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REPUBLIC OF SOUTH AFRICA



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

CASE NO: 42538/2012

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

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DATE

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SIGNATURE

In the matter between:

C N

Plaintiff

And

**MEMBER OF THE EXECUTIVE COUNCIL FOR EDUCATION
GAUTENG PROVINCE**

Defendant

J U D G M E N T

MOSHIDI, J:

INTRODUCTION

[1] The plaintiff, acting in her own right and on behalf of her son, S N (“S”), instituted action against the Provincial Government (*“the MEC”*), or (*“the defendant”*), for damages as a result of certain injuries sustained by S, a grade R learner on 23 February 2012.

THE ISSUE FOR DETERMINATION

[2] The trial was concerned with the merits only of the plaintiff’s claim, the issue of the quantum of damages standing over for later adjudication. In essence, the plaintiff’s claim is that the school or S’s class teacher or supervisor, could have prevented the incident, but had wrongfully and negligently failed to do so.

SOME COMMON CAUSE FACTS

[3] Based on the pleadings, pre-trial conference minutes, as well as the evidence led, the following facts can safely be accepted as common cause: S, a 5 year old, and a grade R learner at the I P School, M S, S, sustained certain injuries on 23 February 2012. S sustained injuries to his leg, which was fractured, and which necessitated hospitalisation, treatment and surgery. During the course of the learners’ activities, in class or the school playing area, S sneaked away, apparently without the class teacher’s awareness, and found himself in the school’s jungle gym or the castle gym. It is not in dispute that S was injured at the castle gym. The class teacher at the time was Ms

Busisiwe Khumalo (*"Khumalo"*). She has, regrettably, since died. The manner and nature in which the evidence was presented in this trial, as to how exactly S was injured, was by far not a model of perfection. It was largely hearsay and circumstantial evidence, as shown below. However, and crucially, the fact that S sustained the injuries whilst at school, was not in dispute at all. I must also hasten to observe that the particulars of claim were also prepared with some imperfection so much that, certain allegations therein made, could not be sustained by any evidence, which necessitated an amendment or abandonment or concession of such allegations during the trial and/or in argument.

THE WITNESSES

[4] What further compounded matters, was the following: the plaintiff, Ms C N, was the only witness in her case. She presented as an unsophisticated person, with a standard 10 level of education. She received a call from the school on the day about her injured son. She proceeded to the school. On arrival, S had already been taken by his uncle to the local clinic. As stated before, the plaintiff's evidence regarding the injury to her son, was largely hearsay.

[5] The principal of the school, Ms S M Mbuli (*"Mbuli"*), gave a report to the plaintiff as to how S was injured. This was during a meeting at the school. The report came from the class teacher, Khumalo. In broad terms, S was injured whilst playing on one of the swinger operations situated in the nearby jungle

gym. The plaintiff confronted Mbuli as to why S was not taken by the school to the clinic. Mbuli said that she was busy and had no time to do so. The report given to the plaintiff by Mbuli, and which was confirmed by Mbuli in her evidence, on her version, came to this: that on the day of the incident, S had asked the class teacher, Khumalo, to go to the toilet. The jungle gym where S was injured, was for the use of grade R's only, and was part of the grade R's syllabus. Instead, S forced his way into the locked and fenced off jungle gym, and injured himself.

[6] However, the above version, differed substantially from what the plaintiff was told by S, and another unidentified teacher. S told his mother that the learners were playing in the jungle gym. He and another learner, X, were at the top of the swings. X pushed S which caused him to fall to the ground and was injured. The plaintiff also denied the version of Mbuli that she was aggressive and confrontational during their meeting. The version of the plaintiff that she was subsequently visited at home by the above named unidentified teacher, and given a similar report as that of S, was not seriously challenged.

THE PLAINTIFF'S EVIDENCE BRIEFLY

[7] The plaintiff testified that, since her son was in grade R, she expected that the school and teachers would look properly after him. In fact, the school conveyed to the parents that, when grade R's play, they ought to be supervised. This was so since some of the playing equipment at the jungle

gym was situated high, and surrounded by a thorny fence as well. She found it hard to accept that her son was injured at school.

[8] The plaintiff was cross-examined. It was put to her that the school regretted the unfortunate incident, which was unexpected. When it was put to her that the school authorities had however taken proper measures to prevent such incidents, which proved in vain, she had no comment. She conceded readily that she was not present during the incident. Based on her knowledge of the school, the jungle gym area was not fenced off as contended by the school. The further cross-examination of the plaintiff established further common cause facts which I deal with later below. The plaintiff denied emphatically that S returned to the school after the incident on 23 February 2012.

APPLICATION FOR ABSOLUTION FROM THE INSTANCE

[9] At the conclusion of the plaintiff's case, an application for absolution from the instance was launched. It was opposed strenuously. The application was refused by the court. The reasons for such refusal now form part of this judgment.

APPLICATION FOR ADMISSION OF HEARSAY

[10] At the commencement of the trial, the defendant had applied for the acceptance of the hearsay evidence of its only witness, Mbuli. The application

was based on the provisions of sec 3(1)(c) of the Law of Evidence Amendment Act 45 of 1998 (*“the Evidence Amendment Act”*). The application was premised principally on the common cause fact that the class teacher at the time, Khumalo, had since died, and was therefore obviously unavailable to testify in these proceedings. Mbuli was therefore, to testify solely on the report made to her subsequently by Khumalo. See *Giesecke and Dvrient Southern Africa (Pty) Ltd v Minister of Safety and Security* 2012 (2) SA 137 (SCA).

[11] The application to lead the hearsay evidence of Mbuli was not opposed. In fact, the parties agreed at the commencement of the trial that the hearsay evidence could be led. In the end, the evidence of Mbuli must be assessed and evaluated as such. From the further evidence of Mbuli, it was not in dispute that: S was at school on the day of the incident; he was with other co-learners, under the supervision of Khumalo; he was injured on the school premises without Khumalo being aware, either on the version of what he told his mother, or the version of Mbuli, or that of the unidentified teacher; all of which was hearsay evidence; that S was taken to the local clinic for treatment of his fractured leg; and that there was a confrontation between his mother and Mbuli subsequently. It was further not in dispute that in 2012, the school had some 300 learners, of which some 30/40 were grade Rs, with one teacher only for grade Rs. The jungle gym situated not far S's classroom, about 70/78 meters away, which was meant exclusively for the grade Rs, was under repairs since something was wrong with one of its swingers. The key to

the entrance gate of the jungle gym was kept by Khumalo, whilst Mbuli also kept a duplicate.

[12] The cross-examination of Mbuli, during which she made certain concessions, was rather revealing. The concessions were made, in my view, quite correctly. She could not verify the veracity of the report given to her by Khumalo. The teachers themselves, without outside assistance, undertook the repairs to the jungle gym. There were not adequate or sufficient precautions taken by the school to guard against incidents such as the one under discussion, especially whilst hosting young and vulnerable and energetic and curious learners, such as S at the school. Further that such very young learners could easily engage in frolics of their own during school activities. Mbuli, whilst being emphatic that the school tried its best in the circumstances to avoid any injuries caused to learners, and that the incident was the first of its nature, conceded that the school being in a capacity of *in loco parentis*, could have done better. Grade Rs in particular, and even older learners, must be supervised adequately since they turned to play anyhow on their own.

[13] The further cross-examination of Mbuli, revealed that: whatever supervision class teacher, Khumalo, had in place on that fateful day, could have resulted in a lapse, which made it possible for S to sneak away from the other learners and Khumalo, since Khumalo had a large group of grade Rs to constantly monitor. As regards the conflicting versions of Mbuli and S's mother, whether or not S returned to the school after the incident, Mbuli conceded readily that she had no documentary proof to support her

assertions that S had in fact returned. In these circumstances, the mother's evidence must be accepted. In any event, not very much turned on this aspect. Mbuli conceded that it would be hard to accept her version. The burglar bars to the gate of the jungle gym, through which S sneaked, on the version of the school, were properly and carefully constructed to avoid such incidents. The school nevertheless accepted that Si cannot be blamed for such unfortunate incident, in view of his tender age of 5.

[14] On the above evidence, with all its imperfections on both sides, the pertinent question is this: whether any negligence can be ascribed to the school during the incident, and whether the school breached any duty of care towards S and the plaintiff in the circumstances.

[15] The often quoted and classical case is *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E-F. In *McIntosh v Premier, KwaZulu-Natal and Another* 2008 (6) SA 1 (SCA), at para [12] the Court said:

"The second inquiry is whether there was fault, in this case negligence. As is apparent from the much-quoted dictum of Holmes JA in Kruger v Coetzee 1966 (2) SA 428 (A) at 430E-F, the issue of negligence itself involves a twofold inquiry. The first is: was the harm reasonably foreseeable? The second is: would the diligens paterfamilias take reasonable steps to guard against such occurrence and did the defendant fail to take those steps? The answer to the second inquiry is frequently expressed in terms of a duty. The foreseeability requirement is more often than not assumed and the inquiry is said to be simply whether the defendant had a duty to take one or other step, such as drive in a particular way or perform some positive act, and, if so, whether the failure on the part of the defendant to do so amounted to a breach of that duty. But the word 'duty', and sometimes even the expression 'legal duty', in this context, must not be confused with the concept of 'legal duty' in the context of wrongfulness which, as has been indicted, is distinct from the issue of negligence. I mention this

because this confusion was not only apparent in the arguments presented to us in this case but is frequently encountered in reported cases. The use of the expression 'duty of care' is similarly a source of confusion. In English law 'duty of care' is used to denote both what in South African law would be the second leg of the inquiry into negligence and legal duty in the context of wrongfulness. As Brand JA observed in Trustees, Two Oceans Aquarium Trust at 144F, 'duty of care' in English law 'straddles both elements of wrongfulness and negligence'."

See also Neethling *et al*, *Law of Delict* 7ed, p 138, where it is emphasised that the test is "(a) *a diligens parterfamilias in the position of the defendant would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; (ii) would take reasonable steps to guard against such occurrence; and (b) the defendant failed to take such steps*".

[16] One of the contentions raised by Mbuli in the present matter was that an incident such as under discussion had never occurred at the school. What comes to mind immediately is the question whether such contention is reasonable and sufficient justification for what happened to S. In my considered view, it is not. In *Hawekwa Youth Camp v Byrne* 2010 (6) SA 83 (SCA), the facts were briefly as follows: the father and natural guardian of a minor, about 9 years old, and a grade 3 learner at a school, had accompanied a school group under the control of his teachers on a two-day excursion. The group arrived at the camp where they were accommodated in bungalows. During the early hours of the next morning, the minor was found on the cement floor of his bungalow. No one witnessed how the minor landed up on the floor, but he was unconscious and appeared to be having convulsions. He was taken to hospital where medical examination revealed that he had

suffered a fractured skull with underlying brain injuries which led to some degree of permanent brain damage. In the course of dismissing the appeal of the camp, and finding in favour of the father and natural guardian of the minor, the Court at para [29] of the majority judgment said:

“Another argument raised on behalf of the Minister (the Minister of Education in the Western Cape), was that the ... school had previously used the same camp site for ten years; that the teachers involved had not been informed of any reported incident where a child had fallen off an upper bunk; and that they therefore had no reason to think that it would happen on this occasion. Though this argument might be superficially attractive, I believe it is flawed. Firstly, the reasonable teacher would appreciate that incidents might have gone unreported. Secondly, logic dictates that once a risk has been recognised as inherently foreseeable, such as, for example, the one created by an unfenced swimming pool, the reasonable person will not disregard that risk simply because it had never materialised before.” (my insertion and underlining)

[17] In the context of the present matter, the following questions arise: did the defendant and the school and the class teacher, foresee the occurrence of this incident? If so, what reasonable steps were taken to prevent it? The first question must be answered in the positive, and the second, unfortunately, in the negative. This is so because of the following: S was in a class of 30/40 grade R learners, with Khumalo as the only class teacher; the jungle gym was near his classroom; Khumalo was not aware how he was injured, on either versions; the school had told parents, including the plaintiff, that grade Rs must not be in the jungle gym unsupervised; the burglar to the gate of the jungle gym proved inadequate to prevent a learner from gaining entrance thereto; having regard to the *ratio* of class teacher to learner, at the school, it was clearly not reasonably possible for Khumalo to keep proper supervision

(not continuously) over all the learners under her supervision, all the time; Mbuli conceded this much and said that it was an unfortunate incident, and that all the school's preventative measures, could have been better but proved in vain; at the time of the incident, the jungle gym was under construction or repairs undertaken by the school itself; there was no evidence of any school patrols or supervision in the vicinity of the jungle gym; learners at the age of S, 5 year olds, are considered, at least in respect of criminal capability, to be *doli incapax*. In respect of delictual claims, the position is stated by Neethling (*supra*) at p 131, as follows:

“According to our law, a person may lack the necessary mental capacity (and he is thus not accountable – culpa incapax) ... A child who has not completed his ninth year (an infans) is always regarded by the law as being culpa incapax (lacking capacity).”

See also *Jones NO v Santam Bpk* 1965 (2) SA 542 (A), at 552A-C. The criticism levelled against the plaintiff for not leading the evidence of S in the trial, was therefore without merit at all.

[18] It is significant that the Court, in *Hawekwa Youth Camp*, (*supra*), per Brand JA, at para [25] of the judgment said:

“In this case I find it convenient to deal with the question of wrongfulness first, primarily because I believe the answer to be self-evident. Properly formulated the enquiry under this rubric is this: on the assumption that the teachers in charge of the group could have prevented the harm that Michael suffered and that they had negligently failed to do so, should they – and by vicarious extension, the Minister – as a matter of public and legal policy, be held liable for the loss resulting from such harm? But for the confusion between wrongfulness and negligence which transpires from the Minister's heads of argument, it appears to me that wrongfulness had in fact been

conceded. What is in effect disputed is negligence. However, be that as it may, I am satisfied that wrongfulness had been established. In this regard I am in full agreement with the following statement by Desai J in Minister of Education and Another v Wynkwardt NO 2004 (3) SA 577 (C) at 580A-C:

'It was not in dispute that [the respondent's minor son] R was injured at school while under the control and care of the appellant's employees and it was fairly and properly conceded that teacher owe young children in their care and legal duty to act positively to prevent physical harm being sustained by them through misadventure. It was submitted that in this instance, as in many other delict cases, the real issue is "negligence and causation and not wrongfulness".'

In a recent decision of a full court in this division, and in the matter of *Mgaga Beauty v MEC For Basic Education* (case number A5066/2014), the facts were briefly as follows: the plaintiff's minor son, a learner at a school, was hit on the head with an axe by a fellow-pupil. The plaintiff sued for damages in respect of the injuries suffered by her son. In the course of upholding the appeal with costs (in favour of the plaintiff) at para [33] of the judgment the Court said:

"It was submitted that Ms Manyaka and Ms Molefe [members of staff] both conceded that these were the steps required and attempted to persuade the court that they had been taken by the school. The school's safety and security policy also provided that its purpose was to ensure the safety of all persons on the school premises in terms of the South African Schools Act No 84 of 1996 and the guidelines for the achievement of that purpose, including the rules that were to be complied with by learners and educators, supervision and control by educators and learners were in place." (my insertion and underlining)

In *LUR Vir Onderwys En Kultuur, Vrystaat v Louw En 'n Ander* 2006 (1) SA 192 (HHA), it was held that in terms of sec 60(1) of the South African Schools Act 84 of 1996, the State is liable *'for any damage or loss caused as a result of any act or omission in connection with any educational activity conducted*

by a public school and for which such public school would have been liable but for the provisions of this section'.

[19] Based on all the above, as well as the legal principles referred to, I conclude that the plaintiff has succeeded, on a balance of probabilities, in spite of the defendant's contentions to the contrary, to make out a case for the relief sought against the defendant. In any event, on the common cause factors, including that S was about 5 years old, and injured at school, the defendant has not shown that, based on its statutory duty, it had taken all proper and reasonable measures in order to ensure the safety of S. The occurrence of the incident cannot be said to have been too remote for the defendant's staff not to have foreseen it. This much was conceded by Mbuli. The costs which is a discretionary matter, must follow the result.

[20] Prior to concluding, one other unconscionable matter has to be mentioned. It is that: at the end of closing argument, counsel for the plaintiff, who had argued his case based on oral submissions only, undertook to provide the court with written heads of argument soon thereafter. However, as at the date of the preparation of this judgment, this had not been done. On the contrary, counsel for the defendant had prepared thorough and helpful written heads of argument. This kind of conduct ought not to be countenanced by the courts in the strongest possible terms. I need say no more.

ORDER

[21] The following order is made:

21.1 The defendant shall be liable to the plaintiff for all proven damages as a consequence of the injuries sustained by S at I P School on 23 February 2012.

21.2 The defendant shall pay the costs of the action.

**D S S MOSHIDI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

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