IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

[redacted]

SIGNATURE DATE: 14 June 2024

Case No. A2024-002787

In the matter between:

SUSANNA SWANEPOEL Appellant

and

MARK REYNECKE Respondent

CORAM: CRUTCHFIELD J, WILSON J and DU PLESSIS AJ

JUDGMENT

WILSON J (with whom CRUTCHFIELD J and DU PLESSIS AJ agree):

1 On 30 July 2020, the respondent's daughter, J, was attacked and mauled by two pit bulls in the back garden of a property belonging to the appellant, Ms. Swanepoel. The two dogs, which also belonged to Ms. Swanepoel, were, at the time, rearing a litter of puppies.

2 The respondent, Mr. Reynecke, sued Ms. Swanepoel in the court below in his representative capacity claiming the medical expenses and general damages J sustained as a result of the attack. The questions of liability and quantum were separated, and the trial proceeded in the court below on 11, 12 and 13 October 2022 on the question of liability alone.

3 On 7 November 2022, the court below gave judgment for Mr. Reynecke, primarily on the bases that the dog attack was foreseeable, and that Ms. Swanepoel did not give evidence of the steps she took to prevent it. Ms. Swanepoel now appeals against that decision, with the leave of the Supreme Court of Appeal.

4 Mr. Louw, who appeared for Ms. Swanepoel before us, staked his case on the decision of this court in *Green v Naidoo* 2007 (6) SA 372 (W). In *Green*, Satchwell J held that, where liability for damages caused by an animal attack is pressed in an action based on the wrongful and negligent conduct of the animal's owner, it must be established that the animal attack was foreseeable. Foreseeability is ordinarily established by reference to whether the animal in question has a history of, or predisposition to, aggression. Where no such history or predisposition is established, it will generally be difficult to conclude that the owner of the animal could have foreseen the attack.

5 Mr. Louw argued that Mr. Reynecke had not discharged the onus on him in the court below to demonstrate that the attack on J was foreseeable. For that reason, Mr. Louw argued, there was effectively no case for Ms. Swanepoel to answer there, no basis on which the court below could have given judgment

for Mr. Reynecke, and accordingly no need for Ms. Swanepoel to have given evidence.

6 In this Mr. Louw was mistaken. Not only was the foreseeability of the attack effectively conceded in Ms. Swanepoel's plea, it was plainly established on the evidence. Foreseeability having been conceded on the pleadings and established in the evidence, Ms. Swanepoel led no evidence whatsoever of the measures she alleged were taken to prevent the attack. Ms. Swanepoel's failure to testify caused the court below to draw an inference against her. That inference was that no such preventative measures were taken. Relying in part on that conclusion, the court below found that Ms. Swanepoel had wrongfully and negligently failed to prevent the injuries that J sustained.

7 In my view, the court below was entirely correct in its approach. The appeal must fail. In giving my reasons for reaching that conclusion, I shall first address the issues that were defined in the pleadings before the court below. I shall then address the relevant evidence.

The concessions in Ms. Swanepoel's plea

8 In paragraph 5 of his particulars of claim, Mr. Reynecke alleged that Ms. Swanepoel had a duty of care to the general public, and in particular to J, to guard against the attack that took place. In paragraph 6 of those particulars, Mr. Reynecke said that Ms. Swanepoel had breached that duty by keeping dangerous dogs on the premises when she ought reasonably to have foreseen that the dogs would attack and cause injury to J; by failing to keep the dogs locked in a secure enclosure; by failing to warn J that the dogs were

dangerous; and by failing to take such other precautions as were reasonable to prevent the attack.

9 In paragraph 5 of her plea, Ms. Swanepoel accepted that she had the duty of care alleged. In paragraph 8, Ms. Swanepoel "specifically pleaded that the female dog had puppies and as such [the dog] was isolated and kept in a separate enclosure on the porch". In paragraph 9.3 of her plea, Ms. Swanepoel alleged that she warned J "as she warns all visitors that the female dog had puppies and may be more protective than usual".

10 Mr. Louw was unable to convince us that these averments were anything less than an admission that the dog was potentially dangerous and that it was liable to attack those who approached it while it was rearing its puppies. In my view, the issue of foreseeability was accordingly conceded in the plea, and no evidence need have been led of that fact.

11 Mr. Louw argued against this approach, relying on the dictum of Cloete JA in *Imvula Quality Protection v Loureiro* 2013 (3) SA 407 (SCA) at paragraph 47, that "cases are decided on the evidence, not on the pleadings". That much is true, but nothing that was said in *Imvula* sought to interfere with the trite proposition that a fact conceded in a plea is a fact of which no evidence need be led.

12 In this case, the defence mounted in the plea entailed the concession that the attack was foreseeable. Ms. Swanepoel's case in her plea was not that she could not have known that the dogs might attack, but that she foresaw that at least one of them might attack and that she took measures to prevent it from

doing so. Mr. Reynecke was not required to lead evidence that Ms. Swanepoel foresaw the very outcome that she pleaded she took measures to prevent.

The evidence on foreseeability and prevention

13 In any event, the evidence led on Mr. Reynecke's behalf did more than enough to establish, at least *prima facie*, that the attack on J was both foreseeable and foreseen. J gave evidence that Ms. Swanepoel's husband "het vir my ma gesê dat die kinders weet hulle moet die honde bêre voordat iemand kom kuier" ("told my mum that the children knew to put the dogs away before someone comes to visit"). Mr. Louw dismissed this evidence as inadmissible hearsay that could not be imputed to Ms. Swanepoel. However, it seems to me that the evidence accords entirely with Ms. Swanepoel's plea, and that the court below was entitled to have regard to it in considering whether, Ms. Swanepoel's pleaded admissions aside, the attack was at least *prima facie* foreseeable.

14 When evaluated in context, J's evidence is not hearsay, and there is no need to "impute" anything to Ms. Swanepoel on the basis of it. J's evidence need not have been tendered to prove that the Swanepoels' children actually knew to put the dogs away, or that Ms. Swanepoel had said so. All that matters is that the evidence shows that it was present to Mr. Swanepoel's mind that the dogs needed to be "put away". If that was present to his mind, it must surely have been foreseeable to anyone living in the house, as Ms. Swanepoel did, that the dogs needed to be confined because of the potential threat they posed.

15 Moreover, there was the expert evidence of Dr. Greenberg, a qualified vet and self-described ethologist, or expert in animal behaviour. Dr. Greenberg gave

evidence that pit bulls are an aggressive breed, and that a female dog with puppies is likely to be aggressive. The foresight that a dog with puppies may be aggressive seems to me to be something a Judge is entitled to infer from ordinary human experience. Be that as it may, if expert evidence was required, the court below heard it.

16 Mr. Louw criticised Dr. Greenberg as a biased witness. It is hard for me to discern the gravamen of this criticism. Dr. Greenberg was plainly not biased against any of the parties. The suggestion seems to have been that Dr. Greenberg had an inherent bias against pit bulls. However, even if that is accepted, it is hard to see how it supplies a basis on which to reject Dr. Greenberg's unsurprising observation that a dog with puppies might bite.

The approach of the court below

17 In reality, there was more than enough on the pleadings and in the evidence before the court below for it to form the view that the attack on J was foreseeable, and that measures, such as the measures enumerated in Ms. Swanepoel's plea, were warranted. Yet, Ms. Swanepoel led no evidence that those measures were taken. The court below drew the appropriate adverse inference from this failure: that the measures Ms. Swanepoel pleaded she took were not in fact taken.

18 That, coupled with Ms. Swanepoel's failure to lead evidence to rebut the *prima facie* evidence that the attack on J was foreseeable and in fact foreseen, was more than enough for the court to be satisfied that negligence was established, and that judgment should be given for Mr. Reynecke.

19 No criticism was advanced of any other aspect of the approach or the conclusions of the court below, which I consider to be correct in every respect. The appeal fails.

Costs

20 Both counsel sought costs on the "B" scale as provided for in Rule 67A. I said in *Mashavha v Enaex Africa* (Pty) Ltd [2024] ZAGPJHC 387 (22 April 2024) at paragraph 26, that scales "B" and "C" should only apply to "truly important, complex or valuable cases". I accept that this case and the injuries it involves are of a great deal of importance to Mr. Reynecke and to J, but I do not think that the case has an objective value or complexity that justifies costs on the "B" scale.

Order

21 For all these reasons, the appeal is dismissed with costs.

S D J WILSON
Judge of the High Court

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading to Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 14 June 2024.

HEARD ON:	5 June 2024
DECIDED ON:	14 June 2024
For the Appellant:	M Louw Instructed by HJ Badenhorst & Associates Inc

For the Respondent:	RA Britz Instructed by Burnett Attorneys