

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/T/702/2018

In the matter between

KHETSI KHETSI

PLAINTIFF

AND

‘MABATHO TLAI-TLAI

1ST DEFENDANT

LEBOHANG HLATSANA

2ND DEFENDANT

Neutral Citation: Khetsi Khetsi v ‘Mabatho Tlai-Tlai and Another [2025] LSHC

CIV 51 (28 February 2025)

CORAM : P. BANYANE

HEARD : 12 NOVEMBER 2024

DELIVERED : 28 FEBRUARY 2025

Summary

Practice and procedure - absolution from the instance at the close of the plaintiff's case - applicable test reiterated - Application dismissed.

ANNOTATIONS

Cited Cases:

Lesotho

1. Hata-Butle (Pty) Ltd v Felix petroleum (Pty) Ltd CIV/APN/18 of 2017
2. Tsiu v Nthane Brothers (Pty) Ltd CIV/T/310/20
3. Phuthi Transport (Pty) Ltd v Khiba CIV/T/593/2010

South Africa

1. Claude Neon Lights (SA) Ltd v Daniel 1976 (4) SA 403 (A)
2. Gascoyne v Paul and Hunter 1977 TPD 170
3. South African Railways and Harbours v Edwards 1930 AD 3
4. Marine & Trade Insurance Co Ltd v Van der Schyff 1972 (1) SA 26 (A)
5. Gordon Lloyd Page & Associates v Rivera & another 2001 (1) SA 88
6. Van der Westhuizen v Burger 2018 (2) SA 87 (SCA)
7. Solomon and another NN. O v De Waal 1972 (1) SA 575 (A)
8. Mkwanazi v Van der Merwe 1970 (1) SA 629
9. Van Der Merwe v Road accident Fund 2006(4) SA 230

BANYANE J

Introduction

[1] The plaintiff claims payment of damages from the defendants because of the alleged attack of his sheep by the 1st defendant's dogs on 07 October 2017. The defendants refute liability for the plaintiff's claim. At the close of the plaintiff's case, the defendants applied for an order of absolution from the instance.

The summons and declaration

[2] It is appropriate to examine the basis for the plaintiff's claim as contained in his summons and evidence led by the plaintiff and his witnesses at trial.

[3] In his summons, the plaintiff avers that on 07 October 2017, his 25 sheep and 15 lambs were mauled by the plaintiff's dogs at his cattle post. He consequently claims an amount of M53, 509.39, made up as follows;

- a) M49 500 for the value of the forty sheep.
- b) M 100,000,00 for contumelia.
- c) M 50.000.00 for loss of business.

The Trial

[4] The plaintiff and two witnesses testified at trial. The plaintiff testified that he rears or breeds sheep for various purposes including production of wool for sale. His breeding post/cattle post is located next to the 1st defendant's

cattle post. On 07 October 2017 he found his flock of sheep dead and some at the blink of death. They were in his sheep pen. Shortly after his arrival, Tumisang, a herd boy from the neighbouring post, approached him. Tumisang was walking with the 1st defendant's dogs. The dogs had fresh blood stains on their paws, fur and around the mouth. Tumisang informed him that the 1st defendant's dogs killed the sheep. He asked Tumisang how the dogs gained access into his pen. Tumisang showed him a hole through which they slipped into the pen. He also told him that the dogs were not tied up, hence they easily wandered/strayed into his area.

[5] From there, they proceeded to the chief's place with Tumisang. They found the chief's assistant. The assistant went to the cattle post with them to see the damage done. Later in the day, he was at his neighbour's house, Mr. Linane, when the 1st defendant (Mabatho) approached him. She told him that she received a report that her dogs killed the livestock. She then proposed to take the carcass, sell it, and compensate him for the loss. They even discussed the mode of conveyance of the carcass from the cattle post. He offered his truck for this purpose. However, the truck got stuck and could not reach the cattle post. On the following Monday, the 1st defendant reneged from her promise or undertaking and now refused to compensate him. She claimed that several dogs besides hers killed the sheep so she could not shoulder the blame alone.

[6] PW 2 corroborated the plaintiff's story that on 07 October 2017, the 1st defendant arrived at Mr. Linane's home. She was accompanied by Tumisang. She told the plaintiff that she received a report that her dogs had attacked and killed the plaintiff's livestock. She then proposed selling the carcass and compensating the plaintiff. She discussed transportation logistics with the plaintiff to collect the carcass from the cattle post. The plaintiff offered to provide his truck for that purpose; however, the truck got stuck before reaching the cattle post.

[7] In cross-examination to PW 2, Counsel for defendants admitted or suggested that indeed the plaintiff met the 1st defendant on the day in question because 'Mabatho had approached him. According to Counsel, the 1st defendant approached the plaintiff proposing heightened security in their area to avert these unfortunate occurrences.

[8] PW 3 Salemane Kape also witnessed the damage in the presence of the plaintiff, Tumisang, and the chief's assistant. According to the witness, Tumisang stated that the sheep were killed by the 1st defendant's dogs.

The application for an order of absolution from the instance

[9] At the close of the plaintiff's case, the defendant's counsel, Advocate Makara applied for an order of absolution from the instance.

[10] He firstly submitted that the plaintiff's case rests on two pillars: namely, that the 1st defendant's dogs killed the plaintiff's sheep, and that the 1st defendant promised to compensate the plaintiff for the damage.

[11] The plaintiff failed to bring evidence of eyewitnesses who saw the dogs attacking the sheep, neither did he hand in any photographic evidence of the dogs attacking the sheep. The plaintiff relied on circumstantial proof to the effect that the dogs had blood on their mouth, paws and fur. This evidence is uncorroborated because the people who allegedly saw these blood stains on the dogs are now deceased. Accordingly, the plaintiff's case is solely based on hearsay, and thus, the plaintiff failed to establish the relationship between his damage and the 1st defendant's dogs. Resultantly, the plaintiff failed to make a *prima facie* case for his claim, so went the argument.

[12] The defendants' counsel cited relevant authorities on the proper approach to applications for an order of absolution from the instance. In addition, he cited **Hata-Butle (Pty) Ltd v Felix petroleum (Pty) Ltd**¹ to submit that circumstantial evidence alone, without any direct evidence of causation, is insufficient to establish liability.

¹ (CIV/APN/ 18 of 2017) [2019] LSHC 6 (25 March 2019)

[13] Concerning the alleged promise or undertaking made by the 1st defendant to compensate the plaintiff, he submitted that absent a written proof of the agreement/undertaking, the plaintiff failed to establish its existence. Accordingly, the oral testimony of the plaintiff's witnesses constitutes inadmissible hearsay.

[14] The second prong of his argument relates to the quantum of damages. He submitted that the plaintiff failed to adduce evidence concerning the breed of the sheep and their value. Consequently, he failed to discharge the burden of proving the quantum of damages. His claim is, therefore, unsubstantiated.

[15] Advocate Kao for the plaintiff also cited authorities wherein the test for absolution from the instance was discussed.² Applying these authorities to the facts of this matter, Advocate Kao submitted that the plaintiff established a *prima facie* case upon which the court might find for him.

[16] In her view, the plaintiff's evidence that he saw the plaintiff's dogs with blood stains around their mouths and front paws is direct evidence linking the damage to the plaintiff's dogs. In addition, when he saw these dogs, they

² Claude Neon Lights (SA) Daniel 1976 (4) AD 403, Gascoyne v Paul and Hunter 1977 TPD 170 at 173, Phuthi Transport (Pty) Ltd v Khiba.

were with the 1st defendant's employee (Tumisang). The plaintiff further showed that he saw a hole in the fence through which the dogs accessed his sheep pen.

[17] She submitted that the plaintiff's evidence was confronted only with a bare denial and no counter-averments. Citing **Hata-Butle (Pty) Ltd v Felix Petroleum (Pty) Ltd**³ she finally submitted that the plaintiff adduced evidence relating to all the elements of his claim, thus, his claim survives absolute.

The test for absolute

[18] The test for absolute to be applied by a trial court at the end of a plaintiff's case was formulated in **Claude Neon Lights (SA) Ltd v Daniel**⁴ in these terms;

“when absolute from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established but whether there is evidence upon which a court applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff.”

[18.1] This implies that a plaintiff has to make out a *prima facie* case- in the sense that there is evidence relating to all the elements of the claim- to survive absolute because without such evidence, no court could find for the

³ Supra

⁴ 1976 (4) SA 403 (A) at 409 G – H see also Tsiu v Nthane Brothers (Pty) Ltd CIV/T/310/20.

plaintiff.⁵ As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one.⁶

Issue for determination

[19] The sole issue that falls for determination at this stage of the proceedings is whether the plaintiff adduced evidence relating to the elements of his claim. To answer this question, it is perhaps necessary to summarize the nature of his claim and its elements.

Discussion

[20] I understand the plaintiff's claim to be pleaded under *actio de pauperi* and, alternatively, negligence. In **South African Railways and Harbours v Edwards**⁷ De Villiers CJ said that *actio de pauperie* is based upon ownership. It lies against the owner in respect of harm done by a domesticated animal acting from inward excitement. The idea

⁵Marine & Trade Insurance Co Ltd v Van der Schy H 1972 (1) SA 26 (A) at 37 G – 38 A, Gordon Lloyd Page & Associates v Rivera & another 2001 (1) SA 88

⁶Gordon Lloyd Page & Associates v Rivera and another (supra)

⁷ 1930 AD 3

underlying the *actio de pauperie* is to hold the owner liable only in cases where, so to speak, the fault lies with the animal. In other words, the responsibility for damage done by one's animal is founded on ownership.⁸

[21] To succeed in a claim under the *actio de pauperie* a plaintiff must allege and prove that;

- a) The defendant was the owner of the animal when the damage was inflicted.⁹
- b) The animal was domesticated;
- c) The animal acted contrary to the nature of a domesticated animal, generally in causing damage to the plaintiff,
and
- d) The conduct of the animal caused the plaintiff's damage.¹⁰

[22] With these principles in mind, I turn to examine the evidence adduced. Although the plaintiff adduced no direct evidence of eyewitness, it seems undisputed that his sheep were attacked and mauled to death in their pen. It is also undisputed that the 1st defendant's cattle post is neighbouring the plaintiff's post. The plaintiff asserts that the 1st defendant's dogs attacked and killed his livestock. According to his testimony, the 1st defendant's herd boy

⁸ Van der Westhuizen v Burger 2018 (2) SA 87 (SCA) at para 25

⁹ Solomon and another NNo v De Waal 1972 (1) SA 575 (A)

¹⁰ supra

approached him to own up to the damage. During their discussion, he saw the 1st defendant's dogs with fresh blood stains on their paws, fur and around their mouths. The herd boy even showed him a hole through which the dogs slipped through into his sheep pen.

[23] It is noteworthy that during cross-examination, it was never suggested that the defendant's dogs were not at her cattle post on the night of the attack. In addition, it was admitted during cross-examination that the 1st defendant instigated a meeting with the plaintiff after the incident. She was accompanied by Tumisang, the herd boy, to this meeting.

[24] The evidence adduced by the plaintiff and his witnesses concerning; a) the presence of fresh blood stains on the paws and fur of the dogs; b) Tumisang and the 1st defendant's conduct after the incident, may justify a reasonable inference that the 1st defendant approached the plaintiff because Tumisang and the plaintiff converged on the scene of damage as alleged. Tumisang, in turn reported the damage to the 1st defendant. In other words, the defendant approached the plaintiff to discuss an incident because she was already aware that the plaintiff's livestock had been killed.

[25] For purposes of the inquiry at this stage of trial, a court applying its mind reasonably to this evidence might find the 1st defendant liable for the plaintiff's damage.

[26] In relation to quantum of damages, the plaintiff testified that his flock was purebred type. A sheep of this type was valued at M 1 500.00 in 2018, and a lamb was around M 800.00. He claimed M 49,500.00 as value for 25 sheep and 15 lambs.

[27] Under the head of loss of business, he testified that he used to produce and sell quality wool from his sheep. He generated an income ranging from M 13 000.00 and M 20 000.00. He claimed the amount of M 50,000 under this head.

[28] The third claim for *contumelia* is for non-patrimonial loss (general damages), not sounding in money and thus not susceptible to exact calculation in monetary terms.¹¹ Under this head, he testified the sight of his dead flock not only hurt his feelings but also traumatized him. He asks for compensation of M 100,000.00.

¹¹ Van Der Merwe v Road accident Fund 2006(4) SA 230 at 253

[29] As shown above, the plaintiff established, *prima facie*, that as a result of the attack, he suffered damages. Bearing in mind that the plaintiff is not required at this stage to establish what would finally be required to be established, the question before court is not whether there is evidence upon which a court ought to give judgment in favour of the plaintiff. The plaintiff's claim under these heads cannot therefore be dismissed at this stage.

[30] It is well established that an aggrieved party must adduce all evidence available to enable the Court to determine compensation due to him. However, if it has been proved that the aggrieved party has suffered damages, the difficulty of quantifying the sum due is no reason to dismiss the claim. The Court must endeavour as best it can to determine the amount due based on the evidence available.¹²

Order

[30] For these reasons, the defendants are not entitled to an order of absolution. It is accordingly dismissed with costs.

¹² Mkwanazi v Van der Merwe 1970 (1) SA 629 at 6331-2

P. BANYANE

JUDGE

For plaintiff : Advocate Kao-Theoha

For Defendants : Advocate Makara