

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GQEBERHA)**

Case No: 760/2022

In the matter between:

SOLOMZI ANTHONY RAFU

Plaintiff

And

HUGO VAN RENSBURG

Defendant

JUDGMENT

BESHE J:

[1] This is an action for general damages for injuries suffered by the plaintiff as a result of having fallen in the process of avoiding defendant's two dogs.

[2] At the commencement of the proceedings, having heard the parties, a separation order in the following terms was made:

"1. The issues relating to the defendant's alleged liability are to be separated from the issues relating to the quantum of the plaintiff's claim.

2. The matter is to proceed first in relation to:

2.1 Particulars of claim: paragraphs 1 – 4; paragraph 5 excluding the following words "in the process incurring a fracture of the distal radius of the right arm"; paragraph 6 – 8; and paragraph 9 excluding the

following words “which in fact he did and incurred a fracture of the distal radius of the right arm”;

2.2 Plea: paragraphs 1 – 6.

3. That the remaining issues relating to the quantum of the plaintiff’s claim and the corresponding paragraphs of the defendant’s plea, are to stand over for later determination.”

[3] Plaintiff was also granted leave to amend paragraph 3.1 of his particulars of claim to reflect the date of the incident as the 8 May 2020 instead of 18 May 2020.

[4] Plaintiff pleaded that on the said date and at or near [...] R[...] M[...], S[...] Street, Swartkops, Gqeberha, he was walking along the pavement when a vehicle driven by defendant’s wife approached a motorised gate, which opened. Two dogs ran out of the premises through the said gate. The dogs ran towards the plaintiff, giving him the impression that he was being attacked. In a bid to escape the dogs he stepped backwards or retreated and fell in the process. The basis of plaintiff’s claim against the defendant, so it is pleaded, is that as the owner of the dogs he had a duty of care *vis-a-vis* the public and the plaintiff in particular in that:

He had to keep the dogs under control and supervision;

Prevent the dogs from escaping into the public area and charging and or attacking pedestrians and the plaintiff in particular.

He should have ensured that should anybody open the motorised gate the dogs do not escape. Further that the conduct of the defendant was unlawful and negligent in that he breached the duty of care by allowing the dogs to escape, failing to keep them under proper or adequate control, failing to control the dogs from attacking or giving the impression that they were attacking pedestrians that were passing by. Furthermore, on the basis that it

was reasonably foreseeable that in the event of a breach of duty to care mentioned earlier, plaintiff can suffer harm.

[5] In resistance of plaintiff's claim, defendant pleaded *inter alia* that:

It is admitted that plaintiff was at or near the pavement of the pleaded address just before the incident occurred. Defendant admitted allegations relating to the motorised gate opening as the vehicle driven by his wife was approaching the gate. The two dogs were Jack Russels. He denied that the dogs attacked the plaintiff and pleaded that they ignored the plaintiff. Further that plaintiff reacted without assessing the situation, overreacted to a benign situation to dogs that were greeting his wife. He failed to stand still when the dogs exited the premises, failed to look where he was stepping, failed to avoid the occurrence of the incident when he could or should have done so by exercising reasonable care.

In the alternative, defendant pleaded that plaintiff acted negligently when he acted in the manner described above and that his negligence caused or contributed causally to the incident.

Evidence

[6] As would appear from the pleadings, it is common cause that on the day in question plaintiff was walking on the pavement next to defendant's address when the motorised gate leading to the residential complex opened, and defendant's two dogs came out. This was also confirmed in evidence by the plaintiff and defendant's wife **Ms Karen Van Rensburg**. As to what happened after the dogs came out through the gate, the witnesses give the following accounts.

[7] According to the plaintiff, **Mr Rafu**, as he was walking towards the gate in question, a motor vehicle stopped in front of the gate. We know now that defendant's wife was the driver of the said motor vehicle. The gate opened and two dogs came out. All this before he could reach the gate or go past the gate but was not far from

the gate. Even though the dogs were heading for **Ms Van Rensburg's** motor vehicle, upon seeing him, they changed their direction and started barking and came running towards him. He was still standing at that stage but upon seeing that the dogs were aggressively coming towards him and fearing that they were going to bite him he waved them away. They were at that stage not far from reaching his feet and seemed to be intent circling him. Waving and shooing the dogs away did not elicit any response from both the dogs and **Ms Van Rensburg** who was still inside the motor vehicle. In a bid to make sure that both dogs remained in front of him he moved backwards, he tripped and fell in the process. He could not get up even with **Ms Van Rensburg's** help because his right wrist was injured during the fall. Plaintiff asserted that had the dogs not come out of the gate, he would not have been injured. Plaintiff confirmed during cross-examination that the dogs did not bite him. He denied that the dogs ignored him. He stated that he did not know that the two dogs were not in the habit of chasing pedestrians and insisted they charged at him.

[8] The following emerged from **Ms Van Rensburg's** evidence. She stated that the two gates needed to open before she could drive into the yard, their two dogs came out running towards her motor vehicle as they always do. They started running in a circle next to the motor vehicle on her side of the motor vehicle. They were not aggressive and did not chase the plaintiff. The dogs were not in the habit of chasing pedestrians. She testified that plaintiff must have gotten a fright when he saw the dogs running towards her motor vehicle and circling next to it. She did not see plaintiff waving his arms. That to be able to access their unit easily, they open both the outer gate leading to the complex and the one leading to their unit. It also transpired that the defendant was home at the time and in control of the dogs. She conceded that defendant failed to control the dogs.

[9] **Mr Hugo Van Rensburg**, the defendant, testified that the two dogs are kept inside their apartment. They do venture into public spaces during some mornings and before they go to bed apparently in their company and the safety of the public has never been a problem. He was at home on the day of the incident but did not witness the incident. His attention was drawn thereto by his wife who had been away. He was not aware that she had returned home. He asserted that they had no

option but to open both gates to access their property. To do otherwise would result in a “terrible mission”. It would involve driving further up the premises and then having to reverse into their unit if they opened one gate and waited for it to close before opening the second one. Asked whether they opened the gates simultaneously regardless of the consequences, he answered “yes”. Even if it means the dogs would go out. He conceded that he was not in control and supervising the dogs as he was busy in the kitchen. He also conceded that had the door been closed, the dogs would not have gone out of their unit and go out through the main gate of the complex.

Discussion

[10] Plaintiff’s cause of action is that of negligence on the part of the defendant. Contending that he owed him (plaintiff) a duty of care, that he breached the duty by failing to act in a reasonable and careful manner. This, by failing to keep his dogs under proper or adequate control thus preventing them from attacking or causing the impression that they were attacking passerby.

[11] Defendant’s defence is that of a denial. It is denied that the dogs attacked or ran towards the plaintiff. It is contended that the dogs merely ignored the plaintiff. This was confirmed by **Ms Van Rensburg** in his evidence. That the dogs remained next to her motor vehicle.

[12] it is clear from what has been said above that the parties presented divergent versions only in so far as whether the dogs charged at the plaintiff. There seems to be an acknowledgement by the defendant and his witness, his wife that the plaintiff fell as a result of having been frightened by the dogs running out of the premises. Of course, plaintiff goes on to say that they headed towards him in an aggressive manner. **Ms Van Rensburg** denies that the dogs were barking even though she conceded that they do bark. More about this aspect later.

[13] Plaintiff asserts that the defendant is liable for the damages she suffered as a result of having fallen because he breached his duty of care towards him. In ***Van Eeden v Minister of Safety and Security***¹ it was stated that:

“An omission is wrongful if the defendant is under a legal duty to act positively to prevent the harm suffered by the plaintiff. The test is one of reasonableness. A defendant is under a legal duty to act positively to prevent harm to the plaintiff if it is reasonable to expect of the defendant to have taken positive measures to prevent the harm”.

Defendant's case amounts to a concession that plaintiff fell as a result of being frightened by defendant's dogs. It was however argued that the incident was not foreseeable and therefore a reasonable man could not have done anything to prevent the incident. This because, it was submitted the dogs were not in the habit of chasing pedestrians. They had no history of chasing passersby. Reliance was placed on a number of decided cases in this regard. I must say that in argument defendant's case went far beyond what was pleaded and presented by defendant's witness in evidence. For example, in defendant's written heads of argument supplementing the oral argument delivered earlier, it was submitted that defendant had no expectation that anyone would be on the street as it was Covid lockdown alert level 4. This was not part of defendant's pleaded case. It was however also submitted that due to the long history of the **Van Rensburg's** owning these dogs and the dogs' known circling conduct and their obedient nature, it was unforeseeable that an incident of the nature described would play out. The dogs being small Jack Russels aged 12 and ± 10 years old respectively. Again, this was not defendant's pleaded case. I am not going to go through all the allegations that are made during argument by defendant's counsel, yet they were not part of defendant's pleaded case or evidence. This, in my view was done to place the case under consideration within the parameters of remarks made in a matter referred to in ***Deyzel v Karsten***² on which reliance was placed by the

¹ 2003 (1) SA 398 (SCA) [9].

² 1994 (1) SA 447 (A).

defendant. In that matter a motor cyclist was injured after having collided with the defendant's puppy which had run across the road. Defendant had apparently taken reasonable care to prevent the dog from running into the street. It was not clear who had let the puppy out. It was held that a reasonable owner would as a rule foresee that if his dog was allowed to roam free, it would run into the street and cause damage to passing motor vehicles. But because the owner of the dog had taken reasonable care to prevent the dog from running into the street he was absolved from liability. This decision was confirmed on appeal. It was further held that a reasonable dog owner would as a rule foresee that, if his dog was allowed to wander freely, it could cause damage – although this would not be the case where the dog was, for example, too old, too young, too sick or too well disciplined. It is the latter remarks made in ***Deyse*** matter that in my view, it is sought to fit defendant's case into these exceptions by extending the facts of the case beyond what was pleaded by the defendant and in some instances not even part of his evidence.

[14] Turning to the divergent versions of the parties. In my view, in light of the common cause factors, the only material fact to be considered in this regard is whether after running out of the gate of the residential complex the dogs upon seeing the plaintiff moved their attention from **Ms Van Rensburg** to the plaintiff and whether or not they were barking. It is in these material respects that there is no congruence between the parties.

[15] In ***SFW Group & Another***³ the technique to be employed by courts in resolving factual disputes where there are two unreconcilable versions was said to be the following:

“[5] On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So, too, on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may

³ *SFW Group Ltd & Another v Martell et Cie & Others* 2003 (1) SA 11 at 14 [5].

conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the *onus* of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

Similarly and much earlier, the following was said regarding instances where a court is faced with mutually destructive versions in ***National Employers' General Insurance v Jagers***⁴:

"It seems to me, with respect, that in any civil case, as in any criminal case, the *onus* can ordinarily only be discharged by adducing credible evidence to

⁴ 1984 (4) SA 432 at 440 D-G.

support the case of the party on whom the *onus* rests. In a civil case the *onus* is obviously not as heavy as it is in a criminal case, but nevertheless where the *onus* rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false."

It is with these dicta in mind that I am going to approach the versions presented by the plaintiff and the **Van Rensburgs** in this regard.

[16] Plaintiff who is an adult male person (born on 2[...] F[...] 1968), painted a clear picture of what occurred before two dogs came out. It does not seem as though he was suddenly startled by the appearance of the dogs. He had seen **Ms Van Rensburg's** motor vehicle park in front of the gate. He had stopped to give way to her motor vehicle. He observed the gate open. He saw two dogs come out and head towards the motor vehicle. They however turned their attention to him when they saw him. According to the plaintiff the dogs were barking when they charged at him. He had to walk backwards to avoid them reaching him. If the dogs had remained close to **Ms Van Rensburg's** motor vehicle and circled next to her door, what would have caused the plaintiff to move from where he was standing waiting for **Ms Van Rensburg's** motor vehicle to drive into the complex? Why did he retreat? We know the two dogs were of a small breed, not big menacing dogs. We do know however that the dogs do bark according to **Ms Van Rensburg**, although according to her

they do not bark when going to meet her motor vehicle. We also know that they came out of the complex running. In my view, it seems improbable that the plaintiff would have moved from where he was standing to give way to **Ms Van Rensburg's** motor vehicle if the dogs had not charged at him. It is improbable that he would have made a hasty retreat as it seems he did, resulting in him tripping and falling if the dogs did not charge at him in the manner he described. I am satisfied that plaintiff's version is true and accurate and therefore acceptable.

[17] Does the defendant's conduct of failing to keep his dogs under a proper or adequate control and thus prevent them from attacking the plaintiff or causing the impression that they were attacking him, amount to negligence on his part? In my view, the answer is yes. The test for negligence was stated to be the following in the matter of ***Mukheiber v Raath and Another***⁵:

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

(a) a reasonable person in the position of the defendant–

(i) would have foreseen harm of the general kind that actually occurred;

(ii) would have foreseen the general kind of causal sequence by which that harm occurred;

(iii) would have taken steps to guard against it, and

(b) the defendant failed to take those steps.”

In my view, defendant's conduct falls squarely within this exposition of what amounts to negligence.

⁵ 1999 (3) SA 1065 (SCA) at 1077 E-F [31].

[18] For the reasons set out above, I am of the view that defendant should be held liable for any damages suffered by plaintiff as a result of falling on the day in question. This on the basis that he owed plaintiff a duty of care to protect him and other passersby from being attacked or made to believe that they were being attacked by his dogs. Defendant breached this duty by not keeping the dogs under his control and supervision resulting in them escaping into the public area.

Costs

[19] Plaintiff's counsel agitated for an order for costs on a punitive scale, namely, attorney and client scale of costs. The basis for praying for punitive costs was, in *Mr Jooste's* submissions that the opposition to the action was frivolous. That defendant did not have a defence. Conceded that had the dogs not be allowed to exit the complex gate unattended plaintiff would not have fallen. Cross-examination was protracted and amounted to a fishing expedition. I agree that cross-examination of the plaintiff was protracted and rather aimless ranging from impugning the date of the incident, to suggesting defendant's wife did not leave the house because of Covid due to her ill health, to introducing past conduct of the dogs which was not part of the pleadings. The topography of the area where the incident took place was also thrown into the mix, it being suggested that the plaintiff did not pay attention to where he was stepping. I however do not think that a punitive costs order is warranted. I do not think that the defendant or his counsel conducted themselves in a vexatious or reprehensible manner.

Order

[20] The defendant is declared liable to compensate the plaintiff in such sum as may be agreed or determined in due course.

[21] The defendant is liable for payment of plaintiff's costs.

**N G BESHE
JUDGE OF THE HIGH COURT**

APPEARANCES

For the Plaintiff: Adv: P E Jooste
Instructed by: GREGORY CLARK & ASSOCIATES INC.
9 Buffelsfontein Road
Mount Pleasant
GQEBERHA
Ref: G C Clark/Vicki
Tel.: 041 – 367 3489

For the Defendant : Adv: A du Toit
Instructed by: BDP ATTORNEY (GQEBERHA)
C/o PAGDENS ATTORNEYS
18 Castle Hill
Central
GQEBERHA
Ref: Jan Jan Eksteen/Helen Dalldorf
Tel.: 041 – 502 7240

Date Heard: 22 and 23 March 2023
Date Reserved: 23 March 2023
Date Delivered: 18 July 2023