

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT

Case No: HC-MD-CIV-ACT-DEL-2017/04086

In the matter between:

CHRISTINA KAPUKA

PLAINTIFF

and

GABRIEL NGHIWANWA HAUFIKU

DEFENDANT

Neutral citation: *Kapuka v Haufiku* (HC-MD-CIV-ACT-DEL-2017/04086) [2021]
NAHCMD 316 (02 July 2021)

Coram: USIKU, J

Heard: 11, 13-14 June 2019; 03 December 2019; 09 November 2020 and 05
March 2021

Delivered: 02 July 2021

Flynote: Animals – *Actio de pauperie* – Defendant's dogs allegedly having attacked and bitten the plaintiff – Dogs having acted *contra naturam sui generis* in the circumstances – Defendant liable for damages for injuries suffered by the plaintiff.

Summary: The plaintiff was attacked and bitten by three dogs belonging to the defendant. The plaintiff was on a public road when the dogs attacked her. She sustained severe lacerations to her legs. The court grants her general damages in the amount of N\$50 000 in respect of pain and suffering.

ORDER

1. The court grants judgment in favour of the plaintiff against the defendant in the following terms:
 - (a) payment in the amount of N\$50 000,
 - (b) interest on the abovementioned amount at the rate of 20% p.a. from date of judgment to the date of final payment,
 - (c) costs of suit.
 2. The matter is removed from the roll and regarded finalised.
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JUDGMENT

USIKU, J

Introduction

[1] This is an action for damages resulting from injuries sustained by the plaintiff arising from an attack upon her by three crossbreed dogs, allegedly owned by the defendant. The plaintiff's claim is premised upon the *action de pauperie*.

[2] The plaintiff claims from the defendant payment in the amount of N\$287 00 as damages, made up as follows:

- (a) permanent scars, pain and suffering, trauma, shock and emotional distress – N\$250 000;
- (b) medical expenses – N\$7 000;
- (c) loss of income – N\$6 000; and
- (d) future medical expenses – N\$25 000.

[3] The defendant denies liability and placed in issue whether his dogs were those which attacked the plaintiff. The defendant further pleaded that in the event

that it is found that his dogs attacked the plaintiff, the dogs were provoked by the plaintiff.

Legal principles

[4] The essential requirements that need to be proved to sustain a claim based on *action de pauperie* are:

- (a) the defendant is the owner of the dogs;
- (b) the dogs were domesticated;
- (c) the dogs acted contrary to their nature as domesticated animals; and
- (d) the conduct of the dogs resulted in damages suffered by the plaintiff.¹

[5] An owner of a dog that attacks a person who was lawfully at a place where he /she was injured and who neither provoked the attack nor by negligence, contributed to his own injury, is liable, as owner, to make good the resulting damage.

²

[6] *Prima facie*, an attack by a domesticated animal is *contra naturam* and therefore unreasonable and wrongful. The *onus* is discharged when the plaintiff proves that she was attacked and bitten by the dog owned by the defendant, without apparent cause.³ The test is an objective one based on a “reasonable dog”.⁴

Plaintiff's evidence

[7] Four witnesses testified in support of the plaintiff's claim, namely: Christina Kapuka ('the plaintiff'), Sara Katrina Cloete ('Ms Cloete'), Eva Thomas ('Ms Thomas') and Dr Refanus Rudolf Kooper ('Dr Kooper').

[8] The plaintiff testified that she resides at Erf No. 831 Tseiblaagte, Keetmanshoop. On 29 October 2014 at about 21h00, she went to visit her aunt, Elize Appolus, at Erf No. 48, New Extension, Tseiblaagte, Keetmanshoop. As she reached the gate of the Erf No. 48 and was in the process of opening the gate, she was

¹ *Thysse v Bekker* 2007 (3) SA 350.

² *Brahman v Dippenaar* 2002 (2) SA 477 (SCA).

³ *Silva v Coetzee* 1970 (3) SA 603.

⁴ *Silva v Otto* 1986 (1) SA 538.

suddenly attacked by three dogs. Two of the dogs were black in colour and the third one was yellowish. She could see the dogs as there was a floodlight at the area.

[9] The plaintiff testified that the three dogs attacked her and bit her on her upper leg; and on her right lower leg, underneath the knee; and pulled her down.

[10] During the attack, the plaintiff screamed and called for help. Her aunt's dog ran out of the yard and attacked the three dogs. The three dogs let her go and ran across the street into the yard of Erf No 19. Her aunt's daughter, Ms Cloete, came running to assist her. Ms Cloete helped the plaintiff get up and took her inside the house. Ms Cloete attempted to stem the bleeding. Thereafter Ms Cloete took the plaintiff to the hospital.

[11] As a result of the attack, the plaintiff sustained a severe laceration on her left thigh of which the scars are still visible and a severe laceration to the lower right leg, of which the scars are still visible. The plaintiff was in severe pain as a result of the injuries.

[12] At the hospital, the medical personnel cleaned and dressed the wounds. She was injected and given some tablets to take.

[13] According to the plaintiff, from 29 October 2014 to 2 December 2014 she had to attend the clinic daily to have the wounds cleaned and dressed. She was in excruciating pain and had difficulty walking. She was traumatized by the incident. She still experiences problems with her legs, cannot walk long distances and cannot stand for long periods of time. During winter, her legs become swollen. Furthermore, she has sustained ugly scars on her legs as a result of the dogs' attack.

[14] The plaintiff further related that at the time of the attack, the premises at Erf No. 19 were partly enclosed with wire-fencing, however, part of the fence was lying on the ground, as a result of which the three dogs could move freely in and out of the premises. On or about 10 to 12 December 2014, the plaintiff saw and recognized the three dogs in Erf No. 19, across the street from her aunt's premises.

[15] When the plaintiff found out who the owner of the three dogs was, she called the defendant and informed him about the incident. The defendant promised to phone her back, but never did.

[16] The plaintiff further testified that at the time of the incident she was employed as a teacher at Kingdom Life Ministries, at Keetmanshoop. Her salary was N\$1 500 per month. As a consequence of the dog-bites, she was unable to work and was booked-off sick as from 30 October 2014 to 28 February 2015. During the time she was booked off she did not earn a salary and as a result she suffered loss of N\$6 000 (calculated as N\$1 500 x 4 = N\$6 000).

[17] Ms Cloete testified that she resides at Erf No. 48, New Extension, Tseiblaagte, Keetmanshoop. Erf No. 48 is opposite Erf No. 19, and Erf No. 19 is the house of the defendant, situated across the street. Ms Cloete knows that the defendant owns three dogs being two black dogs and one yellowish dog.

[18] On or about 29 October 2014, Ms Cloete was at home when the plaintiff arrived at their residence. The time was about 21h00, when she heard a commotion of screams and shouting, as well as dogs barking. She instructed her son, William, to go and see what was going on. William obliged and he later called Ms Cloete. When Ms Cloete went outside, she observed the plaintiff lying outside the big gate of Erf No. 48, already bitten. At that time the dogs were at the gate of Erf No 19.

[19] According to Ms Cloete, at that time, the plaintiff was in pain and could not walk and was severely traumatized. She assisted the plaintiff to get up and walked her inside the house. The plaintiff's wounds were bleeding profusely and she attempted to stop the bleeding. Thereafter she took the plaintiff to the hospital.

[20] Ms Cloete related an incident which occurred on 23 December 2014 at about 19h00 when she assisted certain Tekla Hansen to her house, after the latter was allegedly attacked by the same three dogs. Furthermore, Ms Cloete recounted having observed the same dogs attacking children in the street.

[21] Ms Thomas testified that she lives at Erf No 40, New Extension, Tseiblaagte, Keetmanshoop. On 15 June 2014, she was on her way to church when the three

dogs (being two black dogs and a yellowish one) owned by the defendant attacked her. The dogs tore her clothes apart. She did not sustain serious injuries. After attacking her, the dogs ran back into Erf No 19, the property of the defendant.

[22] Dr Kooper testified that he is a medical doctor practising at Keetmanshoop since 2014. On 28 January 2016 he examined the plaintiff. He re-examined the plaintiff on 20 February 2017. The result of his examination was that he found that the plaintiff sustained dog-bites on 29 October 2014 and that she has a parastetic pain, defined as peripheral neuropathy affecting her gait. Dr Kooper explained that neuropathy is a nerve injury that could complicate as a result of the type of injury. This complication can be disabling, causing gait disorder. The gait disorder relates to a functional disability of lower limbs when a person cannot walk properly.

[23] According to Dr Kooper, the plaintiff experiences peripheral neuropathy affecting her gait, as a consequence of the dog bites that she sustained in 2014. Dr Kooper estimates future medical costs to be N\$25 000, 'since it is a chronic condition, with episodes of accusation and it is difficult to give an accurate estimation for future treatment'.

Defendant's evidence

[24] The defendant gave evidence and did not call further witnesses.

[25] He testified that he resides at Erf No 19 New Extension, Tseiblaagte, Keetmanshoop. He does not know the plaintiff and has never met her.

[26] During October 2014 he had two dogs. He is not aware that the plaintiff was bitten by his dogs on 29 October 2014 and has no knowledge of the injuries sustained by the plaintiff.

[27] The first time that the defendant acquired knowledge that his dogs had allegedly bitten the plaintiff was in 2017 when he received summons.

[28] Since 2014 until now his dogs have never bitten anyone and they are not aggressive at all. There are several dogs in the street and one of his children was bitten by a dog of his neighbour.

[29] According to the defendant, his premises are surrounded by a boundary brick-wall, with a height of 1.8 metres. The main gate is remote-controlled. There is a small gate, which is constantly closed with padlock.

Submissions

[30] Counsel for the plaintiff, Mr Schurz, submitted that the plaintiff has furnished evidence that she has sustained injuries as a result of an attack by the dogs owned by the defendant. Mr Schurz contended that the defendant failed to call witnesses to support his version that his premises were secured and that his dogs could not have attacked the plaintiff. Furthermore, so counsel argued, the defendant did not furnish evidence that the plaintiff had provoked the dogs prior to the attack. Mr Schurz submitted that the plaintiff is entitled to the relief she seeks.

[31] On the other hand, counsel for the defendant, Mr Amoomo, submitted that plaintiff's claim has prescribed in terms of the *Prescription Act* and that the claim should be dismissed on this score.

[32] On the aspect of prescription, counsel for the plaintiff responded that the issue of prescription is now *res judicata* as the court has already delivered judgment on the issue on 14 June 2018 and has dismissed the plea of prescription.

[33] In addition, Mr Amoomo contended that the plaintiff failed to make out a case set out in her pleadings.

Analysis

[34] In the present matter, the defendant denies that the dogs that attacked the plaintiff belong to him. In the event that it is found that the dogs that attacked the plaintiff belong to the defendant, the defendant alleges that the plaintiff provoked his dogs.

[35] Evidence adduced by the plaintiff is that the three dogs that attacked her ran across the street into the defendant's yard, after the attack. Ms Cloete, who knows the defendant's dogs, observed the same dogs at the gate of defendant's residence, soon after the attack upon the plaintiff. Ms Thomas testified to the effect that at the defendant's premises there were three dogs fitting the description of the dogs that attacked the plaintiff.

[36] On the aspect of ownership of the dogs, I find the evidence of the plaintiff, Ms Cloete and Ms Thomas to be credible and reliable, in respect of what they respectively observed. It is improbable that dogs, other than the dogs owned by the defendant, attacked the plaintiff and thereafter ran into the yard of the defendant in the circumstances.

[37] In his plea, the defendant stated that he was not at his residence at the time when the alleged incident occurred. If the defendant was not at home when the alleged incident happened, then he could not verify that his dogs did not attack the plaintiff. His testimony on this aspect cannot, therefore, be relied upon.

[38] From the evidence given by and on behalf of the plaintiff, the balance of probabilities support the conclusion that the three dogs that attacked the plaintiff are dogs owned by the defendant.

[39] Furthermore, the probabilities are that, at the time of the incident, the defendant's premises were partly enclosed with a wire-fence, part of which was lying on the ground. The corollary of that was that the dogs could leave and return to the premises as they wished.

[40] Having found that the dogs that attacked the plaintiff are dogs owned by the defendant, the defendant bears the *onus* of proving that the plaintiff provoked his dogs. There is no evidence at all that the plaintiff has provoked the dogs and I find that the defendant has failed to discharge the *onus*.

[41] On the evidence adduced on behalf of the plaintiff, I find that the attack upon the plaintiff was unprovoked and therefore the dogs acted contrary to the nature of

domesticated animals. I find further that the plaintiff was lawfully at the place where she was attacked and that the conduct of the defendant's dogs resulted in the plaintiff sustaining serious bodily injuries. The defendant is, therefore, liable, as owner of the dogs, to make good the resultant damages suffered by the plaintiff.

Damages

[42] The plaintiff claims general damages for pain and suffering, permanent scars, shock and emotional distress, as well as special damages for past medical expenses, loss of income and future medical expenses.

General damages

[43] As a general rule the assessment of an appropriate award of general damages is a matter for the discretion of the court, based on what is fair in the circumstances of a particular case. Previous awards in similar cases are instructive, but not decisive.

[44] I have had regard to cases of similar nature referred to in the written submissions of plaintiff's counsel. I have also taken into consideration the award made in *Nghilundua v Maritz*⁵ and similar cases cited therein. The nature and extent of the injuries suffered by the plaintiff in the present matter appear to me to be comparable to those sustained in the aforesaid comparable cases. The upper limit in those cases appears to be N\$50 000 and the lower base line appears to be N\$15 000.

[45] In the present case, as a result of the attack on the plaintiff by the defendant's dogs, the plaintiff sustained a severe laceration on her left thigh, of which the scars are still visible and a severe laceration to the lower right leg, of which the scars are still visible. The plaintiff was bleeding profusely as a result of the attack. She was in severe pain as a result of the injuries. She had to attend to the clinic daily from 29 October 2014 to 2 December 2014 to have the wounds cleaned and dressed. She

⁵ *Nghilundua v Maritz* Case No. HC-MD-CIV-ACT-DEL-201-/04292 [2020] NAHCMD 409 (4 September 2020).

was traumatized by the incident. She now has ugly scars on her legs as a result of the attack.

[46] It is apparent to me that the plaintiff sustained bodily injuries as a result of the attack and is entitled to compensation for the pain and suffering as well as for trauma, shock and emotional distress she suffered.

[47] The plaintiff claims general damages in the amount of N\$250 000. This amount appears to me to be excessive and not justified by the evidence. I am of the opinion that the amount of N\$50 000 in respect of general damages is reasonable in the circumstances. I shall, therefore, make an order to that effect.

Special damages

[48] As special damages, the plaintiff claims payment of N\$7 000 in respect of medical expenses incurred to date. The plaintiff has not furnished any evidence on how and when such amount was incurred or paid. There being no proof for such claim, this claim stands to be dismissed.

[49] In addition the plaintiff claims payment of N\$6 000 allegedly being loss of income for a period from 30 October 2014 to 28 February 2015. The Plaintiff did not furnish proof that she was indeed employed by Kingdom Life Ministries, and earned a monthly salary of N\$1 500 and that the employer did not pay her the monthly salary for the period in question. This claim also falls to be dismissed.

[50] Furthermore, the plaintiff claims payment of N\$25 000 for future medical expenses. According to Dr Kooper, the plaintiff experiences 'peripheral neuropathy' affecting her gait. Dr Kooper estimates future medical costs in respect of the required treatment, to be N\$25 000. There is no evidence furnished providing the basis upon which such amount was arrived at. Nor is there evidence on who the prospective service provider would be. Furthermore, there is no evidence whether the N\$25 000 would be in respect of a single treatment session or will be paid in respect of various treatment sessions. I am therefore of the view that there is no evidence upon which the court could make a reasonable and fair assessment of the plaintiff's future medical expenses. This claim therefore stands to be declined.

Prescription

[51] I now turn to the issue of prescription raised by the defendant's counsel during closing submissions. The issue of prescription was already decided by the court in the ruling on special plea delivered on 14 June 2018. In that ruling the court dismissed the special plea of prescription. The issue of prescription is therefore *res judicata* and cannot rightly be raised again during closing submissions. In addition to the foregoing, the issue of prescription does not appear in the Pre-Trial Order and the defendant has not shown any good cause why such issue should be available to him. In terms of *rule 26(10)*, issues and disputes not set out in the pre-trial order are not available to the parties at the trial, except with leave of court granted on good cause shown. The prescription issue raised by the defendant is therefore rejected.

Conclusion

[52] The plaintiff's claim for general damages stands to succeed. The claims for special damages are declined.

[53] As regards the issue of costs, I am of the view that the plaintiff is the successful party and the general rule that costs follow the event should find application.

[54] In the result, I make the following order:

1. The court grants judgment in favour of the plaintiff against the defendant in the following terms:
 - (a) payment in the amount of N\$50 000,
 - (b) interest on the abovementioned amount at the rate of 20% p.a. from date of judgment to the date of final payment,
 - (c) costs of suit.
2. The matter is removed from the roll and regarded finalised.

B USIKU
Judge

APPEARANCES:

PLAINTIFF:

Mr Marco Schurz
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Windhoek

DEFENDANT:

Mr Kadhila Amoomo
Of Kadhila Amoomo Legal Practitioners
Windhoek