

MARIE MICHEAL MODABBEK
versus
MAVIS MBUNGA

HIGH COURT OF ZIMBABWE
TSANGA & MAXWELL JJ
HARARE, 6 October 2022 & 27 April 2023

Civil Appeal

B Chipupuri with *DT Stevenson*, for appellant
I Chikaka, for respondent

TSANGA J: The essence of this appeal is against the lower court’s refusal to make a factual finding that the respondent, Mavis Mbunga, was the owner of a dog that bit the appellant in an incident which occurred in December 2017. She was bitten on her fore arms, her right thigh, right shoulder, buttock and left breast. The incident occurred when the appellant had gone to the respondent’s residence to look at a potential cottage for rental. She was taken to hospital and her bills were paid for by the respondent. She claimed US\$4000.00 in the court below for loss of earnings as she said she could not work for several months thereafter due to the injuries. She claimed a further US\$10 000.00 for pain and suffering and US\$264.00 for additional medical expenses.

The lower court’s finding in essence was that the appellant had failed to prove that the respondent was the owner of the dog. Regarding the appellant’s evidence the lower court had noted as follows:

“Closely assessing the evidence on record the court noted that the plaintiff led insufficient evidence to prove that the defendant is the owner of the dog in question. There was no proper description of the dog’s appearance or even the dog’s name. From the evidence led and on record there was insufficient evidence to prove that the defendant allowed the plaintiff to enter the premises on the day the plaintiff was attacked by the dog. The plaintiff alleged that she called the defendant on the phone and the defendant allowed her to come to the premises. No proof in the form of a call register was produced in court to prove that assertion”.

In its judgment the court below further noted that while the respondent (the defendant in the court below) gave inconsistent evidence as to who opened the gate for the appellant (plaintiff in the court below), however, that the inconsistency did not substantiate the claim by the appellant. The court observed that the evidence which pointed to the fact that the gate of the respondent was always open and is always open was not disproved, thus making it believe that there was a high possibility that the dog in question could have been a stray dog that got inside the premises. It therefore found that there was insufficient evidence to sustain the appellant's claim for damages.

It concluded that there was no need to assess the quantum of damages claimed when it was apparent that the appellant had failed to link the respondent as the owner of the dog and liable to pay for the damages. It therefore dismissed the claim for lack of sufficient evidence to substantiate the cause of action and ordered that each party pay its own costs.

Ground of appeal and relief sought

There is one ground of appeal which is that the court erred by making a finding of fact that the dog that attacked the appellant may have been a stray dog when the totality of the evidence indicated clearly that the dog belonged to or was under the control of the respondent.

Appellant seeks that the judgement of the court *a quo* be set aside and substituted with the following order:

The plaintiff's claim succeeds and the defendant is ordered to pay the following damages

- a) Medical expenses in the sum of US\$264.00
- b) Loss of earning a capacity in the sum of US\$4000.00
- c) Pain and suffering in the sum of US10000.00
- d) Costs of suit on a legal practitioner and client scale

The submissions

In arguing that there was misdirection counsel for the appellant, Mr. *Chipupuri* submitted that the stray dog averment posed difficulties having regard to the evidence on record that in fact the gate was always closed. In particular, Mr. *Chipupuri* referred to the fact that messenger on three cited occasions had affixed process on a closed gate. More importantly, in giving her

evidence in the court below the appellant had clearly stated that the gate was closed, for example page 15 of the record was referred to in which she stated as follows:

“.. she called and said she is now at home and I can come and view the cottage that I want. I went there and told her I was by the gate and she was to put her dog away. The gate opened and someone by the name Shane came and he said (he) is the cousin of Mavis the defendant.” We walked down the long drive way. On reaching the lawn which is about 10 meters to the house a dog appeared. The dog attacked me by (*sic*) the left hand and I was on the floor and drenched in blood. I heard screaming and voices and Shane was in front of me and someone came and got hold of the dog with a chain as the dog was still trying to chase after me. Mavis came and said don't worry you will be fine. She ordered someone to bring water. The dog was held by Briton the son of Mavis....”

The respondent's sworn additional affidavit in an application she made for rescission of judgment was also referred to in which she herself had averred as follows in paragraph 10 of her affidavit:

“Plaintiff who is the first respondent in this matter was not invited into the premises by the owner of the property .A tenant let him into the place”.

The suggestion here was that if she had had to be let in the gate would obviously have had to have been closed.

On p 28 of the record reference had also been made to the respondent's answer in cross examination which suggested a closed gate;

Q. Plaintiff said she called you and you sent someone to open the gate.

A. I dispute that, I did not call her. I did not send anyone to open for her. She came in alone.

Counsel for the appellant also motivated his argument that there could not have been a stray dog by referring to the magistrate's own finding in the judgment on the credibility of the respondent regarding who opened the gate. This is how the magistrate had addressed that issue in his judgment,

“Court took judicial notice of the fact that during trial the defendant gave some inconsistent evidence with regards to who opened the gate for the plaintiff the day she was attacked. Defendant in her oral evidence in court she told the court that the gate is always opened and no-one opened the gate for the plaintiff. Defendant in her papers file of record particularly in her application or

rescission of judgment she stated that a tenant called Shan opened the gate. Such inconsistency partially destroyed the credibility of the defendant but the inconsistency however did not do much to substantiate the claim of plaintiff, it could not however clarify to the court whether the dog was owned by the defendant or was in control of the defendant.”

In view of all the above, appellant’s counsel submitted that the respondent was not a witness who could have been trusted and that giving false evidence is in itself a reason for dismissal.

In his heads of argument appellant’s counsel emphasized that the lower court had used the wrong standard in that it had required evidence beyond reasonable doubt instead of the balance of probabilities. He argued that the balance of probabilities in fact highly favoured the appellant if regard is had to the totality of the evidence.

The respondent insisted that the appellant had failed to prove that the dog belonged to the respondent and that there was no probative proof that it belonged to the respondent.

Legal and Factual Analysis

Claims for delictual damages arising from dog bites are a way of regulating conduct of dog owners by ensuring that they take responsibility for the harm caused by their animal. A cause of action is established through ownership of the dog. The lower court’s finding as stated was that the appellant had failed to prove that the respondent was the owner of the dog.

In this case the lower court was faced with a situation where the respondent denied ownership of the dog. In civil cases proof is indeed on balance of probabilities. The issue is whether the evidence before the lower court on balance supported a finding that the dog belonged to the respondent contrary to the court’s finding that ownership was not proved. Unless findings of fact are so unreasonable that no reasonable person would have arrived at such a conclusion, appeal courts are generally inclined to leave them well alone when it comes to factual findings.

The lower court dealt with the claim which from the particulars of the claim was brought under the *pauperin* action. Such a claim is against the person who is the owner of the animal at the time the injury was inflicted. The liability is strict liability In that no fault needs to be proved unlike if the cause of action had been said to arise under an *acquilian* action where negligence would have had to be proved. It does not lie against a possessor of controller who is not an owner. All

that has to be proved under a *pauperin* action is that the animal was a domesticated animal and acted contrary to its species. By keeping the animal the owner creates the risk of the animal causing harm hence the liability for compensation. See G Feltoe Guide to the Zimbabwean Law of Delict. To succeed the following must be proved:

- 1) The defendant was the owner of the animal when the harm was inflicted
- 2) The animal that inflicted the harm was a domestic animal
- 3) The plaintiff was lawfully present at the location where the harm was inflicted
- 4) The animal acted contrary to the nature of its species.

Respondent's counsel referred to the case of *Da Silva v Otto* 1986 ZLR 478 as embodying these principles.

Looking at the lower court's reasoning, the fact that the appellant could not describe the dog or iterate its name should not have been surprising. She was attacked soon after entering the yard and would clearly not have had an opportunity to pay attention to such details as to what the dog was being called whilst she was being mauled. No reasonable person under attack would be paying attention to descriptive details such as the nature of a dog's ears, the colour of its coat or eyes, its canines or the likes. One's energy shifts to survival mode not a reflective mode.

As for the argument that the respondent had not let her in, it was not in dispute that they had engaged over the possible let of a cottage the previous day and that she would return. Therefore her being on the premises perfectly made sense and would explain why she was let in by whoever at the house. A requirement that she should have produced a record of the call on that day was superfluous. In fact the witness that the court found inconsistent was the respondent not the appellant. That in itself ought to have raised alarm bells as to what the respondent was trying to hide. Nowhere in her quest for further particulars or her plea had she raised the defence of a stray dog.

Even the evidence of the gate tended to lean predominantly in the gate having been closed and someone having to be let in. If the dog did not belong to the respondent one would have thought that this would have been one of the issues she would have raised in her request for further particulars. Instead her question which appear on page 46 of the record leaned more in terms of seeking to assess the extent of damages such as asking what work she did and whether the injuries

were severe or minor. Indeed the record shows that even when she sought rescission of the default judgment her defence was that the court did not have monetary jurisdiction for the amount claimed. The fact that the dog was allegedly not seen thereafter as the lower court remarked could mean that the owner got rid of the dog given the fact that the incident occurred on 2 December 2017 and summons were only issued on 8 October 2020. As for the respondent's son being bitten also, dogs have been known to attack even those they live with. The dog was in any event in attack mode.

In this case the finding that the dog did not belong to the respondent seemed rather stretched. It is easy for a dog owner whose dog is not registered to deny ownership knowing the risks they face for liability as a result of the dog bite. The lower court indeed seemed to have wanted proof beyond reasonable doubt on the ownership of the dog instead of assessing the factual circumstances in their totality to assess where the balance of probability lay in terms of the respondent's ownership of that dog.

The appellant's evidence suggested that she had seen the dog the previous day and hence had asked that the dog be put away when she visited the next day as her evidence quoted earlier states. The evidence on record clearly points to a closed gate on the premises where someone would have had to be let into the premises. The respondent's own averment had been that someone had let the respondent into the premises. It also seems highly unlikely that with the rate of theft any premises in the low density areas as was the case here would have had a gate wide open at all times more particularly on a major well known road as Golden Stairs where both human and vehicular traffic is heavy.

Furthermore, when the dog attacked, a chain had been readily had been readily availed as evident in the record pointing to the probability that it was there to control the dog. Additionally the respondent had paid for the appellant's bills, not altruistically but most likely because it was her dog on those premises. The dog had also come from the direction of the house. All this points to the very strong probability that the dog was indeed one that lived on the respondent's premises. If indeed the attack was by a stray dog it seems very odd that this fact did not come up immediately following the attack. The lower court's finding defied logic.

Everything done on the premises of the respondent and thereafter points to the dog having been the respondent's. The lower court definitely erred in failing to find on balance the ownership

of the dog was with the respondent. This appeal court concludes that on the evidence led and on a balance of probabilities the dog belonged to the respondent.

The appellant in this case seeks that this appeal court gives her the damages that she sought in the lower court. These were not proven because the lower court did not delve into the issue of damages once it erroneously arrived at the conclusion that ownership of the dog had not been proven. Therefore with this court's finding that the dog belongs to the respondent, the damages need to be proven and assessed.

The matter is accordingly remitted back to the magistrate to assess the quantum of damages payable on the facts, if any.

1. The appeal therefore partially succeeds with costs.
2. The matter is remitted back to the magistrate for assessment of quantum of damages payable to the plaintiff on the facts, if any.
3. Defendant shall pay the costs.

MAXWELL J

Thomson Stevenson and Associates, applicants' legal practitioners
Zvimba Law Chambers, respondent's legal practitioners