



IN THE HIGH COURT OF SOUTH AFRICA, NORTHERN CAPE DIVISION, KIMBERLEY.

Reportable/ Not reportable

Case No: 874/2019

In the matter between:

MINISTER OF JUSTICE & CORRECTIONAL SERVICES

APPELLANT

And

KARL KITCHER

FIRST RESPONDENT

MOMPATI CELETIOUS SEBOGO

SECOND RESPONDENT

Coram: Phatshoane ADJP, Mamosebo J and Van Tonder AJ

Determined on paper

Delivered: 22 January 2021

Judgment

PHATSHOANE ADJP

Introduction

- [1] Mr Karl Kitcher, the first respondent, was viciously attacked and injured by the dogs that belonged to Mr Mompoti Celetious Sebogo, the second respondent. He instituted action for damages in the amount of R1 799 832.77 against Mr Sebogo and the Minister of Justice and Correctional services, the appellant. The cause of action pleaded by Mr Kitcher against Mr Sebogo was *actio de pauperi* which action "*lies against the owner in respect of harm (pauperies) done by*

*domesticated animals, such for instance....dogs acting from inward excitement (sponte feritate commota) if the animal does damage from inward excitement or, as it is also called, from vice, it is said to act contra naturam sui, generis; its behaviour is not considered such as is usual with a well-behaved animal of the kind. On the other hand, if the act was not due to vice on the part of the animal but was provoked-in other words if there has been concitatio, the action does not lie."*¹

- [2] Mr Kitcher's alternative cause of action against Mr Sebogo is under the *Actio Legis Aquilia* on the ground, *inter alia*, that he negligently caused foreseeable injury to him by failing to take reasonable precautions to prevent the dogs from harming him.

- [3] As against the Minister it was pleaded that he was aware of the danger posed by Mr Sebogo's dogs to the employees of Correctional Services and members of the public; he had a legal duty to take reasonable steps to ensure that the public and, in particular, Mr Kitcher was protected from being attacked by the dogs; he unlawfully and negligently failed to prevent the harm from eventuating. It was further pleaded that the Minister ought to have compelled Mr Sebogo to confine his dogs in his yard or dispose of them; and to have exercised sufficient control over them.

- [4] The parties agreed before Coetzee AJ to have the merits disposed of first while the question of *quantum* stood over for later determination. Having granted the application in terms of Rule 33(4) of the Uniform Rules Coetzee AJ ordered that the matter proceed on the issue of liability only. On 07 December 2018, following the hearing of evidence he upheld Mr Kitcher's claim and found that the Minister and Mr Sebogo were jointly and severally liable for all damages, as Mr Kitcher would be able to prove, in consequence of Mr Sebogo's dogs having attacked and injured Mr Kitcher including the costs of the action.

¹ *South African Railways and Harbours v Edwards* 1930 AD 3 at 9-10.

- [5] This appeal, which serves before us with leave of the Court *a quo*, our brother Coetzee AJ, is against part of the judgment and order. As will be noted in due course the liability of the owner of the dogs, Mr Sebogo, is not in issue but central to this appeal is the liability of the Minister.

Factual background

- [6] Mr Kitcher and Mr Sebogo were employed by the Minister as Section Head: Case Management Administration and Call Centre Clerk: Supply Chain, respectively. They rented official accommodation in two of about 10 married quarters which form part of the Douglas Correctional Centre (prison premises) under the control of the Department of Justice and Correctional Services ("the department") and the Minister. Mr Kitcher and Mr Sebogo's family houses were situated on opposite sides of the street. Each of these married quarters or units is fenced off and fitted with a gate. Overall, around the correctional facility is a security perimeter fence of the razor-wire type. Access to the premises is controlled.
- [7] Although there were no declared internal rules or policy governing keeping of pets in general or dogs in particular the tenants of the family quarters were not debarred from owning domesticated animals provided they did so within their fenced yards and the gates properly closed at all times. Mr Sebogo owned three dogs: an Alsatian/Police dog called Tiger; a mixed-breed type of an Alsatian called Sissy and a small-sized dog whose name is not apparent from the record. It was initially disputed in the Court *a quo* that the mauling dogs fitted the description of Mr Sebogo's. However, no appeal lies against that Court's finding that it was indeed the case.
- [8] Mr Kitcher testified that Mr Sebogo's gate was not always kept closed which "suffered the dogs to be free", (as the saying goes). On 08 November 2012, following a complaint concerning the dogs, Mr George Frederic Enslin, the Centre Coordinator: Staff Support for correctional services, directed a letter dated 05 November 2012 to Mr Sebogo on behalf of Mr Van Wyk, the head of the correctional facility, in which he was instructed to keep the dogs inside his yard or to discard them because they had been roaming around the complex,

overturned rubbish bins, stormed officials, and caused disturbance with their incessant nocturnal barking. The letter further records:

‘Please keep in mind that domestic animals must be inoculated on a regular basis to prevent the outbreak of rabies and that if an animal attacks a person, the owner is liable for civil action.’

- [9] Five months later, on 03 April 2013, Mr Sebogo’s dogs bit 20 years old Mr Cheslyn Snykop on the left arm. Ms Veronica Snykop, Cheslyn’s mother, reported the incident to Mr Morolong, the Operational Support of the department. However, the issue was resolved between Mr Sebogo and Cheslyn’s parents.
- [10] A further four months down the line, on 09 August 2013 at approximately 23h30, close to the fenced gate of the correctional facility, while Mr Kitcher was on his way to report for night duty Mr Sebogo’s three dogs stormed him. He tried to calm them down but Tiger and Sissy mauled his upper leg and arm. In an attempt to escape he fell and broke both his wrists whereupon he kept still for a while which caused the dogs to retreat. He was hospitalised and was off duty for a period of a month following the attack. Mr Enslin instructed Mr Sebogo on the morning following the vicious attack to remove his dogs from the premises. The dogs were later put down.

The judgment of the Court *a quo*

- [11] The Court *a quo* reasoned that the Minister had a legal duty but failed to act reasonably in order to prevent the repetition of the occurrence that followed the warning issued by Mr Enslin on 05/08 November 2012. The Court found the existence of such a legal duty on the following factual basis: The Minister was the owner of the property or in control thereof; the Minister had authority to decide which employees were allocated houses on the “married quarters”; on 05 November 2012 the Minister, through Mr Enslin, had proactively responded to a report on the unruly behaviour of Mr Sebogo’s dogs by directing a letter to Mr Sebogo in which he commanded him to keep his dogs confined or to discard them. In so doing, the Court held, the Minister assumed responsibility. The Court

further found that the Minister omitted to take positive steps notwithstanding that he had knowledge that the dogs also attacked Cheslyn Snykop. As already alluded to, the Court found both the Minister and Mr Sebogo jointly and severally liable for all damages as Mr Kitcher would be able to prove.

The appeal

[12] The grounds of appeal are that the Court *a quo* erred in finding on the facts and the law that:

- 12.1 the Minister was burdened with a legal duty to take reasonable steps to prevent Mr Sebogo's dogs from attacking and injuring Mr Kitcher;
- 12.2 the Minister acted unlawfully and negligently;
- 12.3 the alleged *ommissio* by the Minister attracted liability in view of moral indignation and general sense of the community;
- 12.4 the Minister assumed a legal duty by writing a letter to Mr Sebogo on 05 November 2012;
- 12.5 the Minister's failure to act during April 2013 to prevent a repetition of an occurrence of an event of 05 November 2012, after the incident involving Ms Snykop's son had been reported to him, was unreasonable.

The discussion

[13] The overriding question for determination is whether the legal convictions of the community required the Minister through his functionaries to exercise control over the dogs that belonged to one of his employees, Mr Sebogo, and to prevent them from attacking and injuring Mr Kitcher.

[14] Mr Kitcher's claim against the Minister is based on omission. Liability follows only if the omission was in fact wrongful, and this will be the case only if a *legal duty* rested on the Minister to act positively to prevent harm from occurring or

befalling the victim but he failed to comply with that duty.² The element of wrongfulness constitutes a fundamental and distinct requisite for delictual liability.³ A court's decision on whether conduct is wrongful or not is a conclusion of law drawn on a case-by-case basis from the facts before it.⁴ The question is whether the defendant's conduct is wrongful against the plaintiff and in terms of the consequences that followed. In *Za v Smith and another*⁵ the SCA dealt with the most recent jurisprudence on the element of wrongfulness as follows:

'The import of wrongfulness in the province of delict – and particularly with reference to delictual liability for omissions and pure economic loss – has been formulated, both by the Constitutional Court and in this court on numerous occasions recently... In the most recent of these expositions by the Constitutional Court in *Country Cloud Trading CC v MEC Department of Infrastructure Development* [2015 (1) SA 1(CC) paras 20-21] Khampepe J explained the position as follows:

"Wrongfulness is an element of delictual liability. It functions to determine whether the infliction of culpably caused harm demands the imposition of liability or, conversely, whether "the social, economic and other costs are just too high to justify the use of the law of delict for the resolution of the particular issue". Wrongfulness typically acts as a brake on liability, particularly in areas of the law of delict where it is undesirable and overly burdensome to impose liability.

Previously, it was contentious what the wrongfulness enquiry entailed, but this is no longer the case. The growing coherence in this area of our law is due in large part to decisions of the Supreme Court of Appeal over the last decade. Endorsing these developments, this court in *Loureiro* [*Loureiro v Imvula Quality Protection (Pty) Ltd* [2014] ZACC 4; 2014 (3) SA 394 (CC) para 53] **recently articulated that the wrongfulness enquiry focuses on – "the [harm-causing] conduct and goes to whether the policy and legal convictions of the community, constitutionally understood, regard it as acceptable. It is based on the duty not to cause harm**

² *Bergivier Municipality v Van Ryn Beck* 2019 (4) SA 127 (SCA) at 140 para 43.

³ *Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd* 2000 1 All SA 128 (SCA) par 19

⁴ *Mabaso v Felix* 1981 2 All SA 306 (A); 1981 3 SA 865 (A) 875.

⁵ *Za v Smith and Another* [2015] ZASCA 75; 2015 (4) SA 574 (SCA) paras 15 and 16.

– indeed to respect rights – and questions the reasonableness of imposing liability."

The statement that harm-causing conduct is wrongful expresses the conclusion that public or legal policy considerations require that the conduct, if paired with fault, is actionable. And if conduct is not wrongful, the intention is to convey the converse: "that public or legal policy considerations determine that there should be no liability; that the potential defendant should not be subjected to a claim for damages", notwithstanding his or her fault."

With reference to the criterion for wrongfulness referred to in *Loureiro*, as to whether it would be reasonable to impose liability on the defendant, the Constitutional Court sounded the following note of caution in *Le Roux v Dey* [*Le Roux v Dey (Freedom of Expression Institute and Restorative Justice Centre as amici curiae)*] [2011] ZACC 4; 2011 (3) SA 274 (CC) para 122]:

"In the more recent past our courts have come to recognise, however, that in the context of the law of delict: (a) the criterion of wrongfulness ultimately depends on a judicial determination of whether — assuming all the other elements of delictual liability to be present — it would be reasonable to impose liability on a defendant for the damages flowing from specific conduct; and (b) that the judicial determination of that reasonableness would in turn depend on considerations of public and legal policy in accordance with constitutional norms. Incidentally, to avoid confusion it should be borne in mind that, what is meant by reasonableness in the context of wrongfulness has nothing to do with the reasonableness of the defendant's conduct, but it concerns the reasonableness of imposing liability on the defendant for the harm resulting from that conduct." (My own emphasis)

- [15] Ms Erasmus, for the appellant, argued that the legal conviction of the community would not demand a duty to act on the part of the Minister prior to the vicious attack in issue because no one had been bitten by dogs by 05 November 2012. In respect of the second incident of April 2013 she contended that the dispute had been amicably resolved between the Snykops and Mr Sebogo. In any event, she argued, during an unrelated incident of April 2013, in which Mr Sebogo had filed a complaint against one of the employees for having fired an Airgun at his

dogs Mr Kitcher attested to an affidavit in which he intimated that he had no issues with Sebogo's dogs. She further contended that the legal conviction of the community would not impose a legal duty on the Minister in the circumstances where Mr Sebogo had been provided with the means to exert control over his dogs but failed to utilise those means appropriately.

[16] The Bill of Rights entrenches the rights to life, human dignity and freedom and security of the person.⁶ There is a duty imposed on the State and all of its organs not to perform any act that infringes these rights.⁷ These constitutional imperatives would ordinarily place a legal duty on the Minister to act. But even more compelling in this case is the employment relationship between the Minister and his employees who are at loggerheads. In *Minister of Safety and Security v Carmichele*⁸ the Court dealt with the requirement of a special relationship as follows:

'Likewise, the requirement of a special relationship (which is in my view just another label for proximity) is not essential for wrongfulness. However, if there is in fact some connecting factor between the plaintiff and the defendant, it is more likely that in the case where the defendant is an individual the breach of a duty might arise; and in the case where the defendant is the State it is less likely that there will be any deviation from the norm of accountability that the Constitution imposes.'

[17] The 10 family quarters fall within the Minister's administration and control. The head of the correctional centre directed the letter dated 05 November 2012 to Mr Sebogo when the first incidents were reported concerning the dogs to, *inter alia*, keep the dogs inside his erf or to discard them. This was indicative thereof that Mr Sebogo had failed to confine his dogs as required. When the second incident occurred, the attack on Mr Snykop, some internal investigation was conducted. Ms Snykop deposed to an affidavit because the dogs were not removed from the

⁶ See s 10, 11, 12 of the Constitution of the Republic of South Africa Act 108 of 1996.

⁷ *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) at 957 para 44.

⁸ 2004 (3) SA 305 (SCA).

terrain. The details of how this complaint was dealt with internally are very sketchy. It matters not that the Snykops and Mr Sebogo privately resolved their grievance. The key issue here is that the Minister had authority over Mr Sebogo who had failed to heed his previous warning to keep his vicious dogs in his gated property or to dispose of them. Over a period of four months after the dogs had charged at Mr Snykop the Minister failed to order Mr Sebogo to remove the dogs from the premises. The Minister appreciated the risk that the dogs could attack and injure the residents or visitors to the complex. Under these circumstances the legal convictions of the community would impose a legal duty on the Minister to prevent Mr Kitcher or those similarly circumstanced from being harmed by the dogs.

[18] In *Minister of Safety and Security v Van Duivenboden*⁹ the Supreme Court of Appeal held:

'[12] ... A negligent omission is unlawful only if it occurs in circumstances that the law regards as sufficient to give rise to a legal duty to avoid negligently causing harm. It is important to keep that concept quite separate from the concept of fault. Where the law recognises the existence of a legal duty it does not follow that an omission will necessarily attract liability - it will attract liability only if the omission was also culpable as determined by the application of the separate test that has consistently been applied by this court in *Kruger v Coetzee* [1966 (2) SA 428 (A) at 430 E – F], namely whether a reasonable person in the position of the defendant would not only have foreseen the harm but would also have acted to avert it.'

[19] Ms Erasmus argued that the harm was not foreseeable as the Minister had provided fenced properties to the residents who were required and had been instructed to confine their dogs within their gated erven.

[20] The difficulty with this submission is that on 05 November 2012 it was apparent to the Minister and his functionaries that the dogs had been storming officials and inmates and generally causing a disturbance in the neighbourhood. It was

⁹ *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) ([2002] 3 All SA 741; [2002] ZASCA 79) at 441E – 442B.

axiomatic that Mr Sebogo was not confining his dogs to his premises. Regard being had to the two preceding separate incidents involving these dogs, already discussed, the conduct of the Minister fell short of the conduct of the notional reasonable person. I am of the view that the Minister must have foreseen the reasonable possibility of the dogs attacking a resident of or visitor to the precinct, like Mr Kitcher.

- [21] The next enquiry is whether the Minister should have taken reasonable steps to guard against the dogs' attack. In *Cape Metropolitan Council v Graham* ¹⁰ the Court said:

'Turning to the question of negligence, it is now well established that whether in any particular case the precautions taken to guard against foreseeable harm can be regarded as reasonable or not depends on a consideration of all the relevant circumstances and involves a value judgment which is to be made by balancing various competing considerations. These would ordinarily be

'(a) the degree or extent of the risk created by the actor's conduct; (b) the gravity of the possible consequences if the risk of harm materialises; (c) the utility of the actor's conduct; and (d) the burden of eliminating the risk of harm'.

... If a reasonable person in the position of the defendant would have done no more than was actually done, there is, of course, no negligence.'

- [22] The facts speak for themselves in respect of the gravity of the consequences if the dogs attacked a resident of or visitor to the family units. With regard to the utility of the actor's conduct and the burden of eliminating the risk of harm Joubert, LAWSA, second edition, Vol 8 part 1 para 122 at p213 states:

'In general the magnitude of the risk must be balanced against the utility of the conduct and the difficulty, expense or other disadvantage of desisting from the conduct or taking a particular precaution. If the magnitude of the risk outweighs the utility of the conduct, the reasonable person would take measures to prevent the occurrence of harm; if the actor failed to take such measures he or she acted

¹⁰ 2001 (1) SA 1197 (SCA) at 1203-1204 para 7.

negligently. On the other hand, if the burden of eliminating a risk of harm outweighs the magnitude of the risk, the reasonable person would not take any steps to prevent the occurrence of the foreseeable harm..’

[23] The Minister and his functionaries knew that Mr Sebogo’s dogs had been on the loose around the family units on numerous occasions. On his own version Mr Enslin says upon receipt of Ms Snykop’s complaint he cannot remember if he relayed the complaint to the head of the correctional facility but went on to say “*I would have reported it.*” He conceded that on the basis of the report that the dogs had attacked Mr Cheslyn Snykop the head ought to have instructed Mr Sebogo “*to get rid*” of the dogs.

[24] The ultimatum given to Mr Sebogo following the attack on Mr Kitcher, that either he had to leave the complex or his dogs should, was too little and came too late. It was clear at that stage that the dogs had the propensity for storming officials and or residents of the family units. This would have prevented the dogs from straying onto the streets and mauling Mr Kitcher. Such steps would have been reasonable and would not have involved much extra cost or disbursement but would certainly not have imposed a financial burden on the Minister. The failure to give instruction to remove the dogs from the premises was unreasonable and negligent.

[25] The Court *a quo* correctly concluded that the Minister breached his legal duty towards Mr Kitcher in a wrongful and negligent manner and therefore liable to make good the damage, as Mr Kitcher may be able to prove, jointly and severally with Mr Sebogo. It follows that the appeal must fail.

[26] What remains is the questions of costs of the proceedings of 17 August 2020 when the appeal had been set down but could not be disposed of due to the incomplete record that had been filed. We directed the parties to file supplementary heads addressing the issue of wasted costs occasioned by the postponement.

[27] The argument is made in the Minister's heads, which ought to have been contained in an affidavit and placed before us in terms of the rules, that the registrar had failed to place three complete sets of record before the Court when she had been duly served. Ms Erasmus submitted that neither party is to blame for the aborted proceedings of 17 August 2020. In any event, she urged, the costs concerned do not fall within the ambit of wasted costs because the parties agreed, subject to the Court's directive, that the appeal be disposed of on paper and thereby eliminating additional costs of appearance for oral argument. She urged for no order as to costs alternatively, the costs of the day be costs in the appeal.

[28] Mr Botha, for Mr Kitcher, does not make common cause with the Minister that the registrar defaulted in placing the complete set of the record before the Court. Like the Minister, Mr Kitcher did not verify his allegation by deposing to an affidavit. The appeal was initially set down for hearing on 20 April 2020 but could not be heard due to the declaration of the National State of Disaster and the subsequent National lockdown. Mr Botha submitted that at least two volumes of the record are date-stamped 24 April 2019 while others are dated 12 March 2020. He argued that the state attorneys had ample time, prior to the National Lockdown, effective from 25 July 2019, the date of set down, to ensure that the record was in order. Instead they presented the record in a slovenly fashion. Mr Botha contended that the Minister is to blame for the postponement and the wasted costs occasioned thereby. Absent any order as to these costs Mr Kitcher would have to pay his legal representatives out of his own pocket for services rendered on 17 August 2020, so the argument ran.

[29] Rule 49(7) of the Uniform Rules of this Court provides:

'(7) (a) At the same time as the application for a date for the hearing of an appeal in terms of subrule (6)(a) of this rule the appellant shall file with the registrar three copies of the record on appeal and shall furnish two copies to the respondent. The registrar shall further be provided with a complete index and copies of all papers, documents and exhibits in the case, except formal and immaterial documents: Provided that such omissions shall be referred to in the said index. If the necessary copies of the record

are not ready at that stage, the registrar may accept an application for a date of hearing without the necessary copies if—

(i) the application is accompanied by a written agreement between the parties that the copies of the record may be handed in late; or

(ii) failing such agreement, the appellant delivers an application together with an affidavit in which the reasons for his omission to hand in the copies of the record in time are set out and in which is indicated that an application for condonation of the omission will be made at the hearing of the appeal.

(b) The two copies of the record to be served on the respondent shall be served at the same time as the filing of the aforementioned three copies with the registrar.

(c) After delivery of the copies of the record, the registrar of the court that is to hear the appeal or cross-appeal shall assign a date for the hearing of the appeal or for the application for condonation and appeal, as the case may be, and shall set the appeal down for hearing on the said date and shall give the parties at least twenty days' notice in writing of the date so assigned.

(d) If the party who applied for a date for the hearing of the appeal neglects or fails to file or deliver the said copies of the record within 40 days after the acceptance by the registrar of the application for a date of hearing in terms of subrule (7)(a) the other party may approach the court for an order that the application has lapsed.'

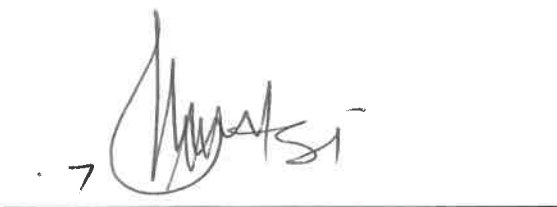
[30] The obligation to prepare and file the complete record of appeal falls squarely on the appellant's attorneys. There was noncompliance with Rule 49(7). It is concerning that some of the records were filed on a date after the initial set down of the appeal. It may well be that by 17 August 2020, the second set down date, the records had been filed with the registrar. However, it is clear that on that date, despite the alleged failure by the registrar to place all records before the Court, the appeal was not ripe for hearing. This is so because the index to most of the volumes of the record are dated 24 August 2020, four days preceding the date in respect of which the appeal would have been heard.

[31] To borrow from Colman J in *Dinath v Breed*¹¹ an attorney who presents his/her appeal record in so slipshod a manner exposes his client to the risk of having his appeal struck off the roll with costs. In the premise the appellant is to pay the wasted costs occasioned by the postponement of 17 August 2020.

I make the following order.

Order:

1. The appeal is dismissed.
2. The Minister of Justice and Correctional Services, the appellant, is to pay Mr Karl Kitcher's, the first respondent's, wasted costs occasioned by the postponement of 17 August 2020; the costs of this appeal; and the costs of the application for leave to appeal.

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Phatshoane ADJP

I concur

A handwritten signature in black ink, appearing to read 'Mamosebo', is written above a horizontal line.

Mamosebo J

¹¹ 1966 (3) SA 712 (T) at 718G.

I concur

A handwritten signature in dark ink, appearing to read 'Van Tonder', is written over a horizontal line.

Van Tonder AJ

APPEARANCES:

For the Appellant:

Adv S.L Erasmus

Instructed by State Attorneys

For the First Respondent: *Adv C.H Botha*

Instructed by Elliot Maris Wilmans & Hay