IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 19155/2015

In the matter between:

JULIANA CROMHOUT Plaintiff

and

PATRICIA ENID O'NEIL N.O. First Defendant

AMANDA CAREY N.O. Second Defendant

RONALD JAMES ANTROBUS N.O. Third Defendant
(In their capacities as trustees of the
Cavendish O'Neil Animal Trust)

Coram: Justice J I Cloete

Heard: 11, 12, 14 February 2019 and 2 May 2019

Delivered: 14 May 2019

JUDGMENT

CLOETE J:

Introduction

[1] This is an application for absolution at the close of the plaintiff's case. The application was interrupted after argument by *Mr Branford* (who appeared for the defendants) due to: (a) an opposed application for amendment of the plaintiff's particulars of claim which was refused with costs on 14 February 2019; (b) a subsequent delay of 2 ½ months while the plaintiff took advice from senior counsel, obtained a transcript of her evidence and considered her position; and (c) a subsequent opposed application for the plaintiff to re-open her case to introduce certain documentary evidence, which the parties were ultimately able to resolve in terms of an agreed order.

[2] During October 2015 the plaintiff issued summons against the three defendants, in their capacities as co-trustees of the Cavendish O'Neil Animal Trust (IT 461/99) for damages of R469 000 allegedly resulting from the loss of her right index finger and bruises to her right arm and body after she was attacked by a chimpanzee, Kalu, the personal property of the first defendant.

[3] Kalu was kept in an enclosure on the farm Broadlands Stud which is owned by the Van der Westhuizen family (who are not involved in these proceedings). The first defendant occupied the manor house on the farm and the plaintiff rented a room on the farm.

[4] During the course of pre-trial case management, the merits and quantum were separated and the trial thus proceeded on the merits only. The plaintiff was the only witness who testified in support of her case. The documentary evidence later introduced was dealt with in the agreed order as follows:

'1. The following documents are received in evidence as exhibits (marked Exhibit C) in the above matter:

1.1 Bank Statements of the Cavendish O'Neil Animal Trust for the periods of June 2013 to February 2014;

1.2 SARS Monthly Employer declaration of the Trust for all its employees, including Michael Tapaseri and Morgan Bricknell for the periods 10/2013 to February 2014.

2. The aforementioned documents are what they purport to be;

3. At the time of the incident the Trust was paying UIF of Michael Tapaseri and Morgan Bricknell;

4. Michael Tapaseri is and was the keeper of Kalu at the time of the incident and Morgan Bricknell was the farm manager at Broadlands Farm at the time of the incident;

5. The bank statements reflect various weekly / monthly payments made to Michael Tapaseri and Morgan Bricknell…'

The pleadings

[5] The relevant allegations in the plaintiff's particulars of claim were that:

5.1 At all material times the defendants were in control of the farm;

5.2 The defendants introduced Kalu, a wild animal, onto the farm, which would not naturally occur there;

5.3 The area in which Kalu was kept was not properly fenced; nor did any warning signs appear at or near the area; nor was the plaintiff ever warned by the defendants about the possible danger in coming close to Kalu's area;

5.4 On 14 December 2013 the plaintiff approached Kalu's enclosure holding a bag of figs under her right arm;

5.5 While the plaintiff was standing close to the fence Kalu grabbed her arm, pulled it through the barred area of the enclosure and bit off her right index finger; and

5.6 The incident was caused by the sole negligence of the defendants in one or more of the following respects, namely (a) they **failed** to warn her of the dangers of interacting with Kalu; (b) they **failed** to properly and adequately fence the area in which Kalu was kept; and (c) they **failed** to avoid the incident when by the exercise of reasonable care they could and should have done so.

[my emphasis]

[6] In their plea the defendants:

6.1 Denied having been in control of the farm;

6.2 Averred that the first defendant, in her personal capacity, introduced Kalu to the farm;

6.3 Denied that Kalu's enclosure was not properly fenced, alleging that it was kept securely fortified with wire mesh and electrified fencing, together with a smaller caged off enclosure which could only be entered through a safety gate;

6.4 Averred that prominent warning signs and disclaimers were positioned at the entrance to the farm, near to the enclosure and on the enclosure itself; and

6.5 Alleged that the plaintiff was verbally warned *inter alia* to be careful of and not to interact with Kalu, including feeding her.

[7] The defendants advanced four defences (each in the alternative) to the allegation of sole negligence on their part. These were:

7.1 Voluntary assumption of risk;

7.2 In the first alternative, sole negligence on the part of the plaintiff;

7.3 In the second alternative:

> *'11.1 On entering and/or exiting the farm, and/or situated at the chimpanzee's enclosure and on the farm, the Plaintiff was advised, by way of prominent signs that:…*
>
> *11.2 The Plaintiff entered and/or exited the farm and/or utilized the premises and approached, interacted with and fed the chimpanzee, in terms of an express, alternatively tacit agreement between herself and the Trust, the terms of which are set out in sub-paragraph 11.1 above, alternatively the Trust had taken reasonable steps to bring the terms in question to the attention of the Plaintiff and the Plaintiff is consequently bound thereby.*
>
> *11.3 The said terms on a proper construction thereof, relieve the Trust of liability for negligence.'*

and

7.4 In the third alternative, contributory negligence.

[8] The contents of the warning signs are also set out in paragraph 11.1 of the plea. In essence, they draw attention to the presence of wild animals including *'giant apes'*; and inform that entry to and presence on the farm are dangerous and may *'pose injuries and life threatening circumstances'*. Some prohibit the feeding, handling or touching of *'monkeys'*.

[9] It is convenient to deal first with the applicable legal principles, secondly with the grounds relied upon in the absolution application, thirdly the evidence relevant to these grounds, and fourthly the parties' respective arguments.

Applicable legal principles

[10] The test for absolution at the close of a plaintiff's case is well established and was set out in *Gordon Lloyd Page & Associates v Rivera and Another*[1]; as follows:

> *'[2] The test for absolution 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 1976 *(4) SA 403 (A) at 409G-H in these terms:*
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> *"…(W)hen absolution 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*

[1] 2001 (1) SA 88 (SCA) at 92E-93A; see also *De Klerk v Absa Bank Ltd and Others* 2003 (4) SA 315 (SCA) at para [1].

*ought to) find for the plaintiff. (*Gascoyne v Paul and Hunter *1917 TPD 170 at 173;* Ruto Flour Mills (Pty) Ltd v Adelson *(2) 1958 (4) SA 307 (T).)"*

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 absolution because without such evidence no court could find for the plaintiff (*Marine & Trade Insurance Co Ltd v Van der Schyff *1972 (1) SA 26 (A) at 37G-38A;* Schmidt *Bewysreg 4th ed at 91-2). 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…'*

[11] Zeffertt *et al*: *The South African Law of Evidence*[2] provide the following useful summary:

'If at the end of the plaintiff's case there is not sufficient evidence upon which a reasonable man could find for him or her, the defendant is entitled to absolution. Or, as it has been expressed on more than one occasion by the Appellate Division, the only question is whether, at the close of the plaintiff's case, there was such evidence before it, ***assuming it were true****, upon which a reasonable court might, not should, give judgment against the defendant. …*

The courts have frequently emphasised that absolution should not be granted at the end of the plaintiff's evidence except in very clear cases, and that questions of credibility should not normally be investigated until the court has heard all the evidence which both sides have to offer. Thus in Siko v Zonsa *Solomon J said that a magistrate should not grant absolution merely because he or she does not believe the plaintiff's evidence, except "where witnesses have palpably broken down, and where it is clear that they have stated what is not true… the Supreme Court of Appeal has held that the test is whether a court, if no further evidence were led, after reasonable application of its mind, might find in favour of the plaintiff (*De Klerk v Absa Bank Ltd and Others*)."*[3]

[my emphasis]

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[2] At 164-165.

[3] See also *South Coast Furnishers v Secprop Investments* 2012 (3) SA 431 (KZP) at para [15].

[12] The plaintiff's cause of action is the *actio legis Aquiliae.*[4] It is clear from the plaintiff's pleaded case that she relies squarely on an omission or omissions on the part of the defendants, premised on their having introduced Kalu onto and having been in control of the farm. She made no specific averment that the defendants' alleged omissions were **wrongful**.

[13] The convenient starting point is the dictum of Harms JA in *Telematrix (Pty) Ltd v Advertising Standards Authority SA*:[5]

> *'The first principle of the law of delict, which is so easily forgotten and hardly appears in any local text on the subject is, as the Dutch author Asser points out, that everyone has to bear the loss he or she suffers. The Afrikaans aphorism is that "skade rus waar dit val". Aquilian liability provides for an exception to the rule and, in order to be liable for the loss of someone else, the act or omission of the defendant must have been wrongful and negligent and have caused the loss. But the fact that an act is negligent does not make it wrongful although foreseeability of damage may be a factor in establishing whether or not a particular act was wrongful.'*

[14] As to wrongfulness, in *Sea Harvest Corporation (Pty) Ltd and Another v Duncan Dock Cold Storage (Pty) Ltd and Another*[6] Scott JA said:

> *'…If the omission which causes the damage or harm is without fault, that is the end of the matter. If there is fault, whether in the form of* dolus *or* culpa*, the question that has to be answered is whether in all the circumstances the omission can be said to have been wrongful…To find the answer the Court is obliged to make what in effect is a value judgment based,* inter alia*, on its*

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[4] Although in her opening address the plaintiff's counsel placed reliance in the alternative on the *edictum de feris,* the essential elements that the defendants owned Kalu and that Kalu strayed from her enclosure were neither pleaded nor established on the plaintiff's own evidence.

[5] 2006 (1) SA 461 (SCA) para [12].

[6] 2000 (1) SA 827 (SCA) para [19].

perceptions of the legal convictions of the community and on considerations of policy…'

[15] This was dealt with as follows in *Za v Smith and Another*[7] at para [20]:

'Reverting to the enquiry into wrongfulness – properly understood – in this case, it will be remembered that prior to the watershed decision of this court in Minister van Polisie v Ewels *1975 (3) SA 590 (A), liability for omissions was confined to certain stereotypes. One of these was referred to as relating to those in control of dangerous property, who were said to be under a duty to render the property reasonably safe for those who could be expected to visit that property. After* Ewels*, those stereotypes did not become entirely irrelevant. They still afford guidance in answering the question whether or not policy considerations dictate that it would be reasonable to impose delictual liability on the defendant in a particular case, although these stereotypes no longer constitute the straitjackets that they were before* Ewels*…'*

[16] In *H v Fetal Assessment Centre*[8] it was said at paras [51] and [67] that:

'[51] Our pre-constitutional law of delict is not couched in terms of a duty to protect fundamental rights. It is clear, however, that many interests and rights protected under the common law quite easily translate into what we now recognise as fundamental rights under the Constitution…

[67] In addition to the general normative framework of constitutional values and fundamental rights, our law has developed an explicitly normative approach to determining the wrongfulness element in our law of delict. It allows courts to question the reasonableness of imposing liability, even on an assumption that all the other elements of delictual liability – harm, causative negligence and damages – have been met, on grounds rooted in the Constitution, policy and legal convictions of the community…'

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7 2015 (4) SA 574 (SCA).
8 2015 (2) SA 193 (CC).

[17] In *Le Roux and Others v Dey*[9] the Constitutional Court also pointed out:

> *'Incidentally, to avoid confusion it should be borne in mind that, what is meant by reasonableness in the context of wrongfulness has nothing to do with the reasonableness of the defendant's conduct, but it concerns the reasonableness of imposing liability on the defendant for the harm resulting from that conduct.'*

[18] In *MTO Forestry (Pty) Ltd v Swart N.O.*[10] it was stated at para [18] that:

> *'[18] One further issue relevant to both wrongfulness and negligence must be mentioned. In* Country Cloud *this court, despite in the past having recognised foreseeability of harm (a clear requirement of negligence) as a factor in determining wrongfulness, expressed its 'reservation about this approach, mainly because it is bound to add to the confusion between negligence and wrongfulness'. The author of the judgment has since stated extra-curially that it 'went all the way by saying that, because foreseeability is an essential component of negligence, it should find no place in the enquiry into wrongfulness at all'. With great respect, that may be the effect of the judgment but it does not spell it out as being the case in unequivocal terms. But I agree with the motivation for such a conclusion. It is potentially confusing to take foreseeability into account as a factor common to the inquiry in regard to the presence of both wrongfulness and negligence. Such confusion will have the effect of the two being conflated and lead to wrongfulness losing its important attribute as a measure of control over liability.* ***Accordingly, I think the time has now come to specifically recognise that foreseeability of harm should not be taken into account in respect of the determination of wrongfulness, and that its role may be safely confined to the rubrics of negligence and causation.****'*
>
> [my emphasis]

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[9] 2011 (3) SA 274 (CC) para [122].
[10] 2017 (5) SA 76 (SCA).

[19] In *Stedall v Aspeling*,[11] it was held at paragraphs [11] and [12] that:

> '*As is apparent from its judgment, the court* a quo *regarded negligence as the essential issue that fell to be decided. Consequently it confined itself to the enquiry whether the appellants' failure to secure the swimming pool gates so they could not be opened by a young child, and the second respondent's failure to keep C under constant observation, constituted negligence as determined by the well-known test in that regard – namely, whether a reasonable person would in the circumstances have foreseen that C might be injured by falling into the pool, and taken reasonable steps to avert such harm. However, in doing so, it appears to have overlooked the requirement often stressed by both this Court and the Constitutional Court, particularly in recent years, that wrongfulness is also an essential and discrete element which has to be established for delictual liability to ensue ...'*

[20] While wrongfulness may be assumed in cases involving positive conduct (for example, an assault) giving rise to personal injuries, this is not the case with conduct in the form of an omission – where facts and circumstances **may** give rise to a legal duty of care and a breach thereof **may** be wrongful. In this regard, it was held at para [15] in *Stedall*, as follows:

> *'Moving to a different issue, in contrast to a positive act which causes physical harm to a person or property, a negligent omission, as relied on by the respondents, is not necessarily regarded as* prima facie *wrongful. Consequently, in* Van Duivenboden*, Nugent JA stressed that a negligent omission should only be regarded as being wrongful, "if it occurs in circumstances that the law regards as sufficient to give rise to a legal duty to avoid negligently causing harm".'*

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[11] 2018 (2) SA 75 (SCA).

[21] Concerning the necessity of pleading wrongfulness as a separate and distinct element of delict in the case of an omission, in *Stedall* it was made clear at paras [17] to [19] that:

> *'[17] There is another matter relevant to the dispute before this court. As an omission is not prima facie unlawful the respondents, on particularising their claim, should not only have alleged that the negligent omissions upon which they relied had been wrongful, but pleaded the facts upon which reliance was based in support of that contention. Indeed in* Kadir *this court stated that the facts pleaded "in support of the alleged legal duty represent the high-water mark of the factual basis on which the court will be required to decide the question". Conspicuous by its absence in the particulars of claim, however, was even a bare allegation of wrongfulness on the part of the appellants. All that was alleged was the alleged negligent failure to take reasonable steps to ensure that the swimming pool gate was closed or properly secured.*
>
> *[18] Counsel for the respondents attempted to persuade us that it was implicit in the pleading that the alleged negligence of the appellants had been wrongful. But not even on a generous interpretation of what was pleaded, can this be found. This is an issue that should have been raised before the court a quo; but it was not, and both sides proceeded to litigate seemingly oblivious to the fact that a necessary element of liability had not been mentioned in the pleadings.*
>
> *[19] In his heads of argument before this court, counsel for the respondents objected to the appellants, in their notice of appeal, having raised the fact that the court a quo had "overlooked" the fact that as C had been accompanied by her mother they were entitled to rely on the latter to look after her. This, he complained, had never been pleaded by the appellants, and if it had been evidence could have been led "to show why appellants could not in the circumstances have relied on second respondent's presence at the house to negative their defence". All of this overlooks that* ***it was in fact the respondents who bore the onus to allege and prove wrongfulness, and that the appellants were not***

called on to establish a "defence" to a claim based on wrongfulness that had not been levied against them.'

[my emphasis]

Grounds for absolution

[22] The grounds advanced were essentially threefold, namely:

23.1 The failure to plead wrongfulness where a negligent omission(s) was the plaintiff's case, coupled with the absence of any evidence as to wrongfulness;

23.2 The failure to establish any *prima facie* case against **the defendants**, i.e. the Trust; and

23.3 The failure, in any event, to establish a *prima facie* case of negligent omission.

The plaintiff's testimony and the documentary evidence

[23] The plaintiff testified that on the day of the incident she resided on the farm in a section that was *'under'* the first defendant personally. It was the first defendant, in her personal capacity, from whom the plaintiff rented the room, which was located in a wing separate to the manor house and was previously used by the first defendant's late brother. Her evidence was further that her interactions with Kalu were at the instance, and indeed with the encouragement, of the first defendant personally. The plaintiff was aware of

Kalu's history and how it came about that the first defendant brought or introduced her onto the farm. She also accepted, with reference to the relevant permit, that the first defendant personally was Kalu's owner.

[24] The plaintiff did not mention that the Trust caused Kalu to be introduced to the farm, and there was no evidence that the Trust itself played any direct role in the control over Kalu save for payment of the salary and wages of her keeper, Mr Tapaseri. Indeed, there was no evidence as to the "legal" arrangements between the first defendant personally, the Van der Westhuizens as owners, and the Trust, other than a vague reference to the first defendant having a usufruct and the documentary evidence that the Trust paid the salaries and UIF contributions of the farm manager, Mr Morgan Bricknell, and Mr Tapaseri.

[25] Significantly, the plaintiff did not establish, *prima facie*, that either Mr Bricknell or Mr Tapaseri were responsible for any negligent omission giving rise to the incident. She did not rely on vicarious liability either. In fact, she conceded in her testimony that Mr Bricknell had cautioned her against interacting with Kalu but that she persisted because the first defendant knew best, given the latter's long relationship with Kalu and her expertise in interacting with wild animals over many years. Equally significantly, the plaintiff maintained that Mr Bricknell had no *'authority'* to dictate to her how she should interact with Kalu. There was no suggestion in the plaintiff's evidence that the first defendant acted in her representative capacity as trustee of the Trust in either her own interactions with Kalu, her alleged encouragement that the plaintiff should interact with Kalu, or her alleged instruction to the plaintiff that she

should ignore the concerns expressed by Mr Bricknell and certain other individuals employed on the farm.

[26] Moreover, insofar as the first defendant herself was concerned, the plaintiff gave no evidence that there was any negligent omission on her part. Instead, contrary to what was pleaded, the plaintiff relied in her testimony on the first defendant's **positive conduct**.

[27] As to the incident itself, on the plaintiff's own version it was **she** who approached Kalu's enclosure for the purpose of feeding her the figs in the bag hanging from her right arm; that she fed Kalu a few of them by extending her own arm into the separate but adjoining caged-off section while Kalu did the same; and it was not suggested by her that this particular interaction with Kalu had anything to do with the enclosure not being *'properly fenced off'* as pleaded. It was immediately after this interaction that Kalu grabbed her arm and bit off her finger. The plaintiff herself testified that this was probably because Kalu became impatient with how slowly she was feeding her the figs.

[28] According to the plaintiff, she noticed after the incident that, in addition to the caged-off area being covered in mesh as well *'…there were more notices against the fencing, the camp surrounds, I noticed that more notices had been put up, many more'.* She conceded the presence of warning signs prior to the incident against the fencing of the enclosure. She conceded that feeding, handling or touching were prohibited by these signs.

[29] However the fact that there were warning signs did not, on her own version, deter her from interacting in the manner she did with Kalu on the day of the incident. The following passage from her evidence in chief is relevant:

> *'Ms Joubert: the defendants raise the following issue, saying that there were notice boards up, warning people not to interact with Kalu, despite the notice boards you still went and you interacted with Kalu in the manner in which you described it to the court.*
>
> *Plaintiff: Yes.*
>
> *Ms Joubert: OK. Why did you interact with Kalu in that way?*
>
> *Plaintiff: Because I was encouraged to.*
>
> *Ms Joubert: By who?*
>
> *Plaintiff: By Pat O'Neil, because Pat O'Neil at no time to this very day did she ever stop me from doing any of the things that I did do, and which as I have previously testified… such as feeding her, scratching her back etc. Pat never, ever warned me not to do it, she never told me not to do it, she actually encouraged me to interact with Kalu.*

[30] The plaintiff sought to place reliance on her understanding that Kalu had been tamed but conceded that at all material times she knew Kalu was a wild animal; that a wild animal's behaviour can be unpredictable; and that such unpredictability can be dangerous. According to her however, none of this entered her mind during all of her interactions with Kalu because *'…I put my faith and my trust and my interaction entirely on Pat O'Neil'*. Nevertheless at the time of the incident she was aware of two previous occasions when Kalu had acted unpredictably and dangerously, one involving Mr Bricknell and the other when Kalu bit off the fingertip of one of the first defendant's guests. She

conceded that before the incident she was accordingly aware that Kalu had the potential to act out of character and to bite off someone's finger.

[31] Ultimately she accepted that the incident was possibly her fault but also placed the blame on the first defendant personally. In her words *'I relied not on the people in the case of the farm at Broadlands, I relied on Pat'.* The *'people'* to whom the plaintiff referred necessarily included both Mr Bricknell and Mr Tapaseri.

Discussion

[32] The Supreme Court of Appeal in *Minister of Safety and Security v Slabbert*[12] held as follows:

> *'A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at a trial. It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding the case.'*

This dictum has been cited with approval by the Constitutional Court in *Molusi v Voges*.[13]

[33] In arguing against absolution *Ms Joubert*, who appeared for the plaintiff, submitted that the defendants created a source of danger (a positive act) by

[12] [2010] 2 All SA 474 (SCA) at para [11].
[13] 2016 (3) SA 370 (CC) at para [28].

merely being **in possession** of a dangerous wild animal. In this regard she placed reliance on Neethling et al: *Law of Delict*[14] where it is stated that:

> *'A person acts prima facie wrongfully when he creates a new source of danger by means of positive conduct (commissio) and subsequently fails to eliminate that danger (ommissio), with the result that harm is caused to another person. Prior conduct in the form of a positive act that creates a danger of harm may, in other words, be a strong indication that a legal duty rested upon the defendant to take steps to prevent the damage from materialising…'*

[34] This argument is not persuasive. There is not a single allegation in the particulars of claim that the defendants "possessed" Kalu. Their alleged "possession" of Kalu was also not relied upon by the plaintiff during her testimony, and the documentary evidence introduced thereafter, in terms of the agreed order, took this no further on the plaintiff's own evidence. *Ms Joubert* was unable to refer me to any authority that possession *per se* constitutes positive conduct and *Mr Branford* was unable to find any authority to support this proposition either.

[35] Perhaps fatal to this argument however is that it could only have a bearing on the issue of wrongfulness. Neethling et al themselves deal with it under this rubric; and at the risk of repetition and having regard to *Stedall supra*, the plaintiff neither specifically alleged wrongfulness on the part of the Trust in her particulars of claim, nor established its existence on a *prima facie* basis in her testimony.

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[14] 7th Edition at 60 (para 5.2.1).

[36] As regards *Mr Branford's* submission that the plaintiff failed to establish any *prima facie* case against the Trust, *Ms Joubert* relied on their plea, in particular paragraph 11 thereof. She submitted that in the plea the Trust raised various defences on the **merits** of the case as opposed to denying liability on the basis that they were the wrong parties before the court. She argued that a reasonable inference could therefore be drawn from the contents of the plea, amplified by the documentary evidence concerning payment of UIF contributions and wages by the Trust to Messrs Bricknell and Tapaseri, that the Trust was in fact in control of Kalu's enclosure.

[37] Again, this argument is not persuasive. The onus rested on the plaintiff, not on the defendants, to prove that the Trust was in control of Kalu. This was an allegation made by the plaintiff that was specifically denied in the plea. In any event, this argument is at odds with that advanced by *Ms Joubert* on the basis, not of control, but of possession.

[38] In respect of the ground advanced that the plaintiff, in any event, failed to establish a *prima facie* case of negligent omission, *Ms Joubert* argued that it was the undisputed evidence of the plaintiff that she could physically interact with Kalu at the caged-off area; was encouraged by the first defendant to physically interact with Kalu; and that shortly after the incident, that area was covered with mesh. These, it was submitted, established a *prima facie* case of negligence. However, the omissions upon which the plaintiff relied in her pleading were simply not borne out by her own evidence; and nor were the aspects upon which *Ms Joubert* relied part of the plaintiff's pleaded case.

[39] As submitted by *Mr Branford,* while the plaintiff's pleaded case was premised on Kalu simply grabbing her arm while she was standing close to the enclosure, her evidence showed that she had, to the contrary, been physically interacting with Kalu just prior to the incident by feeding her and that she had, to this end, been putting her hand and/or arm through the safety bars into the caged-off area of the enclosure.

[40] Significant concessions made by the plaintiff included that:

42.1 She disregarded verbal "cautions" as well as warning signs of which she was aware (including a warning sign that appeared on the enclosure right where the incident allegedly occurred);

42.2 She was aware of the previous incidents involving Mr Bricknell and another guest; and

42.3 She nonetheless repeatedly put herself at risk by regularly physically interacting with Kalu prior to the incident.

[41] A defendant is only required to take reasonable measures to safeguard others.[15] As argued by *Mr Branford*, even if it had been established, *prima facie*, that the Trust was in control of Kalu, there was no evidence to suggest that her enclosure was not sufficiently or reasonably safely secured. It was in fact the plaintiff who breached those safety measures by putting her arm and/or hand through the bars of the caged-off area.

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[15] *Pretoria City Council v De Jager* 1997 (2) SA 46 (AD) at 55H to J.

[42] Despite being aware, on her own version, of the risks and dangers posed by interacting with Kalu, including the nature and potential ambit thereof, the plaintiff nevertheless voluntarily exposed herself to these risks. To the extent that she relied on the first defendant's personal encouragement, this had nothing to do with the Trust's "control". I thus disagree with *Ms Joubert's* submission that the defendants would nevertheless still be required to prove the defence of voluntary assumption of risk. The plaintiff's own evidence established this.

[43] In respect of additional security measures effected to the caged-off area of the enclosure after the incident, in *Sea Harvest Corporation (Pty) Ltd supra* it was held at para [27] that:

> *'…With the benefit of hindsight the situation may seem otherwise; it usually does. But that is not the test. In* S v Bochris Investments (Pty) Ltd and Another*, (*supra *at 866J to 867B) Nicholas AJA said the following:*
>
> *"In considering this question [what was reasonably foreseeable], one must guard against what Williamson JA called 'the insidious subconscious influence of* ex post facto *knowledge' (in* S v Mini *1963 (3) SA 188 (A) at 196E–F). Negligence is not established by showing merely that the occurrence happened (unless the case is one where* res ipsa loquitur*), or by showing after it happened how it could have been prevented. The* diligens paterfamilias *does not have 'prophetic foresight'. (*S v Burger *(supra) at 879D). In* Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (the Wagon Mound) *[1961] AC 388 (PC) ([1961] 1 All ER 404) Viscount Simonds said at 424 (AC) and at 414G–H (in All ER):*
>
> > *'After the event, even a fool is wise. But it is not the hindsight of a fool; it is the foresight of the reasonable man which alone can determine responsibility.'"*

[44] **The following order is made:**

1. The application for absolution from the instance at the close of the plaintiff's case succeeds with costs; and

2. Such costs shall include any reserved costs orders as well as the costs pertaining to the application to re-open the plaintiff's case.

_____

J I CLOETE

For plaintiff: Adv L **Joubert**
Instructed by: Miller Bosman Le Roux
For defendants: Adv A **Branford**
Instructed by: Everinghams Attorneys