the various factual witnesses, their reliability and the probabilities of their versions, including the witness's extra curial statements or*

actions.(see **STELLENBOSCH WINERY GROUP LTD and ANOTHER v MARTEL Et CIE and OTHERS 2003(1) SA 11 (SCA).**

FACTS CONSIDERED IN THIS CASE

21. In light of the mutually destructive versions of the parties in this case I have considered three key aspects in this case emanating from the evidence, namely; ownership of the dogs, the description of the dogs and the conduct of the defendant. I deal with these aspects individually hereunder.

OWNERSHIP

22. It is noted that the defendant denied that the address stated in the plaintiff statement to the police was hers. She, however, did not deny that the house shown in the victim's rough sketch and from which the dogs allegedly emerged was her house. The incorrect address does not, in the circumstances of this case, suggest that the dogs could have emerged from a house other than the one shown on the sketch. It is necessary to reiterate the evidence of the defendant's daughter that the parties live about five or six houses apart on same street and the undisputed evidence that the victim and the plaintiff pass the defendant's corner house on their way to the shops, school and to work. They had seen the defendant's dogs previously chasing passing children and cars. The second plaintiff's witness testified that he had seen that the defendant was the driver of the car for which the gate was being opened. He also pointed out both the defendant and her daughter seated among other people in court at the hearing. This witness's testimony that he ran on seeing the defendant's car approaching the entrance gate in anticipation that the dogs would come out, indicates not only that he knows the defendant and her house, but also the presence and the behaviour of the defendant's dogs. The defendant herself conceded that her dogs do run out of her premises and onto the street once the gate is opened. She also testified that no strange dogs had entered her premises on the day of the incident for which she would have had to open the gate so they could exit. It follows that

only her dogs could have emerged as her daughter opened the gate. On this basis I find that the house from which the dogs emerged as well as the dogs belonged to the defendant.

CONDUCT OF THE DEFENDANT UPON RECEIVING REPORT

23. One of the aspects indicated in the case of Oosthuizen cited above as a deal breaker, is extra curial statements and actions of a witness or party. In my view, the statements and conduct of the defendant described in paragraph 14 are conclusive proof of her acceptance of liability. She could not gone as far as she did had she genuinely not accepted that her dogs had indeed attacked and bit the victim. I find it impossible not to accept the plaintiff's evidence that the defendant had initially accepted that it was her dogs that had attacked and bitten the victim.

DEFENDANT'S FOLLOW UP AND PURPOSE THEREOF

24. The defendant's follow up enquiries on the condition of the victim and her plan to visit him in hospital , her sending of a "sorry and get well soon" card and a chocolate to the victim's family, ostensibly for the victim; her evidence that she made attempts at talking to the victim's family with a view to assisting them with the victim's medical care/costs, in my view, could not be the ordinary concern and generosity of a good Samaritan, but that of a person driven by a feeling to own up or take responsibility for the occurrence. The defendant's evidence that the victim's parents subsequently and persistently ignored her follow up calls, resulting in her concluding that "*they did not want to come to the party*", again, in my view, is indicative of her acceptance of liability as opposed to her being merely lending a hand. I find that defendant's allegation that the purpose of her follow up calls was merely to establish how the incident had occurred is inconsistent with her evidence and conduct described above and stands to be rejected.

CONCLUSION

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M/MBONGWE

Heard on:	25- 27 July 2016
<u>For the Plaintiff:</u>	Adv GF JANSEN
<u>Instructed by:</u>	Gert Nel Inc, Pretoria
<u>For the Defendant:</u>	Adv R B Mphela
<u>Instructed by:</u>	Tsebane Molaba Inc, Pretoria
Date of Judgment:	22 September 2016

ACTING JUDGE OF THE GAUTENG DIVISION, PRETORIA