

IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CASE No. 438/20

In Matter between :

Zanele Mabuza

Plaintiff

And

Joyce Malgas

Defendant

JUDGMENT

Neutral citation : Zanele Mabuza v Joyce Malgas (438/20) SZHC 210 (2020)
(29th October, 2022)

CORUM: Z. Magagula J

Mr W Maseko for Plaintiff

Ms N Gwiji Defendant

Dates heard: 08.03.22, 24.03.22, 30.03.22

Date delivered: 29.09.22

"there is no absurdity in obliging him to make compensation whose animal has caused the damage, or who has excited and goaded it to the damage of another..."

(van Leeuwen's commentaries on Roman- Dutch Law 3.39.5)

[1] In this action, the Plaintiff claims damages against the defendants as follows;

(a) Pain and suffering, shock, loss of amenities, disfigurement E170 000-00.

(b) medical expenses E4 3775.75

(c) Loss of clothing and other accessories E3650-00.

(d) Loss of income (past and future) E20 000-00

TOTAL **E 237 425.75**

[2] The Plaintiff's claim arises from injuries sustained after she was bitten by dogs. She alleges belong to the defendant. The Plaintiff pleaded in her particulars of claim that on the 16th February 2019 while walking along a path commonly used by pedestrian's several metres in front of the Defendant's property she was severely mauled by several mixed breed dogs which were at all material times owned by the defendant and which had escaped from defendants property.

[3] The dogs bit and tore away flesh from both her upper thighs, tore away flesh from her right chick, bit and tore away flesh from her forehead and on her left forearm. As a result of the injuries suffered. It was further alleged in the Plaintiff's particulars of claim that the dogs, as domesticated animals acted contrary to their nature, that the Defendant was negligent in that she knew or ought to have known that the dogs were sometimes vicious and likely to attack and/or failed to take steps to safe guard persons lawfully passing by her property from possible attack.

- [4] In her plea, the defendant denied that the Plaintiff had been attacked exclusively by her dogs, that dogs from the neighbourhood were also involved on the attack. Defendant pleaded that Plaintiff only suffered flesh bites and no flesh was torn and that in any event it could not be ascertained whether the Plaintiff's injuries were caused by her dogs or one of the neighbourhood dogs. I may mention that pictures of the Plaintiff's injuries that were produced in court showed deep cuts in to the skin in the areas of the body where she was bitten.
- [5] In her evidence, the Plaintiff stated that on the 16th February 2019 she went to a hillock around Fontetyn, Mbabane where her church normally conduct prayer sessions on Saturdays. This was first time she participated in the sessions.
- [6] Before ascending to the hillock , Plaintiff was advised not to proceed until other ladies who were also going to the prayer session arrived. The reason for this caution is that there were dogs that sometimes bother people around the area. In time, the other ladies arrived, and they all went up to the "prayer mountain".
- [7] A few minutes after the prayer sessions started, Plaintiff got a telephone call informing her that the father of her four month old child, with whom she had left the child now needed to go to work so she should hurry back home. Indeed she informed the others of the sudden emergency and she proceeded to descend towards the road.
- [8] Now there are two routes or pathways along which one could ascend and descend the hillock. There was one that was a bit further from defendant's premises. This is the footpath Plaintiff used to ascend to the prayer

“mountain”, it was also used by members of the public who needed to go up the hill. There is another path-way that is partially paved which is accessed initially by walking up defendant’s drive – way. It leads up to the hillock and is, according to defendant’s evidence, used by employees and officials from the the eSwatini Electricity Company and MTN who have a transformer and transmission tower (respectively) up the hill. (the court made this observation during the inspection in loco).

[9] It was Plaintiff evidence that going down the mountain, she did not use the path way that is some distance from Defendants premises but she used the paved one that runs close to Defendants premises. She said she saw the homestead and remembered they had been warned that there were vicious dogs and could see the dogs, she picked up a stick and the dogs started barking at her. She tried to retreat but fell when she felt something pulling at her leg. She got up and tried to flee – there were about 5 dogs all biting her on various parts of the body. Plaintiff was eventually taken to the Mbabane Government Hospital where she was treated. The hospital wanted to admit her but she declined on account of having a 4 month old baby. She was advised to report daily so the injuries could be maintained and treated. Plaintiff stated that she could not walk and had to be carried into the motor vehicle; she said they had no medication or drugs at the Mbabane Government Hospital so she had to source medication from a private pharmacy. For a week after the incident, Plaintiff had to leave the comfort of her home to live with her sister- in-law, as she needed assistance with some of her daily activities.

[10] Because of the shortage of drugs and the fact that plaintiff would sometimes not get attention at the Mbabane Government Hospital, she decided to seek

help at the Manzini clinic. She was referred to the Mbabane private clinic where she was attended to by Dr Okello. Plaintiff again turned down the request by the Mbabane clinic for admission and had to attend periodically for treatment. It was plaintiff's evidence that hospital expenses at the Mbababane clinic were paid for by her boyfriend's employer, a company called Ngonini.

- [11] At the Mbabane clinic, Plaintiff had to undergo a few procedures including skin – grafting on the face; Plaintiff said this was very traumatic as she had 4 month old baby who was still suckling. Plaintiff mentioned that on the Sunday after the incident, she was visited by the defendant who expressed shock at what had happened, she gave the sum of E100-00 to Plaintiff's sister- in- law to assist in paying for the hospital expenses.
- [12] The Plaintiff concluded her evidence in chief by re-stating that she claimed the medical expenses because her boyfriend would be required to pay his employer for the hospital expenses paid at the Mbabane Private Clinic. She stated that she had on "hair extensions" called "Peruvian" hair and Nike tekkies which were all damaged; she said in respect of pain and suffering, loss of amenities and disfigurement she claimed the sum of E170 000-00. In respect of loss of income, Plaintiff stated that she lost customers as she could not work for a whole month while recovering from the injuries and for this she claimed the amount of E 20 000.00
- [13] On cross examination; it was put to the Plaintiff that she used the wrong pathway to descend from the mountain, one that brought her close to the defendants premises where the dogs were. This' the Plaintiff conceded,

although she mentioned that it was allowed for her to use either of the pathways.

The plaintiff also led the evidence of Qondile Teddy Pereria, her sister-in-law who confirmed the evidence of the Plaintiff save in one material respect. PWII said she received a call from Plaintiff's boy friend that the baby was crying and Plaintiff needed to go attend to her as opposed to Plaintiff's testimony that the boy friend had been called to work. However nothing turns around this contradiction. I consider it to be too minor and does not influence the matter one way or other

- [14] The Defendant also gave evidence in her own defence. She stated that she was out of the country on the 16th February 2019. On her return the next day she got a report that dogs had bitten a lady and she went to the Plaintiff to assess the extent of the injuries and/or to commiserate with Plaintiff and she left the sum of E100-00 as a contribution towards plaintiff's medical expenses.
- [15] Defendant said the footpath or pathway that people ordinarily use to get to the hillock does not pass next to her gate. The path used by Plaintiff to descend the hill is the one not used ordinarily by members of the church or the general public. She mentioned that at the top of the hillock and where the prayer sessions are sometimes held there is an MTN tower and employees used it to access their tower with her express permission. She effectively said the Plaintiff was a trespasser who had no right to be using that pathway.
- [16] In cross-examination, the defendant conceded that her dogs were some of the dogs that had bitten Plaintiff even though she could not say whether they had actually inflicted the wounds on Plaintiff. She conceded that she was

liable to compensate Plaintiff for pain and suffering and for medical medicines expenses, except that the quantum claimed by Plaintiff was, according to her, unjustified.

- [17] Defendants second witness, DW11 was Jennie Littler. His contribution to the matter was minimal. He confirmed that there were two pathways leading to the top of the hillock; one was off – the tarred Fonteyn road, and the other was through Defendant's drive – way then up a paved footpath used by MTN and Eswatini Electricity Company (EEC) employees to access a transmission tower and transformer respectively. The latter was not a public footpath.

THE LAW

- [18] The liability of the owner of an animal that causes injury to another seems to have originated from the ancient Roman Law, the *actio de pauperie*. This liability in Roman times was discharged in what was known as “ *noxal surrender*” – The owner would surrender the offending animal to the injured party. This principle has since fallen into desuetude but Kotze J.A (with whom Stratford AJA concurred) in O'CALLAGHAN NO V CHAPLIN 1927 AD 310 stated;

“ *It is satisfactory to find that the Actio de pauperi still forms part of our law. I think the conclusion is a sound one and just, for if a man choses to keep an animal, and injury or damage is caused by it to an innocent person, he must make adequate compensation.* (my emphasis).

Innes C J (as he then was) in the same case perhaps put it more eloquently;

“ By our law, therefore, the owner of a dog, that attacks a person who was lawfully at the place where he was injured, and who neither provoked the attack nor by his negligence contributed to his own injury, is liable as owner, to make good the resulting damage.... It is confined of course to cases where liability is based upon ownership alone ...”

- [19] In order to found an action under the *Actio de Pauperie* the animal causing damage must act “out of character” or not in the way expected of animals of that particular class. In *SOUTH AFRICAN RAILWAYS and HABOURS V EDWARD* 1930 AD 3 at 9-10 DE Villies J.A said;

“ The action lies against the owner in respect of harm (pauperies) done by domensticated animals...if the animal does damage from inward exitment, 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.”

- [20] If the conduct of the animal that caused harm was due to its being frightened, or in pain, or provoked and it acted as any animal would in the circumstances, then it has not acted *contra naturam* and the owner is not liable. The onus of proving this rests on the owner of the an animal – see Wallis J.A in *CHRISTIAN JACOBUS MEYEREN V GERALD CLOETE* (Supreme court of Appeal of South Africa) case no. 636/2019.

- [21] There are only two circumstances in which the owner of the animal would not be liable. The first would be when the injured party was in a place where he was not entitled to be. For example a house breaker who gets bitten by a watch dog. The second exception would be where the injured party or a third

party provoked the attacked by goading and provoking the animal. Whether these exceptions would be available where young children are concerned is another matter, that fortunately does not arise for purposes of their Judgement. Where a child enters a neighbour premises to retrieve a lost ball or where the dog is teased by one child and the dog bites another child see O'Callaghan N.O V Chaplin (Supra).

[22] However, it may be worth mentioning that the authorities did recognise a third exception in LEVER V PURDY 1993 (3) SA 17 In this case a dog left in the care of a third person by its owner bit the Respondent, Mr Purdy who had been invited into Appellants home by the third party, Mr Cohen, Mr Purdy had specifically asked that the dog (known to be vicious) be locked up. When Purdy got to the premises he called out while at the gate, and the dog jumped him and severely injured his arm which had to be amputated. Mr Purdy instituted a pauperian action against Mr Lever, the owner of the dog. The court held that Lever, escape liability on the grounds of Mr Cohen's negligence.

[23] The evidence in this matter is that the plaintiff was in a public place, where it was not unlawfully for her to be. It was not argued by the defendant, and I think it would not have been supported by the evidence that plaintiff goaded or provoked the dogs

The argument by Ms Gwiji, counsel for the defendant, that it was the mating season and that dogs in such a state tendered to be vicious can not in my view be upheld, in the absence of expert testimony on the behavioral pattern of dogs. I accept that the dogs acted *contra naturam sui genius*. The defendant is liable for the loss occassioned to the plaintiff.

[24] I now proceed to deal with compensation. It is trite that the onus lies upon the plaintiff to prove his losses, present and future. The onus applies equally to general damages: see **NHLANHLA NKAMBULE V THE NATIONAL**

**COMMISSIONER OF POLICE AND ANOTHER HIGH COURT
CASE (UNREPORTED) NO. 3134/2009.**

The plaintiff claims damages in the sum of E 237 425.75 under the following Heads,

• pain and suffering, shocking, loss of insecurities	E 170 000.00
disfigurement	E 43 773.75
• Medical expenses	E 3 650.00
• Loss of clothing and other accessories	<u>E 20 000.00</u>
• Loss by income part and future	<u>E 237 425.75</u>
Total	

Pain and suffering [means] "... all pain physical and mental suffering and discomfort caused by bodily injury, emotional shock, and the medical treatment necessitated by the injuries of importance here in the pain actually experienced by the plaintiff irrespective of whether he is more or less sensitive than the average person." See visser and Potgieter " Law of damages" 2nd edition (juta & co) 2003 page 99

[25] In her evidence, the plaintiff testified that the dogs bit her on the right cheek, on both her upper thighs, on her forehead and her left fore arm. Pictures of plaintiff injuries were admitted into evidence and they show what appears not to be just bite marks, but the flesh appears to have been pulled away leaving deep lacerations. Plaintiff testified that a Medical procedure known as skin grafting had to be performed. In the totality of the evidence , the plaintiff has established that she suffered a great deal of pain. However , she did not claim for future pain and suffering. This would lead to the conclusion that she had fully recovered.

Mlangeni J. in **NHLANHLA NKAMBULE V COMMISSIONER OF POLICE AND ANOTHER** (supra) stated:

"Damages for pain and suffering are general in nature and therefore at the discretion of the court, which discretion is to be exercised Judicially"

That it is a daunting exercise to come up with a precise amount in compensation for general damages, was underlined by **Romodibedi J.A** (as he then was) in **Ntombifuthi Magagula V the Attorney General** (unreported) civil appeal case no. 11/2006 where he said;

"[14] I now turn to that most difficult part of the case, namely the measure of general damages. Difficult in the sense that there are no scales by which pain and suffering can be measured in monetary terms. I commence this exercise by pointing out that the principles which would guide a court in the assessment of general damages are well established. Essentially the question of the assessment of such damages is a matter pre eminently within the discretion of a trial court. Findings on general damages comprising pain and suffering, disfigurement permanent disability and loss of amenities of life, as here is essentially a matter of speculation and estimate."

[26] Contrary to the provision in Rule 18 Sub-rule 10 of the rules of this court, the plaintiff failed to state her date of birth or her age. There is a reason why a plaintiff claiming damages for personal injury is required to state his date of birth in his pleadings, this is meant to assist the court in the assessment of damages. The same injury would be assessed differently if it were suffered by a child as when suffered by adult or even an elderly person. This leaves the court at a disadvantage.

[27] In **DELISA KENNETH MASINA V UMBUTFO SWAZILAND DEFENCE FORCE** (unreported) High court case no 274/2005, a Judgement delivered almost 14 years ago, the court awarded the sum of E 100 000 for pain and suffering to a plaintiff who suffered gunshots wounds leading to temporary blindness. In **NHLANHLA NKAMBULE V NATIONAL COMMISSIONER OF POLICE** (supra) The Court awarded the sum of E 165 000.00 for pain and suffering to a plaintiff who had similarly suffered gunshot wounds and the bullet was permanently lodged within his body; in **MPENDULO SHONGWE V CMC RAVENA (PTY) LTD**, (unreported) High court case no. 1535/2007, plaintiff was awarded the sum of E 75 000 for pain and suffering, where plaintiff had his right arm cut off just below the elbow.

I consider plaintiff's situation in this case as less severe than the cases, I have mentioned herein above . I am awarding plaintiff the sum of E 50 000.00 for pain and suffering.

Medical expenses

- [28] The plaintiff sued for medical expenses. It would appear from the summons that her claim is only for past medical expenses and not future. Certainly from the evidence of the plaintiff she only mentioned the sum of E 43 775.75 apparently paid at the Mbabane private clinic .

S.B Maphalala P.J (as he then was) in **DAVID ALFONSO SONTOS V THE ATTORNEY GENERAL** (unreported) High court case no. 1464/95 stated

“ turning to the issue of special damages, the quantum of this type of damages is determined by evidence. Expert evidence offers a concrete foundation for purposes of calculating quantum. ”

- [29] The plaintiff did not lead expert witnesses. She testified that she was first treated at the Mbabane Government hospital which is a public health facility. The doctor's wanted to admit her as an inpatient but she declined because she had a 4 month old baby that she wanted to look after. She was discharged at her instance and advised to attend for daily check ups.

When her boyfriend's employer heard about her predicament they offered to use their medical aid to have her treated at a private clinic, apparently with better facilities . Again the doctors wanted to admit her as an in patient she declined and they agreed to treat her as on out patient. Plaintiff submitted a number of invoices from the Mbabane Clinic private hospital and she testified that they were proof of payment for medical and related expenses at the clinic.

- [30] These invoices show that payment was made by an entity called Ngonini. Plaintiff explained that Ngonini is a company that employs her boyfriend. She said that her boyfriend will be required to repay the employer.

This has left the court with a great deal of difficulty because there is no nexus between the person who paid the bill and the plaintiff. If I were to accept that Ngonini paid the plaintiff's medical expenses as a loan to plaintiff's boyfriend then the obligation to repay Ngonini is on the boyfriend and not the plaintiff. The loan was advanced not to the plaintiff, but for the plaintiff's benefit. Perhaps the situation would be different if the plaintiff was married to the person to whom the loan was advanced.

While I accept that *ex facie* the invoices and plaintiff's testimony, her medical expenses at Mbabane private clinic amounted to E 43 775.75. I find it difficult to accept that she is entitled to claim this amount from the defendant. The claim for medical expenses is declined.

Loss of clothing and accessories

- [31] Under this head, plaintiff's evidence was that all the clothes that she was wearing on this day were damaged including her hair accessories. The plaintiff is awarded the sum of E 3 650.00 for the damages occasioned to her clothes.

Loss of income past and future

The plaintiff's evidence is that she was self employed in the beauty industry. She said she helped her client with their hair and nails on a free-lance basis. She did not work from fixed premise. Due to her injuries she could not carry on with her trade and lost some of her clients.


The plaintiff claimed the sum of E 20 000 in respect of past and future loss of income without providing evidence of what she used to earn before her injuries, and how much she lost and how her injuries will affect her business going forward.

The result is that I am not in a position to calculate the extent of plaintiff's loss of earnings if any, neither do I have the evidence or the material upon which I may calculate her future loss of earnings.

I therefore make the following order ;

1. Defendant is liable to pay plaintiff;

- 1.1 The sum of E 55 000.00 in respect of general damages for pain and suffering.
- 1.2 The sum of E 3 650.00 in respect of the claim for damage to plaintiff's clothes.
- 1.3 Interest thereon at the rate of 9% per annum calculated from date of judgment to date of payment.
- 1.4 Cost of suit.

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Z. Magagula
Judge of the High Court