

EVANS MULAUI
versus
RUSAPE TOWN CONCIL
and
SOLOMON GABAZA
and
TARISAI MANZONZO

HIGH COURT OF ZIMBABWE
MWAYERA AND MUZENDA JJ
MUTARE, 12 June 2019 and 25 July 2019

Civil Appeal

Appellant in person
M Chiwanza, for the respondents

MUZENDA J: All in the love of a pet! Many linguistic authors have described a pet to include “favourite, preference, darling, idol, jewel, apple of one’s eye, matinee or in French *enfant e gâte*.” Having been frustrated or failed by human friends whether male or female, humans all over the world from time immemorial had experimented with the animal world to find a real mate or friend. These animal friends stretch from domestic to wild animals, felines, bovines, canines, serpents, birds, fish and others, the list is endless. Some of the pests are fiery and dangerous to accommodate in a residential environment, but all has been done in the name of pet love.

These pets to some of the humans evolved into both great and false friends and as the saying goes “false friends are like migratory birds, they fly away in the cold weather.” But to appellant in this case he had managed to show a true character of a friend. It may seem superfluous to say anything more since good friends are among life’s greatest blessings and the lack or loss of them the saddest of deprivations, anything which reminds them of the value of a good friend does not come amiss. Appellant bought a canine pet when it was young and cared for it for a considerable period which ran into years. During that period a great alliance developed. As usual friendship is a hard, strong, slow growing beautiful thing. The soul in which friendship grows is the social set up in which one lives. Friends are made through the heart not the eye. The appellant was not the only one who won the heart of the dog but his sons

and the whole family became a total symbiosis to the dog, that is from the photographs which were produced in the court *a quo*, filed of record. The photographic images depict a real charming togetherness. The Hebrew Scriptures accurately captures that “A faithful friend is a sure shelter. Whoever finds one has found a rare treasure. A faithful friend is something beyond price, there is no measuring his worth.” If the dog could have been asked during its life time it could have equally vividly described how glorious its life was in the company of appellant’s family. Friendship begins with a long standing invitation. It says to the other you get on well with; let us tear down the barriers between us, let us pledge ourselves not to fight one another, but rather to comfort, challenge and support. One has to use a mirror to see one’s face. You use a friend to see your soul. Thus friendship is a union of one mind with another. Men become like those they associate with. Experience globally shows that pet lovers from the Western World go to the extent of sharing their beds and relaxing rooms with their pets, and the majority in the orient dismiss their dogs to the outside when they retire and in most instances the pet or dog has to find a warm place for the night and for the merry makers, they “patrol” the environment exposing themselves to the local authority shenanigans, who in the spirit of controlling infested dogs end up shooting residents’ pest as what happened in this case.

On 15 March 2018 the appellant issued summons against the local authority and its employees claiming:

- (a) payment of the sum of \$2 800-00 being special damages
- (b) payment of the sum of \$200-00 being general damages
- (c) interest *a tempore more* from the date of judgment to date of payment; and
- (d) costs of suit.

According to the synopsis of appellant’s particulars of claim filed in the Magistrate’s Court the first respondent is the local authority, second respondent is the Town Secretary and third respondent is the Chief Security officer. On 16 July 2017 and at 2125 hours, the respondent’s employees wrongfully and unlawfully shot and killed appellant’s dog at appellant’s house No. 1187 Mabvazuva Suburb, Rusape. As a result of respondent’s wrongful and unlawful conduct appellant suffered damages, detailed as follows:

- (a) special damages for money spent on the dog: purchase money as a puppy, its upkeep, castration, dipping chemicals and treatments the dog received for the continuous 9 years appellant had the dog all totalling to \$2 500-00 the dog’s market value of \$300-00. Total \$2 800-00.

(b) General damages for trauma, pain and suffering which includes: sentimental value, loss of companionship, love and affection: \$1 000-00. Emotional distress that is to say seeing the dog die, the time it is going to heal the wound left in appellant's heart and mind caused by the sight of a loved pet dying after being heartlessly butchered which dog appellant had not anticipated would die in that manner as he was in the process of getting ready to feed it with a meal it died having never tasted: \$1 000-00.

In the respondents' plea filed on their behalf they contended that they were working with Zimbabwe Republic Police and other interested persons. On the day in question, Sunday was a working day, stray and feral dogs spread diseases and attack people even on Sundays. The dogs in general, including appellant's, were shot after all necessary legal steps have been taken and were shot by a police detail. Hence respondents' conduct was lawful and guarded by the police. Appellant did not suffer any damages at all or even if appellant suffered any damages, he did not suffer damages shown on the pleadings. The respondents denied that any of the dogs shot belonged to the appellant. The appellant was put to strict proof. The matter proceeded to trial and after the court *a quo* heard all the parties and proceeded to dismiss appellant's claim. Appellant noted an appeal against the learned magistrate's judgment on 9 January 2019. The grounds of appeal cover 10 paragraphs, they are not specific, and they cover both fact and law stretching from statutes and by-laws. I will try to decipher from this thicket what the appellant sought to frame as grounds of appeal.

- (1) the learned magistrate was biased against appellant who was a self-actor and in so doing she erred.
- (2) the learned magistrate erred by making a finding based on a document which was not produced.
- (3) the learned magistrate erred in refusing to go for an inspection *in loco*.
- (4) the learned magistrate erred in justifying the killing of the dog, respondents should have been found liable of the wrongful shooting of the dog.
- (5) the learned magistrate erred in dismissing appellant's claim for damages.

These five grounds I conclude may form the pith of the appellant's appeal. In future litigants are encouraged to seek the advice of legal advisory centres like the Legal Aid Clinic to prepare grounds of appeal so as to crisply outline issues for determination by the court. The appellant went on to write a long essay and labelling such as heads of argument. Throughout

all the pleadings and what he termed the pleadings and what his story is consistent. The local authority killed an innocent dog which was at its owner's stead. The respondents ought not to have resorted to killing the dog but should have captured it.

WHETHER THE MAGISTRATE WAS BIASED AGAINST APPELLANT WHO WAS A SELF ACTOR.

The appellant submits that the trial magistrate was biased, selective and generally did not treat him fairly simply because he was a self-actor during the proceedings. The allegations are not explained by the appellant. On one occasion the appellant made an application to have a witness for the defendants' recalled, and explained why the witness had to be recalled. The defendants' counsel opposed the application, the trial magistrate gave a ruling why such procedure was not available to the appellant. Later whilst assessing the parties' evidence, the court *a quo* preferred to believe the evidence of the defendants to that of the appellant and went on to point out areas of discontent in appellant's case. Appellant was not happy at all about that evaluation and analysis. Appellant proceeded to label the Learned Magistrate as a "player and umpire" at the same time and appellant labels himself a victim and villain. An examination of the proceedings reflect that the appellant was allowed to present his matter freely and was afforded adequate time to cross examine the witnesses without interference. He was allowed to prepare closing submissions at the end of the trial. His main grievance is that he lost the claim but that should not form the basis of calling a trial court biased and partial. The allegations are serious but in this court's view baseless. This ground of appeal borders on contempt of the trial magistrate moreso where no particulars of such bias are provided. Judicial officers deserve every respect wherever possible and do not deserve to be labelled partial without providing details of such. The learned magistrate patently looked at the whole matter and gave reasons for its decision or judgment.

WHETHER THE LEARNED MAGISTRATE ERRED BY MAKING A FINDING BASED ON A DOCUMENT WHICH WAS NOT PRODUCED

The appellant contends that a by-law referred to by the respondent and later on alluded to by the learned magistrate in its judgment should have been discovered by the respondent in court and then provided the appellant an opportunity to cross-examine respondent's witnesses about it. In this case the document was not produced and the appellant was denied a chance to

have sight of it and ask questions relating to that by-law. A by-law is a subsidiary legislation relating to a particular area to guide a department or local authority on a specified target and where such a by-law exists a court can safely quote it or resort to it to make a decision based on the facts before it. It cannot be said to be a document to be discovered as if it is evidence, it's the law which automatically gives an answer to an issue before the judicial officer or tribunal. I see nothing wrong done by the magistrate in this case relating to the by-law.

WHETHER THE LEARNED MAGISTRATE ERRED IN REFUSING TO GO FOR AN INSPECTION IN LOCO

It is common cause that the respondents' witnesses contradicted on the exact place where the dog was shot by the police. One witness stated in court that the dog ran a distance of 25 metres after it was shot, the other witness spoke of 4 metres from appellant's house but died at appellant's house. The appellant applied for an inspection *in loco* during the proceedings but the trial magistrate did not grant it. It declined. In my view, there was no harm by the court to adjourn the proceedings and proceed for inspection although an inspection is at the discretion of the trial court. The inspection could not have assisted the appellant given the nature of the defence of the respondents but would have ensured the appellant that he obtained a fair hearing. However, I do not agree with the appellant that the trial court refused to grant an application for an inspection because the court had taken sides and that the trial proceedings was just a waste of time because the trial court had already passed the verdict. An inspection *in loco* remains at the discretion of the court, it is not automatic that when a litigant requests for an inspection such an application is granted. There are no factual nor legal reasons established by the appellant to show that the judicial officer had predetermined the matter simply because she dismissed an application for an inspection *in loco*. The appellant should be reprimanded for laying unjustified accusations against a court official and at the same time it is also desirable that a judiciary officer must try by all means by the way he or she conducts the proceedings that he or she should not be subject to criticism by litigants by trying to be as far as possible reasonably fair. The site for inspection was in Rusape, the very area where the trial was held, the court should have made arrangements for such an inspection in loco and record its findings in the record and rely in such observations to make its decision all done in the interests of justice.

However that ground of appeal has no merit in my view and it ought to be dismissed.

WHETHER THE COURT A QUO ERRED IN JUSTIFYING THE KILLING OF THE DOG

From the appellant's papers filed of record, the appellant contends that the respondents unlawfully killed his dog and the first respondent's agents/employees admitted in a letter written to the appellant that they had killed the subject dog. The manner the appellant insists with the civil claim for damages for the loss of the dog as well as for general damages premised on the loss shows that his dog is the one which was killed during the operation executed by the respondents and the police.

Generally local authorities through by laws have set conditions that owners of pets should meet. The cur should be licensed through payment of \$10-00 to the local authority and this is applicable to the first respondent. When the licensing fees are paid, the owner of the dog is issued with a collar which should be tied to the dog's neck. The collars is inscribed with the name of the owner. The owner is further required to provide a chain to the dog for purposes of regulating its movement or to facilitate control of the dog when the owner is moving on public roads or thorough fares.

As a further precautionary safety device the owner of the dog should put a security fence around his or her residence and a safety gate to avoid the willy-nilly movement of an unsecured dog for safety of the dog itself and members of the public at large. The dog should be confined between the hours of 2100 hours and 0600 hours. When a dog is not licensed, collared or secured, the respondent contends that such a dog qualifies to be stray.

It is not controverted that on 16 July 2017, appellant's alleged dog "spooky" did not have a collar around its neck, nor a chain and of course was not under control by the appellant. Besides the emphatic insistence by the appellant that the dog belongs to him, he could not provide any credible evidence to prove ownership of that dog. The letter from the first respondent admitting that the dog belonged to the appellant was not enough to gauge whether the appellant abided by the requirements demanded by first respondent to keep a dog at his premises. The issue of ownership in my view is a peripheral one, the crucial question decision to be made is whether at the time the dog was shot by the respondents was a stray? The appellant admitted that there is no perimeter fence at his house, nor a wall, the dog freely moved in and out of the premises. At the time the dog was allegedly shot the appellant was virtually not in control of the dog. He proactively reacted after hearing the gunshot outside his house, only to see the dog lying dead.

The respondents throughout the proceedings vehemently insisted that the law permits them to eradicate stray dogs. The regulations allow them to destroy pets which are vicious, diseased and harmful to human beings. ¹ Tarisai Leonard Manzonzo² testified that before the operation, first respondent flights an advert in the Sunday Mail tabloid or drive around suburbs using hailers advising the public to keep dogs and cats secured, warn them that if found on the roads stray pets would be captured or eliminated. Before 16 July 2017 they had done that and consequently any subsequent killing of stray dogs was lawful.

The use of firearm for any operation exposes great risk to the general public whether the operation is done by the police, the military or the municipal police, it is inherently dangerous. It is necessary that members of the public be given adequate instructions, warning and information. It is not adequate for local authorities to flight adverts in the Sunday Mail newspaper not all town dwellers can afford to purchase a tabloid, more so a Sunday Mail. It is instructive that before carrying out an operation of eliminating stray pets, in addition to the adverts the local authority should ensure through councillors of each affected ward dissemination of information for the pending operation, hold meeting with affected area dropping flyers where possible and place posters on strategic positions so as to minimise danger to the licenced pets as well as public, failing which responsibility for tragedies during such operations may well rest on the shoulders of local authorities.

It is desirable, I think that the facts of this case be brought to the attention of local authorities so that they may consider steps can be taken to improve the dissemination of warning information to those tasked to execute the operation, so that blame should be moved from individuals to local authorities. I am satisfied in this case that the respondents did not prove that they extensively exhausted the dissemination of the information before carrying out the operation. It is apparent that many residents of Rusape were unaware of the operation and were taken by surprise more so when they heard gunshots in residential set-ups. A gunshot upsets lame hearted people and causes panic it would be handled comfortably if people are pre-warned. Had the appellant met all other requirements to prove his matter chances were that he had laid a fundamental basis for his claim but he had a mountain to climb.

The real issue before the court is not whether the operation of the respondents was unlawful or lawful, but whether the respondents were negligent. It is only causative negligence

¹ See p 98 of the record

² At p 101 of the record

that gives rise to liability. The conclusion I reach at this stage is that the appellant's dog was unlicensed, uncollared, unidentified and was in the open when it was shot. In principle it qualified to be a stray and open to elimination by the respondents for the purposes of protecting the public at large from dog bites or harmful diseases. The shooting of the dog was lawful in the circumstances.

WHETHER THE MAGISTRATE ERRED IN DISMISSING APPELLANT'S CLAIM FOR DAMAGES

As already outlined herein above this is the gravament of the appeal. The appellant seeking to rely on negligence sued the respondents for both general and special damages which arose from the killing of the dog "spooky" indeed the claim was spooky because it was unsuccessful and the appellant appealed to this court.

There are various breeds of dogs stretching from Afgan hound, Ariedale terrier, Alsatian, barbet, basset beagle, sleath, boxer, greyhound, bulldog, more than fifty species to include Chihuahua and German shepherd. The appellant was unable to describe what type his was. These classes of dogs fetch various amounts on the open market whether one is acquiring or disposing of them. Without the precise name, one cannot properly put value to it and this was a challenge which appellant met during the proceedings.

The value of \$300-00 was not supported by evidence from a dog dealer or a veterinary doctor, it was put price. A litigant is required to look for an expert in the canine field to properly place monetary value on a specie of a dog. Where such evidence is lacking it will be taken that the plaintiff had failed to prove that element. The cost of acquiring the dog and maintaining it for a period of 9 years in my view was irrelevant. No one including the appellant knew as when the dog was going to die. The appellant had a duty to look after the dog anyway, what was vital was the replacement value which he placed at \$300-00. He ought to have supported that value by evidence and he failed to discharge that onus.

The issue of special and general damages is closely linked to the issue of negligence. In the matter of *Maketo and Another v Wood & Others* 1994 (1) ZLR 102 (H) at 104C-D it was held that:

"that third defendant was liable on the grounds that there was sufficient relationship of proximity that in the reasonable contemplation of the third defendant, carelessness on its own part or on the part of its agents might be likely to cause damages to the plaintiffs..."

In the matter of *Van Buuren v Minister of Transport* 2000 (1) ZLR 292 (H) CHATIKOBO

J pointed out the following:

“The passage shows in my opinion that the most weighty consideration from which legal duty may be implied in a permissive power is that the object of the power is to effectuate either a private or a public right-a right requiring that the power conferred shall be exercised and therefore capable of enforcement.”³

“Negligence is the failure to take proper care and proper care is the care which according to law, would be taken by a prudent and reasonable man. The question whether in any given situation, a reasonable man would have foreseen the likelihood of harm and governed his conduct accordingly, is one to be decided upon the consideration of all the circumstances. The law does not set up impossible standards, and it does not make extravagant demands. Moreover a person is entitled to assume that others will take reasonable care of themselves and will keep the eyes open.” (My emphasis)

In the matter of *Musadzukwa v Minister of Home Affairs and Another*⁴ the court held that:

“In order to determine the wrongfulness and reasonableness of any given conduct the court is enjoined to make a value judgment based among other things contemporary *bori mores*, in the sense of the convictions of the community as to what fair, just and equitable.”

MALABA JA (as he then was) in *United Bottlers (Private) Limited v Shambawamedza*⁵ reiterated the following:

“The next question to be decided by the Learned Judge was one of fault. It was whether the defendant’s employee negligently caused the damage suffered by the plaintiff. It has been said that negligence is a question of fact and the onus of proving it is on the party alleging it. A person is negligent if he did not act as a reasonable man would have acted in the particular circumstances. He will be held liable for the actual consequences of his negligence which are reasonably foreseeable.”

In *Cape Town Municipality v Paine*⁶ INNES CJ said:

“It has repeatedly been laid down in this Court that accountability for unintentioned injury depends on culpa-the failure to observe that degree of care which a reasonable man would have observed. I use the term reasonable man to denote the *diligens paterfamilias* of Roman law- the average prudent person. Every man has a right not to be injured in his person or property by the negligence of another-and that involves a duty on each to exercise due and reasonable care. The question whether, in any given situation a reasonable man would have foreseen the likelihood of harm and governed his conduct accordingly is one to be decided in each case upon a consideration of all circumstances. Once it is clear that the danger would have been foreseen

³ Van Buuren (supra) (at p 299)

⁴ 2000 (1) ZLR 405

⁵ 2002 91) ZLR 341 (S)

⁶ 1923 AD 207 at 216

and guarded against by the *diligens paterfamilias*, the duty to take care is established and it only remains to ascertain whether it has been discharged.”⁷

The first respondent has a legal duty towards its constituency against any damage that can arise during the operation for eliminating stray pets. Where a party proves negligence against the local authority where such actual consequences of local authority’s negligence are reasonably foreseeable, the local authority will be held liable. However in *casu*, the appellant failed to prove that the dog was lawfully kept at his place, was licenced and secured, he failed to prove that the dog was his. He failed to prove negligence on the part of the respondents. Once I ruled that the killing of the dog was lawful, there is no basis to look at the aspect of damages. Damages arise from the unlawfulness of the killing and the duty of care on the part of the respondents. The appellant failed to pass that hurdle and hence the appeal was dismissed in its entirety. Appellant has to pay respondent’s wasted costs.

In the result, the appeal be and is hereby dismissed with costs.

MWAYERA J agrees _____

Chiwanza Legal Practitioners, State’s legal practitioners

⁷ See also *Lomagundi Sheetmetal & Engineering (Pvt) Ltd v Basson* 1973 (1) ZLR 356 (A) at 362-3