

IN THE HIGH COURT OF NORTH GAUTENG, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO.	YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	YES/NO.
(3) REVISED.	
15 Sept 2011	<i>Ismail J</i>
DATE	SIGNATURE

CASE NO: A 159/2008

16/9/2011

In the matter between:

S M MAHLASE

Plaintiff

and

S WAKEFIELD

Defendant

JUDGMENT

Ismail J :

[A] Condonation (Non- compliance with Rule 50(7))

[1] The appellant seek an order to re-instate the appeal in this matter; and she also seeks condonation for the non-compliance with the provisions of Rule 50(7). The appellant tenders the costs of the application save if the application is opposed.

[2] To this end the appellant deposed to an affidavit setting out the reasons for the non-compliance with Rule 50 (7).

[3] Rule 50 (7) of the Uniform Rules of Court stipulates as follows:

“ (a) The applicant shall simultaneously with the lodging of the application for a date for the hearing of the appeal referred to in subrule (4) lodged with the registrar two copies of the record: Provided that where such an appeal is to be heard by more than two judges, the applicant shall upon the request of the registrar, lodge a further copy of the record for each additional judge.

(b) such copies shall be clearly typed on foolscap paper in double spacing, and the pages thereof shall be consecutively numbered and as from second January 1968, such copies shall be so typed on A4 standard paper referred to in rule 62 (2) or on foolscap paper and after expiration of a period of twelve months from the aforesaid date on such A4 standard paper only. In addition every tenth line on each page shall be numbered.”

[4] The appellant in her affidavit furnishes reasons which caused a delay in her complying with the provisions of rule 50(7). Her reasons being that she was traumatized after the event and that she could not fully understand

the judgment which was handed down in Afrikaans. The judgment had to be translated for her in order for her to appreciate and understand it. Furthermore she lost her employment and she experienced financial difficulties in order to execute the appeal.

[5] The factors which a court should consider when there was a failure to comply with the rules in prosecuting an appeal is dealt with by *Erasmus – Superior Court Practice* at B1-366/7.

[6] The appellant had from the outset considered to appeal the judgment against her and for one or other reason was not able to do so timeously. In *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532H

“Among these are the factors that the subject-matter of the appeal is substantial and of importance to the petitioner, who has suffered grievous injuries; that he has throughout desired to prosecute his appeal and has at no time departed from that standpoint; and on the other hand that the respondent’s interest in finality merits some consideration. With that prelude I tend to what seems to me to be the most important factor in this case, namely an assessment of the prospects of success on appeal...”

[7] Considering the factors referred to above I am of the view that the Appellant’s failure to prosecute the appeal expeditiously in this matter should be condoned.

[B] The Merits

[8] This is an appeal against the judgment of an order given by a magistrate at Wonderboom dismissing the appellants claim with costs.

[9] The appellant (plaintiff in the court a quo) instituted proceedings against the respondent (defendant in the court a quo) for injuries she sustained on the 19 December 2004. The injuries arose as a consequence of the respondent's dog, a bull mastiff, attacking and biting the appellant.

[10] The respondent pleaded that she was not liable as she left the dogs in the care of her domestic helper. Furthermore, her property was separated in such a manner that the bull mastiff and the great Dane dogs were to be kept at the back of the property. There was a gate which was to be locked at all times, in order not to allow the dogs to get to the front of the property.

[11] During the trial various witnesses testified on behalf of the appellant / Plaintiff. The respondent also testified.

[12] According to the appellant she was attacked by both the bull mastiff and the Great Dane. Some of the other witnesses including Mr Zuma testified that it was only the bull mastiff which bit the appellant.

[13] It was common cause that the appellant was bitten on the day in question by the bull mastiff which belonged to the respondent's late husband. Initially it was contended and pleaded that the dog did not belong to the respondent, however, this defense was a superficial one as the respondent when she testified referred to the dogs as being her dogs.

[14] The court a quo dismissed the claim with costs. In a judgment which constituted no more than two pages. The crux of the magistrate's judgment was that the appellant did not impress him as a witness and that the gate which separated the dogs from the front was not locked. In his judgment the magistrate stated the following:

"Eiseres het nie 'n goeie indruk op die hof gemaak nie, sy wou nie in kruisondervraging vroe antwoord nie, en wou geen toegewings maak nie. Sy ontken of die verweerderes op die toneel was of by die hospital, terwyl haar getuie Mnr Zuma verweerdered gestaaf het dat sy wel op die toneel was en larter ook by die hospital en was ook aangebied om die kostes te betaal...".

Verweerderes ontken dat die honed haar eiendom is, en getiug verder dat die honed agter 'n hek toegesluit word, wat net Winnie en die huurder Danie gebruik word.."

[15] The dogs were presumed to have been locked at the rear of the premises and on that day the respondent returned from a weekend away

from her home and used the remote control to open the driveway gate and suddenly the bull mastiff ran out onto the street and attacked the appellant.

[16] The respondent's defense was that she left the dog in the care of Winnie, who left the premises after she went away for the weekend.

[17] Of importance in Miss Mahlangu (Winnie) evidence was that she testified that the gate was never locked with a pad lock. A lock was used but it was merely clipped over the chain as there were no keys for the lock. Only after the appellant was attacked by the dogs was a lock purchased and she was given a key and instructed to lock the gate. The significance of this evidence being that the two dogs according to the evidence often banged against the gate when they saw other dogs. Miss Mahlangu testified that she followed the procedure applicable at the time.

[18] If the dogs banged against the gate as they did and in so doing the lock was displaced it merely needed force in order to open the gate. Once the gate was open the two larger dogs would have access to the front of the property bordering the street.

[19] Once the dogs are in the front of the property and the remote control is used in order to access the opening of the gate, the canines have free

movement to the street and the public at large.

[20] There are only two possibilities whereby the dogs could find themselves at the front of the property. The first being that the gate was left open for them to have free movement alternatively the dogs banged against the gate and managed to open the gate in that manner.

[21] This matter must be distinguished from those matter where a person is entrusted the dogs to walk them in a park where the dogs are tied to a leash. The handler in such an instance be responsible if he cannot manipulate the leash and the dog bites a third party. The owner cannot be held responsible for the actions of the dog. It is also distinguishable from the matter of *Lever v Purdy* 1993 (3) SA 17 (AD).

[22] In Lever's matter the dog was left in the care of one C who was left in charge of the home in the appellant's absence. Respondent who requested C to lock the dog away when he visited the premises. C undertook to do so and when the respondent came to visit he was bitten by the dog as C had not locked the canine as he had undertaken to do.

[23] In the matter before us if Miss Mahlangu had done what she was instructed to do and despite that the dogs got to the front because the gate was not properly bolted but the lock was merely used to hold the two ends

of the chain together. Would that amount to Miss Mahlangu's fault ?

Clearly not.

[24] The respondent when she gave evidence stated that she would use her remote control in order to open the driveway gate when she was at her neighbour's house. She did this as she feared that if she were to use the electronic device whilst in front of her driveway she could be a potential target for hijackers. The gate would therefore be opened before she could view her premises in order to establish whether the dogs were in front of her property or not. She followed this routine and on the day in question when the bull mastiff bit the appellant she could not see the dog patrolling or running around at the front.

[25] In my view the respondent had a duty to ensure that when she opened the driveway gates that the dogs would not run out onto the street thereby causing a threat to pedestrians or to passing motorists. The respondent's failure to ensure that it was safe for her to enter her premises without the dogs bolting onto the road amounted to negligence on her part which resulted in the appellant sustaining injuries caused by the attack by the dog.

[26] The respondent also pleaded that she was not the owner of the bull mastiff. She testified that the dog belonged to her late husband. However,

whilst testifying and as the appellant's counsel rightly pointed out she continuously referred to the dog as her dog. See record page 132 lines 8-14 where the following appears:

"...ek het glad nie gesien my honde is voor nie want ek het nogal redelik struike voor en as ek gesien het my groot honde is voor sou ek nooit my hek oopgelos het, ag oopgemaak het."

From the aforementioned passage it is clear that she acknowledges that the dogs are hers.

See: *Fourie v Naranjo and Another* [2007] 4 All SA 1152 (C) para [5] at 1153i-j.

[27] The facts of this matter are distinguishable from that of the *Lever* matter. In *Lever's* case the owner left the house in the care of a third party who was left in charge of the house and the canine. The dog bit another person when the third party was in charge. The third party failed to secure the dog when he had undertaken to do so.

[28] Mr Brand acting for the respondent in the appeal submitted that the appellant did not plead vicarious liability and therefore the respondent could not be held culpable for the actions of the domestic assistant's failure to ensure that the gate was secured. According to him such negligence cannot be imputed to the respondent as she was away for the weekend

and she expected the gate to have been locked.

[29] Mr Brand also submitted that it could not be expected of a reasonable man placed in the same circumstances as the respondent to assume that the gate would be opened thereby allowing the dogs access to the front of the property. There was no reason for the respondent to believe that the gate would be left opened. In my view the respondent failed to take reasonable steps to ensure that when she pressed her remote control in order to open the driveway gate the inner gate on her property was at least closed. By her own admission she opened the driveway gate prior to her getting to her own property, namely whilst she was alongside the adjacent property from where she could not see the inner gate on her property.

[30] In my view in the light of the respondent's absence from the premises for the weekend, she should have taken the care to ensure that when she returned and opened the driveway gate it was safe for her to do so. In other words that the dogs were where they were supposed to be and that they would not bolt out of the premises onto the street.

See *Kruger v Coetzee* 1996(2) SA 428 at 430 E-F where Holmes JA stated:

“ For the purposes of liability *culpa* arises if-

(a) a *diligence paterfamilias* in the position of the defendant-

(i) Would foresee the reasonable possibility of his conduct injuring

another in his person or property and causing him patrimonial loss;

- (ii) would take reasonable steps to guard against such occurrence; and

(b) The defendant failed to take such steps."

There was a duty on the respondent to ensure that whenever she returned to her house be it from shopping or absence for a longer period she should at least have ensured that it is safe for her to open her front gates prior to driving onto her premises. Her failure in ensuring that the inner gate was closed in the circumstances is what makes her culpable for the actions that followed.

[31] This is particularly so as both the dogs, the bull mastiff and her daughter's dog, the great Dane, were large dogs and were not of a docile and friendly temperament. They were known to pose a threat to the respondent's smaller dogs.

[32] In the circumstances I am of the view that the appeal against the magistrate's judgment should succeed.

[33] Accordingly I would recommend that the following order be made:

- (i) the appeal succeeds;
- (ii) the order made by the magistrate is set aside and replaced with an order that the appellant's action succeeds with costs.



M H E ismail

Judge of the High Court

Gauteng North, Pretoria

I agree



T.J. Kruger

Acting Judge of the High Court

Gauteng North, Pretoria

APPEARANCES:

For Appellant : Adv De Klerk instructed by Dyason Inc,
Attorneys, Pretoria.

For Respondent: Adv J Brand instructed by Andre Grobler Attorneys,
Pretoria North.

Date of Appeal: 11 August 2011

Judgment delivered : 15 September 2011