



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

Case number: 55926/2017

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES/NO
.....	2022-05-18
SIGNATURE	DATE

In the matter between:

VAKESHKA RAUTENBACH

PLAINTIFF

And

ZYBRAND GRUNDLINGH

DEFENDANT

(Delivered: This judgment was prepared and authored by the judge whose name is reflected herein and is handed down electronically and by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date of handing down is deemed to be 18 May 2022)

JUDGMENT

PHAHLAMOHLAKA AJ

INTRODUCTION

- [1] The plaintiff instituted a claim against the Defendant for damages suffered by her as a result of the dogs biting her on 22 August 2014 whilst she was at the residence of the Defendant. The Defendant is sued on the basis of him being the owner of the dogs at the time.
- [2] The Plaintiff's claim is based on the *action de pauperie* on the basis that the dogs acted *contra naturam sui generis*, alternatively based upon *lex aquilia* contending that the Defendant was negligent in allowing the dogs to bite and injure the plaintiff.
- [3] At the outset I was requested by both parties that I make an order in terms of Rule 33(4) of the Uniform Rules that the issues of merits and quantum be separated. I granted the order as requested and as a result the issues of liability and quantum were separated. The trial is therefore, proceeding on merits only.

THE LEGAL POSITION

- [4] It is trite that the owner of a dog that attacks a person who was lawfully at the place where he/she was injured, and who neither provoked the attack nor by his/her negligence contributed to his/her own injury, is liable, as the owner to make good the resulting damage.
- [5] On the *acquilian* action the plaintiff must prove that the defendant negligently failed to take proper precautions to prevent a reasonably foreseeable and reasonably preventable attack by the dog.
- [6] In order to succeed on the *action de pauperie* the plaintiff must therefore, prove that the defendant was the owner of the dogs and the dogs acted contrary to the natural behaviour of a domesticated dog. Alternatively, on the *acquilian* action the plaintiff must prove that the defendant was negligent by allowing the dogs to bite and injure the plaintiff.

FACTUAL BACKGROUND AND EVIDENCE LED

- [7] The following are either common cause or not in dispute:
 - 7.1 On 22 August 2014 at the Defendants erstwhile residence namely, 35 Wisteria Crescent, Centurion, three Rottweiler dogs injured the Plaintiff by attacking and biting the Plaintiff and causing her damage and injury to her left leg, torso, right arm and right leg.

- 7.2 The Defendant was at all material times the owner of the three Rottweiler dogs.
- 7.3 At the time the incident occurred the Plaintiff and Michelle Grundlingh, the Defendants daughter, were school friends.
- 7.4 The Plaintiff and Michelle Grundlingh would go to the Defendant's house after school, where the Plaintiff would stay until such times as her mother would pick her up.
- 7.5 The front yard of the house is enclosed by a palisade fence, preventing access from the street, and the back yard is separated from the front yard by the house and two gates on either side of the house.
- 7.6 The Plaintiff never entered the backyard where the dogs were left in isolation.
- 7.7 The dogs had puppies and the Defendant was in the process of selling puppies to prospective purchasers.
- 7.8 On the day of the incident the Defendant called Mitchell and informed her that a potential buyer of the puppies was coming and that she should show the customer the puppies.

[8] The Plaintiff's witness testified as follows:

Vakeshka Rautenbach testified that on the day of the incident she had visited the Defendant's house. It had been a year she was visiting that property as she was friends with the Defendant's daughter, Mitchel Grundlingh. On that day, the 22nd of August 2014 she and Mitchell went to the Defendant's house after school. On arrival they made themselves sandwiches sausages and as they were sitting Mitchell received a call. When the call ended Mitchell informed her that her father, the Defendant had requested them to take the puppies out because there were clients coming to view the puppies. Thereafter Mitchell told her that that they had to fetch the puppies. They went outside. She enquired from Mitchell if it's safe to go out. Mitchell said it is safe to go out. Mitchell then fed the big dogs. The plaintiff then picked up a small puppy. One big dog jumped on her. The other big one's attached and bit her. Thereafter she cannot remember what happened but she later got up and ran into the house. Initial made call. She tried to sit on the bench but Mitchell said she must not sit there for she would smear blood on the bench. She then sat on the stairs in front of the house. A neighbour approached with a towel which was used to cover her leg. The neighbour suggested that the plaintiff's mother be called. Indeed her mother come to fetch her and took her to Unitas Hospital.

[9] The plaintiff was put under cross examination and among others it was put to her that she went to the dogs knowing that they were dangerous. It was further put to her that she exposed herself to danger because she was not supposed to be where the dogs are kept.

[10] The second witness for the plaintiff was Ester Susana Jansen Van Rensburg. she testified she is the plaintiff's mother. She confirms that she received a call on the day of the incident that her daughter had been bitten by the dogs. She was about 5 minutes away when she received the call as she was coming to fetch the Plaintiff. She arrived at the defendant's house and found her daughter injured. She took her to Unitas Hospital

[11] The Plaintiff closed its case and the Defendant testified in his own defence and he called two witnesses to testify on his behalf.

[12] The defendant, Zybrand Grundlingh, testified that he was the owner of the three adult Rottweiler dogs and puppies. He said that he was a breeder of these Rottweilers and he would sell the puppies thereof. He knew the Plaintiff as the Plaintiff was her daughter's friend. His daughter's name is Mitchell. At the time he stayed at 35 Wisteria Crescent, Centurion. He said that only he and his son would feed the dogs and no one else. He said Mitchell was not allowed to feed the dogs. On 22 August 2014 he called Mitchell on her cell phone informing her that a buyer was coming to the house. He instructed Mitchell not to let the buyer into the property. The Defendant was cross examined and among others he was asked why he was comfortable that day to let his daughter go in there where the dogs are kept to which he answered that his daughter had to help the buyer.

[13] Cheryl Grundlingh testified that she was the Defendant's wife at the time the incident occurred. She was not present when the incident took place. She was not privy to the conversation between the defendant and his daughter, Mitchell.

[14] The next witness called by the defendant was Mitchell Grundlingh and she testified that she is the daughter of the defendant. The plaintiff was her friend at the time of the incident. On the 22nd of August 2014 she and the plaintiff came back from school. She received a phone call from her father telling her that there was a buyer outside the house. She opened the wooden door and saw the buyer inside his car. She went to the back of the house where the dogs are kept. The plaintiff followed her. The male dog jumped on her. She further says, "I told her to calm down for the dog was only playing. The dog jumped on the plaintiff again. She screamed. The female dog hit her. Mitchell hit the dogs with a dog with a mob to ward it off. Mitchell opened the wooden door. The plaintiff got into the house. She said she did not invite the plaintiff. She never told the plaintiff her dad said she must go outside. She said the plaintiff went in first and she closed the door.

EVALUATION AND CASE LAW

[15] it is common cause that the plaintiff and Mitchel Grundlingh were fiends at the time of the incident. It is further common cause that on the day of the incident the Rottweiler dogs belonging to the defendant bit the plaintiff thereby causing her injuries. It is also not in dispute that on that day the defendant called Mitchel and made arrangements that the latter should show the puppies to the potential buyer.

[16] the defendant and Mitchel dispute the fact that the defendant ordered Mitchel to request the assistance of the plaintiff to fetch the puppies. The plaintiff is adamant that this is the case. In order to satisfy myself regarding this aspect I have to evaluate the evidence of the witnesses and determine which version is more probable than the other. In doing so I need to consider, among others, credibility of witnesses. On this particular aspect I am of the view that the plaintiff is a credible witness. Mitchel testified that after she received a call from the defendant she never spoke to the plaintiff regarding the phone call. If that was the case the plaintiff would not have known the contents of the conversation between the defendant and Mitchel. I find that Mitchel did not tell the truth on this aspect.

[17] Mitchel said that she had never gone outside where the dogs are kept but only went that day because her father said so. She conceded under cross examination that she could not handle three adult Rottweiler dogs. It is therefore probable that the defendant could have told Mitchel to seek the assistance of the plaintiff.

[18] In order to be successful with the *actio de pauperie* against the owner of a domesticated animal the plaintiff must prove that injured or harmed a person must establish that the domesticated animal acted contrary to the nature of domesticated animals in causing damage to the plaintiff.

[19] It has been agreed between the plaintiff and the defendant that the dogs belonging to Defendant caused damage to the plaintiff. However, the Defendant denies that the dogs acted contrary to their nature. The defendant contends that the plaintiff consented to the injuries and thus raised a defence of *volenti non fit iniuria*.

[20] in **Waring and Gillows Ltd v Sherbone**¹ Innes CJ outlined the elements the defendant must prove in order to succeed in the defence of *volenti* as follows: "*it must be clearly shown that the risk(of injury) was known that it was realized, and that it was voluntary undertaken. Knowledge, appreciation, consent-these are the essential elements, but knowledge does not invariably imply appreciation, and both together are not necessarily equivalent to consent.*"

[21] In **Van Devents v Botha**² the court confirmed the principles of *actio de pauperi* and the following was said:

1. That the ownership of the dog vested in the respondent at the time the damage was inflicted;

¹ 1904 TS 340 at 344

² (152/2014) [2019] ZAFHC 110

2. *The dogs was a domesticated animal;*
3. *That the dog acted contrary to the nature of domesticated animals and in particular fogs; and*
4. *That the conduct of the dog caused the appellant's damage.*

[22] In the event that the animal did not act *contra naturam sin generis* the action de *pauperi* will not be available against the defendant who is the owner of the animal. In this instance the plaintiff will then have to rely on the negligence of the owner in terms of *lex acquilia*.

[23] Counsel for the Plaintiff referred me to the case of **Van Meyeren v Cloete**³ where Wallis JA quoted with approval the Judgment of Innes CJ in **O Callaghan Nor v Chaplin 1927 AD310** where the law was summarised as follows: "*By our law, therefore, the owner of a dog, that provoked the attack nor by his negligence contributed to his own injury, is liable, as owner to make good the resulting damage. The same principle applies to injuries inflicted by a dog on another animal, and to injuries inflicted by any animals falling within the operation of the law. It is confirmed of course to cases where liability is based upon ownership alone, actions may be founded under appropriate circumstances on culpa, and they will be governed by the ordinary rules regulating Aquilian procedure.*"

[24] Counsel for the defendant relied heavily on **Van Meyeren v Cloete**⁴ where Wallis JA endorsed the principle laid down in **O'Callaghan NO v Chaplin**⁵ and the following passage by Innes CJ was quoted:

"By our law therefore, the owner of a dog, that attacks a person who was lawfully at the place where he was injured, is liable, as owner, to make good the resulting damage. The same principle applies to injuries inflicted by a dog on another animal, and to injuries inflicted by any animals falling within the operation of the pauperian law. It is confined of course to cases where liability is based upon ownership alone. Actions may be founded under appropriate circumstances on culpa, and they will be governed by the ordinary rules regulating Aquilian procedure. The conclusion is satisfactory for two reasons especially. In the first place it provides a remedy in case where otherwise persons injured would be remediless. Instances must occur where a dog, a bull or other domesticated animal inflicts damage under circumstances which make it impossible to bring home negligence to the owner. Yet of two such persons it is right for the owner, and not the innocent sufferer, should bear the loss. And in the second place the adoption of culpa as the sole basis of liability would inevitably led ustowards the scienter test....which it is common cause is not the test which our law applies in cases of this kind."

³ (636/2019) [2020] ZASCA 100

⁴ 2021 (1) SA 59 (SCA)

⁵ 1927 AD 3100

[25] in paragraph 37 of **Van Meyeren**,*supra*, Wallis JA goes further and says the following;

“ where the actions of the victim or third parties are held to exonerate the owner of an animal from pauperian liability, it is because those actions directly caused the incident in which the victim was harmed in the circumstances where the owner could not prevent that harm from occurring. That is why provocation of the animal by the victim or a third party exonerates the owner.

[26] The defendant contends that the plaintiff entered the territory of the dogs and thereby provoking them. This argument cannot hold because I accept the plaintiff's version that she was called by Mitchel who told her that her father wanted both of them to fetch the puppies and show them to the potential buyer. I reiterate that if Mitchel's version were to be accepted, namely that after she received a phone call from her father she did not inform the plaintiff about their conversation, then the plaintiff could not have known that puppies were to be fetched. I cannot therefore find that the plaintiff provoked the dogs prompting them to attack her causing her injuries.

[27] I accept that by calling the plaintiff to come and help her fetch the puppies Mitchel was negligent. Further, by asking Mitchel to fetch the puppies, knowing that the dogs are dangerous the defendant was also negligent. Consequently, the negligence by both Mitchel and the defendant caused the dogs to harm the plaintiff. Further, I am satisfied that the defendant's dogs acted contrary to the normal behaviour of domesticated animals. The defendant is therefore liable to compensate the plaintiff for the damages suffered as a result of her being attacked and injured by the defendant's Rottweiler dogs.

ORDER

[28] In the result I make the following order:

- (a) The defendant is liable to pay 100% of the plaintiff's agreed or proven damages as a result of the injuries she sustained on 22 August 2014 after she was bitten by the defendant's dogs.
- (b) The defendant is ordered to pay costs on party and party scale.

Kganki Phahlamohlaka
Acting Judge of the High Court,
Gauteng Division, Pretoria

JUDGMENT RESERVED ON: 11 February 2022
FOR THE PLAINTIFF: Adv S Cilliers

FOR THE DEFENDANT: Adv JHF Le Roux
DATE OF JUDGMENT: 18 May 2022