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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 25873/2020
25874/2020

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED: N
Date: 22/5/2023

In the consolidated matter between:

L[...] G[...] N[...] obo S[...] H[...] N[...]

First Plaintiff

T[...] O[...] N[...] obo B[...] A[...] N[...]

Second Plaintiff

And

**MEMBER OF THE EXECUTIVE COMMITTEE OF EDUCATION:
GAUTENG PROVINCE**

Defendant

JUDGMENT

NICHOLS AJ

Introduction

[1] This is a consolidated action against the Member of the Executive Committee of Education, Gauteng Province (the MEC) by the plaintiffs L[...] G[...] N[...] and T[...] O[...] N[...] in their representative capacities as the mothers and guardians of the minors S[...] H[...] N[...] (SHN) and B[...] A[...] N[...] (BAN) respectively.

[2] The two minor children, SHN and BAN, sustained various severe injuries on 16 January 2020 at R[...] Primary School, Soshanguve (the school) when a newly constructed gate fell on them whilst they were on their way to the school's portable toilets unaccompanied. They were both grade 1 learners at the school when this incident occurred. SHN and BAN were 5 and 6 years old respectively when the incident occurred. The plaintiffs claim damages as a result of the incident.

[3] At the commencement of the trial and at the request of the parties, an order separating the issues of liability and quantum was granted.

[4] It is common cause that the school is a public school¹ and the MEC would be vicariously liable for the negligent acts of the employees of the school.

Pleadings

[5] The plaintiffs' pleadings mirror each other substantially and plead that the two learners sustained severe injuries when they were 'hit' by a newly constructed gate at the school. These severe injuries include broken bones that have resulted in both learners' inability to walk again.

[6] It is pleaded that the learners' injuries were caused solely by the negligent conduct of the MECs employees who had a duty of care of the learners and who were negligent on, inter alia, the following grounds:

¹ As defined in the South African Schools Act No 84 of 1996.

(a) by placing temporary portable toilets in the school playground, which required that learners, particularly SHN and BAN, pass through a huge newly constructed gate to access these portable toilets;

(b) the newly constructed gate was not properly braced and/or supported; and

(c) there were no adult(s) in the vicinity of the incident to supervise the learners seeking to pass through the gate to access the portable toilets.

[7] The plaintiffs plead further that a reasonable person in the position of the MECs employees would have foreseen the reasonable possibility that their negligence and / or failure to:

(a) properly brace and/or support the newly constructed gate and/or insist that the newly constructed gate be properly braced and/or supported.

(b) place an adult(s) in the vicinity of the newly constructed gate to supervise the learners seeking to pass through the gate to use the portable toilets.

(c) place the portable toilets in a different location which would not require the learners and in particular SHN and BAN to pass through the newly constructed gate to access the portable toilets.

(d) would cause injuries / damages to the learners and in particular to SHN and BAN.

[8] Further, that a reasonable person in their position would have taken reasonable steps to guard against such injuries/damages; and the MECs employees' failure to take such reasonable steps was a negligent failure in the duty of care which they owed to learners and in particular SHN and BAN.

[9] The MECs amended plea is essentially a denial of the allegations of negligence on the basis that:

- (a) the portable toilets were accessible to learners since they were located on the school premises.
- (b) the school complied with the guidelines on safety and security.
- (c) the incident which led to the injuries suffered by SHN and BAN was unforeseeable and the negligence, if any, remote.

[10] In response to the plaintiffs' written request for further particulars required for preparation for trial, the MEC confirmed, inter alia, that:

- (a) the construction of the 'boundary wall' and sliding gate was approved by the school's governing body and not the MEC.
- (b) the school's governing body sub-committee of maintenance (SCM) commissioned and approved the design specification for the boundary wall and sliding gate.
- (c) a detailed drawing was not issued for the construction of the boundary wall and sliding gate, nor was regulatory approval sought for the construction of the boundary wall and sliding gate. The boundary wall details were outlined and provided to the service provider to reinforce the boundary fence on the southern and western side of the school building within the school premises as it was viewed as a gateway for criminals breaking into the school at the time. The steel palisade fence was not serving the purpose of securing the premises. Approval for the boundary wall and sliding gate was not requested as it was considered an alteration to the existing school perimeter fence.
- (d) regulatory approval for the construction of the wall and sliding gate was not sought from the local authority because the activity was considered to be

an alteration/ modification of similar fence although using different material within the school premises.

(e) Madipopo Construction & Projects CC (the contractor) was the service provider which was contracted for the construction of the entire project, and which designed and constructed the wall and sliding gate based on the school governing body's scope/specifications.

(f) the first phase of the project was the construction of the wall and sliding gate. This phase was complete when the incident occurred on 16 January 2020. The gate was open for use from 15 January 2020 when the school re-opened for the year. The second phase of the project was underway, and the construction site associated with this phase was fenced off. Traffic control cones and precautionary tape were also used to demonstrate a construction site and prevent unauthorised entry.

The evidence

[11] The plaintiffs led the evidence of a witness to the incident, Ms Popia Hlongwane, a relative, Ms E[...] S[...] N[...] and an expert witness, Mr Willie du Preez. The MEC adduced evidence by the principal of the school, Mr Gerald Poo and an educator Ms Nombuso Mkhumbuza. The totality of the evidence is uncontentious.

[12] The grade one learners, SHN and BAN sustained severe injuries at the school on 16 January 2020 at approximately 10h30 when a large newly constructed sliding gate (the gate) fell on them. The school made use of chemical portable toilets and to access these toilets at that stage the learners had to pass through the gate. The learners were not accompanied by any adult when the incident occurred.

[13] The gate formed part of a newly constructed wall (the wall) that was built around the school buildings within the fenced off school property. The gate and wall were designed and constructed by the contractor on instructions of the SCM and pursuant to approval provided by the school governing body.

[14] The school has 1352 learners and 32 personnel. It re-opened for the year on 13 January 2020 when staff and educators returned to school. The school year for learners only commenced from 15 January 2020 when the school re-opened for the learners. General construction was taking place on the school property on the day of the incident. The first phase of construction, which involved the construction of the wall and gate, was complete and the second phase of construction was occurring on the south side of the school property.

[15] Ms Hlongwane testified that at the time of the incident she was employed by a feeding scheme for the school on a two year contract. Her contract has concluded, and she is no longer employed at the school. When the incident occurred on 16 January 2020, she had been employed at the school for a year.

[16] She returned to the school for that year on 15 January 2020. When she did, she was informed by Solly, the gardener at the school, not use the gate because its construction was incomplete, and it could fall on them. He said they would be told when to use the gate and security would be posted at it. She noted that security had not been posted at the gate on 15 or 16 January. Solly is now unfortunately deceased, and she is unaware if he relayed this message to anyone else.

[17] On 16 January 2020 at about 10h30 she witnessed the incident occurring. Breaktime is at 11h00. She was delivering food from 10h30 for the 11h00 breaktime when the learners would have their lunch. She was carrying a tray of food to the classroom for the grade three learners' lunch when she saw the entire gate fall.

[18] There were several learners playing in the school yard at the time and there were learners in the vicinity of the gate which fell on them. She ran to help these learners and managed to pull BAN out from under the gate, whilst Solly pulled SHN out from under the gate. They carried the learners to the principal's office, and she accompanied the principal in his car when he took the learners to the clinic for medical attention. BAN was distraught and in immense pain so she stayed as long as she could with her from the moment she pulled her out from under the gate until she was obliged to leave the clinic. BAN told her that they were going to the portable toilets when the incident occurred.

[19] Ms Hlongwane identified the gate that fell on the learners from photographs shown to her. She testified that during her employment at the school she did not interact with any safety officers generally or in the kitchen. She was not informed of safety laws. She was only informed that if anything happened in the kitchen, like if she was burnt by a pot, then that would not be the responsibility of the school. There were no visits by any safety inspectors. The only inspectors that visited that she was aware of related to the quality of food which they made for the learners.

[20] During cross examination, Ms Hlongwane confirmed that she did not know whether the learners had been told about the safety of the gate. She maintained that she could only speak for herself. The school closed for the festive period the year before on or about 15 December 2019. At that time construction was taking place at the school because a kitchen was being built. She was not aware whether those contractors were the same contractors who built the gate.

[21] The principal and senior members of the school did not say anything to her about the safety of the gate. She confirmed that she reported to Ms Ngobeneni who also did not mention any safety concerns about the gate, and she did not enquire into this with her. Solly told her that he was informed about the gate by the principal. When Ms Hlongwane was advised that the principal will deny having issued such instruction to Solly, she conceded that she could not respond to that but maintained having had such conversation with Solly.

[22] She further testified that she did not see safety cones or safety tape adjacent to the construction site when the school closed in December. She confirmed the location of the portable toilets on the day of incident as outside the wall and gate next to the playground/sports field. She also confirmed that the wall encircled only the school buildings and not the entire school premises.

[23] She also testified that a vendor selling sweets also witnessed the incident and that four learners in total were injured by the gate, but she was unaware of the status of the other two learners. She maintained that lunch was taken to the learners in their classrooms, and they had to leave their classrooms to access the portable

toilets whilst the educators remained in the classrooms. She maintained that she saw the gate fall on the learners as she was walking to the classroom. That generally around that time the learners were told to go the toilet if they needed to. Further that she only saw the gate fall on four learners and that there were other learners in the school yard at the time.

[24] Ms N[...] is related to the learners who were injured. SHN is her sister's child and BAN is her sibling. On 16 January 2020, she was at home when her sister received a call from the school telling her to go to the clinic because the learners were injured. She overheard the conversation and immediately ran to the clinic to see the learners. She found SHN sitting on a stretcher and BAN sitting on a chair. When she asked SHN what happened, he told her that they were passing by, and the gate fell on them.

[25] The learners were then taken by ambulance from the clinic to the hospital. Ms N[...] proceeded to the school and to the gate, which was pointed out to her by the security as the gate that fell on the learners. She observed 12 to 13 men around the gate at this time and one of them had a welding machine. She took a photograph of the gate with her cellphone and went home.

[26] She confirmed that the photograph she took is depicted as photograph 00 in exhibit A. This photograph depicts about eight men holding up a solid gate which appears to be almost double their height. The gate is adjacent to a brick wall of similar height. Ms N[...] also confirmed that the portable toilets were situated outside this gate.

[27] Ms N[...]’s evidence was not challenged in any respect and is accepted.

[28] The plaintiff’s expert witness, Mr du Preez is a forensic engineer, registered civil and professional engineer, and construction project manager. He is a consultant to the IMF and the World Bank. He has 41 years of experience, 27 of which were with the South African police services as a forensic engineer, and he has been involved in over 3500 cases. His report dated 7 January 2021 was entered into evidence and marked as exhibit A.

[29] Mr du Preez was instructed to investigate and provide an opinion on the sliding gate that dislodged from its support and fell over at the school. He was provided with two photographs as part of his instruction, one of these being the photograph taken by Ms N[...] on the day of the incident and the second being a google maps photograph of the school property. He was not provided with a copy of the design or drawing specifications for the wall or gate.

[30] He conducted an inspection at the school on 7 December 2020, during which he took photographs of and inspected the wall and gate. He took the photographs to depict the defects and poor construction workmanship that he observed during his inspection. The photographs were annexed to and formed part of his report dated 7 January 2021.

[31] He confirmed that photograph 00 was one of the photographs provided to him and he was informed that it had been taken on the day of the incident. He noted that it indicates the gate as it was lifted back into position. He also observed from photograph 00 that there are no warning signs at the gate or barricades warning of a potentially dangerous situation.

[32] Photograph 28 is the second photograph which was provided to him. It is a google maps photograph of the school property taken on 20 January 2020. It depicts the portable toilets located outside the wall and gate of the school buildings and to the south of the school buildings and north of the sports field. Photograph 29 depicts the portable toilets in a new position on the school buildings side of the wall.

[33] Photograph 4 depicts the elevation of the gate from the front. Although he did not know the weight of the gate, he noted that it was solid steel and quite substantial. He informed the Court that he did not believe that he would be able to stop the gate if it was falling.

[34] Photographs 2, 3 and 5 to 13 depict poor welding practices on elements of the gate. The welding has not been properly done or cleaned off. The surfaces should be properly prepared. Slugs should be chipped off and the surface should be grinded

and smoothed properly to allow you see and notice any defects with the welding. The welding was not continuous on one of the horizontal elements that is supposed to stop the gate in the closing position and the welding was poorly done on one corner of the element only, thereby providing a poor stopper mechanism. The welding was porous. The elements were not lined up and did not evidence a secure welding position.

[35] Overall, the standard of the welding depicted poor welding practices which indicated that there was no quality control and sign off by a qualified and experienced person confirming that it accords with the design or drawing specifications.

[36] Photographs 14 to 24 depict construction deficiencies in the wall which indicate that the wall was not constructed in accordance with SANS 10-400-2011² Part K: Walls (SANS 10-400K), which provides the minimum standards for free standing walls. SANS 10-400K provides, inter alia, that free standing walls shall be designed and constructed to not exceed certain height requirements.

[37] The maximum height above ground to which a free-standing wall with no piers may be built is 2.2 m. A free-standing wall with piers projecting on one side may be built to a maximum height above ground of 2.3 m. A free-standing wall with piers projecting on both sides may be built to a maximum height above ground of 2.1 m. The values which are determinative of the wall's height in each case are the nominal wall thickness, the nominal dimensions of the piers (overall depth x width) and the maximum centre to centre pier spacing distance. These values are irrelevant in these circumstances since Mr du Preez determined and opined that regardless the wall was non-compliant because the height of the wall was 2740 mm / 2.74m.

[38] Additionally, Mr du Preez contended that there was non-compliance with paragraph 4.2.4.2 of SANS 10-400K which provides that 'walls terminate in a pier or a return.' He referred to photographs 15,17,18 and 20 which depict the vertical line of

² The South African National Standard with that number, issued by the South African Bureau of Standards in terms of the National Building Regulations.

the pier and the wall coming onto the pier. He explained that this means that the bricks of the wall come into pier without stabilisation. It is clear, he opined, that the walls terminate against the pier and not inside the pier rendering it non-compliant.

[39] Mr du Preez explained that a construction site is a site on which any portion of the work is being undertaken. Until a certificate of completion is provided, the entire site remains a construction site. If a project is being completed in phases, then the entire site remains a construction site. Children should not be allowed in or near a construction area.

[40] Mr du Preez opined that quality control on any construction site is of paramount importance. This responsibility rests with the person who appointed the contractor, and that person is usually the architect or designer. He concluded that the design in total for the wall and gate was not done by a competent person or that person did not manage and inspect the work diligently. There was either no specification in relation to quality required or nobody with experience and training, diligently exercising the function of quality control.

[41] He was not provided with a copy of the contractor's contract. He assumed that the school, as the client, appointed the contractor. If any architect or engineer was appointed to the project to prepare the required drawing / design, that person would also have been appointed by the school, as the client.

[42] His conclusions and findings were that the wall was constructed incorrectly; the welding in total was sub-standard with no quality control; the construction site was not demarcated properly during the construction; it is unclear who designed the wall and gate and would be responsible for construction site management, control and safety; and there was no stopping mechanism for the gate, which allowed it to move beyond its boundaries where it had no support and fell over. He opined that the stopping mechanism would not necessarily be visible to a layperson. It could be obscured by grass or items, or they may not know what it is.

[43] During construction site safety is important. The responsible person must ensure that the site is safe and only essential people are allowed access to the

construction site. He was not provided with copies of the practical completion certificates, despite formal request. A safety plan must be compiled for the construction site before construction commences. He requested a copy of the safety plan, and it was not provided. This plan should indicate the exact delineation of the construction site and areas that are out of bounds to non-construction workers and personnel. This construction area should be further identified by barricading.

[44] Mr Du Preez was asked to comment on the fact that the school had no authorisation or approval from the local authority for the construction of the wall and installation of the gate because the school considered it as a mere alteration to the existing palisade school fence. He noted that he was unaware of the type of fence the wall replaced, however for a wall of this magnitude it is a requirement of SANS 10-400 that there is a regulatory approved drawing. He expressed the strong opinion that the replacement of a palisade fence with a brick wall is not an alteration.

[45] Mr du Preez's evidence was largely unchallenged during cross-examination. He testified that he considers the technical and engineering aspects when conducting an investigation and compiling his report. He does not consider the school's finances although he conceded a school's resources will have a bearing on his conclusions.

[46] He confirmed that his inspection was conducted 11 months after the incident occurred and he did not know if changes had been made to the gate during that period. He maintained, however that wear and tear would only impact the wheels and moving parts of the gate during this period and the quality of the body of the gate would be the same. Even daily use by 1400 learners would only affect the mechanical and moving element of the gate but not the quality of the body of the gate.

[47] He conceded that he had not interviewed or spoken to any witnesses regarding the circumstances of the incident. He confirmed that he was informed that the learners who were injured were attempting to pass the gate to go to the temporary toilets depicted on photograph 28 when the gate fell and injured them. That on the day when he conducted his site inspection, the portable toilets had been

moved and were situated on the school side of the wall as depicted in photograph 29.

[48] The principal, Mr Poo testified that he has been principal at the school since 2018. The school is a quintile one school, and the parents are therefore not required to pay any school fees. The school is funded by an annual grant. He testified that the incident occurred at about 10h15. He was informed that the gate had fallen on learners. When he observed these learners in the sick bay, he decided that they were clearly in pain, and the emergency services would take too long to arrive, so he drove them to the clinic.

[49] Construction had been taking place at the school since December 2019 with four planned phases. The construction project was approved by the school's governing body and overseen by the SCM of which he was a member. Phase one was the construction of the wall and gate. The contractor was contracted on the design and construction of the wall and gate which were certified safe and complete on 13 January 2020 when the school opened for the staff and teachers. The gate was opened and put into use from that day.

[50] The quality control and inspection were performed by the SCM which had been summoned to inspect whether the gate complied with their specifications. They concluded that it did, and the school then paid the contractor and asked it to move on to phase two of the construction project. He testified that the SCM used a checklist to determine whether the gate complied with their specifications. With regard to the sub-standard welding, which was reported by Mr du Preez, he averred that as a layperson, he and the SCM members considered the gate and were of the view that it was satisfactory and met their requirements. He testified that they were satisfied with the safety of the gate, and they could not have foreseen such an incident occurring. The contractor and SCM members did not raise queries regarding the safety of the sliding gate.

[51] He confirmed that Ms Hlongwane was a contract employee with the school's feeding scheme reporting to Ms Ngobeni. He also confirmed that Solly was employed by the school as one of five general assistants and that he is now

deceased. He denied having informed Solly that the gate was unsafe. He in fact denied being aware that the gate was unsafe. He communicated with staff and teachers by SMS and his communication book. Solly did not form part of his management or communication team.

[52] He testified that the learners have their lunch in the classroom. The educators are in charge in the classroom and have a discretion whether or not to allow a learner to leave the classroom to go to the toilet. Learners need to be supervised when they have lunch in the classroom or when they are in the classroom. At that stage he had 32 teachers for 1352 learners from grade R to grade seven. The normal ratio of teachers to learners is usually 1:36, however the school is situated in a high-pressure admission area.

[53] During questioning under cross-examination Mr Poo disputed Solly's authority to unilaterally inform staff members that the gate was not safe and maintained that Solly was not part of his communication team. He testified that the wall and gate were required because of the ongoing burglaries on the palisade fence and confirmed that the Department of Public Infrastructure had not been involved in the school's construction project.

[54] In his view this construction project was a minor project based on the budget which was allocated for it regardless of the fact that the wall was a 2.74m high walls. He stated that 12% of the school's budget is allocated to maintenance and repairs and the school must work within that budget. However, he could not recall the costs of the project or even an estimate of the costs.

[55] He testified that learners get permission from the educators to leave the classroom and / or go to the toilet during class time. The educator will have a record of the learners who went out at the same time. The learners did not need to touch the gate as it was open and had been open from the morning. He maintained that the learners were supervised at the time of the incident although they were unaccompanied.

[56] He testified that though the portable toilets were located on school property on the day of the incident, they had mistakenly been placed in an incorrect location outside the wall near the sports field. They should have been located on the school building side of the wall and were in fact moved to that location before the end of the week of 16 January 2020.

[57] He did not know the weight of the gate, but he confirmed that it was about 2m in height and that it was not remote controlled. The gate would be opened in the morning and left open for the rest of the day. He confirmed that there would be no security at this gate.

[58] He confirmed that there is a district school safety unit which is coordinated by Mr David Moses. A telephone call or email is a sufficient mode of communication to request his attendance at the school or assistance. They did not seek this unit's assistance beforehand to compile a safety plan and only reported the incident to this district school safety unit. He confirmed that he is not aware of the role played by safety officer although the school does have a safety officer. His reason for not requesting the school safety office or Mr Moses to pre-incident conduct a safety check or compile a safety plan was vague and unconvincing.

[59] He was questioned about his testimony that he looked at the gate and it seemed fine although he also testified that he knows nothing about construction because he is an educator. His response was that they considered the gate and whatever needed to be in place was there or appeared to be there. The gate seemed perfect for their purposes, but he conceded that an expert could tell difference.

[60] He accepted Mr du Preez's opinion that the lack of a stopping mechanism is what caused the gate to fall. He testified that he did not establish the cause of the gate falling although he asked the contractor. He conceded that in the absence of an explanation by him and the school, the expert's opinion that the probable cause was the lack of stoppage i.e., workmanship and / or the design was reasonable and that both could have played a part. He expressed in re-examination that this was a valuable and unbiased opinion. However, he had been assured of the gate's safety

by the contractor and the issue of setting safety measures for the gate never arose prior to the incident.

[61] Mr Poo was of the view that he had appropriate security measures to mitigate risk to learners. The toilet routine for the learners was prescribed as a safety measure and they could ask the individual educators for additional permission.

[62] He conceded that he has no construction knowledge, and he considers himself an expert educator. He confirmed that construction was still ongoing at the school, but he disputed that there was any construction required for the gate or wall. He maintained that he had no safety concerns regarding the gate as the wall and gate were certified safe by contractor. In this regard, the contractor was not called to testify and the certificate of completion which was requested by the plaintiffs for the construction was not produced.

[63] Ms Nombuso Mkhumbuza has been employed at the school since January 2017. She arrived at the school on 16 January 2020 at 07h30. She has a routine for toilet breaks with the learners and she takes them to the portable toilets every day at 09h00. At 10h30, she would be waiting for the feeding scheme ladies to deliver the learners lunch and is required to remain in her classroom at all times to ensure that all the learners have lunch. This is the procedure she followed on 16 January 2020.

[64] At about 09h00, she took the learners in her class to the toilet. Thereafter she conducted her classes. A boy and girl learner asked for permission to go the toilet but because it was around the time when the feeding scheme ladies would be arriving, she allowed the learners to go to the toilets on their own. She did not accompany the learners to the toilets because the regulations required educators to be in the classroom to observe the learners when they have their lunch and there are general workers on the school premises to ensure the safety of the minor learners. She was then called and informed that the gate had fallen on the learners.

[65] She denied having been informed about safety issues relating to the gate and testified that she would have not used the gate entrance when she took the learners

to the portable toilets earlier that morning. She also testified that the gate was in an open position the whole day as it had been opened by the workers.

[66] The educators would be informed about safety issues at the school by the principal or their departmental head. She had been informed by neither that there were safety issues associated with the gate.

[67] Under cross-examination she testified that the school has a problem with toilets at the moment and this is the reason for the use of the portable toilets. She explained that the educators accompany the learners to the toilets in the morning to check if they are passing water. Ms Mkhumbuza had no response to the proposition that the sole reason for educators to accompany learners to the temporary toilets was because safety is paramount and to ensure the safety of the learners and that her conduct of failing to accompany SHN and BAN to the temporary toilet on the day in question was a dereliction of her duty and negligent.

[68] From the time she returned to school on 13 January 2020 she did not see any construction work taking place around the gate. However, there was other construction happening on the school premises on the day of the incident as she could see the contractor working on the wall in the distance. She clarified that the wall which supported the gate was still being built in the distance. She could not see traffic cones or safety signs in that area of construction because it was a distance away from her classroom.

[69] She confirmed that the school has a safety committee, but she could not recall her last communicate from it. This committee meets every term to discuss issues like fire extinguishers and first aid. She recalled that a safety meeting was held when the school closed in December 2019, and she only recalled being told about the construction taking place during the school closure.

[70] Ms Mkhumbuzu was shown photograph 00 and she testified that the men depicted in that photograph were not employed by the school as general assistants but by the contractor for the ongoing construction works. They were the ones who installed the gate and who also fixed it after it had fallen and injured the learners.

Issues for determination

[71] It is trite that educators owe learners under their control and care at school a legal duty to act positively to prevent physical harm being sustained by them through misadventure.³ The imposition of such a duty on educators to prevent such harm coming to learners in their care is aligned with public and legal policy and accords with constitutional norms.⁴ In addition, the MEC did not dispute the issue of wrongfulness.

[72] Accordingly, the issues which require determination in this delictual claim are negligence and causation. Whether the MECs employees were negligent in the circumstances rendering the MEC liable for the damages suffered by the plaintiffs as a result of the injuries sustained by SHN and BAN.

Discussion

[73] In addition to the determination of negligence, an analysis of the circumstances of the matter is required to determine what constitutes reasonable steps for the MECs employees to have taken in the circumstances, and whether these if taken would have averted the harm.

[74] The *locus classicus* on the determination of negligence is by Holmes JA in *Kruger v Coetzee*,⁵ which reads:

'For the purposes of liability culpa arises if-

(a) a diligens paterfamilias in the position of the defendant:

(i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and

³ *Minister of Education and Another v Wynkwardt NO* 2004 (3) SA 577 at 580A-C;

⁴ *AD v MEC for Education, Eastern Cape Provincial Government* (541/2013) [2020] ZAECHC 29 (21 December 2020) para 6.

⁵ *Kruger v Coetzee* 1966 (2) SA 428 (A).

(ii) would take reasonable steps to guard against such occurrence; and

(b) the defendant failed to take such steps to guard against such occurrence.

*This has been constantly stated by the Court for some 50 years. Requirement (a)(ii) is sometimes overlooked. Whether a diligens paterfamilias in the position of the person concerned would take any guarding steps at all, and if so what steps would be reasonable, must always depend upon the particular circumstances of each case.*⁶

[75] The evidence of the plaintiffs' witnesses was largely unchallenged. Mr Managa, who appeared on behalf of the MEC argued that the evidence of Ms Hlongwane is contested in all material respects and is speculative, far-fetched and uncorroborated. I must disagree. Ms Hlongwane did not strike me as being unsophisticated. During her evidence she was sincere, forthright and readily conceded issues where she should. She was very clear about the fact that her evidence was about what she saw, did, was personally told and her views on aspects. I did not gain the impression that she had any axe to grind with the school and she was not overly critical but rather more factual. Additionally, her evidence was corroborated in most material respects by the MECs witnesses. Therefore, I find her evidence to be reliable, credible and acceptable in all respects.

[76] By contrast the MECs witnesses did not impress me as being reliable or credible. Ms Mkhumbuza's reasons for accompanying learners to the portable toilets did not have a ring of truth to it and her evidence seemed contrived to rigidly support one narrative. Where her evidence contradicts that of Ms Hlongwane and Ms N[...], theirs are preferred. The evidence of the principal is addressed fully below.

[77] Mr Managa argued that negligence could not be attributed to the MECs employees because the incident and injuries sustained by the learners were not

⁶ *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E-F.

foreseeable and negligence remote. He argued that the evidence showed that the school has safety measures to ensure that the learners are safe during school hours; the principal and educators were not aware of any safety concerns regarding the gate; the portable toilets are located within the school's premises and accessible to the learners; the gate was certified safe by the contractor; the portable toilets were placed outside the wall by the contractor; the gate was open to allow access to the portable toilets by the learners; and the incident which led to the learners injuries was unforeseeable.

[78] This argument, however, does not address the fact that the no evidence was actually presented regarding the safety measures in place for the learners during school hours. Ms Hlongwane's evidence was that there were no safety briefings or safety measures in relation to the construction. The contractor's completion certificate for the wall and gate was not provided despite a formal request for this document. The principal's concession that the portable toilets should have been moved to the school side of the wall and that construction on the school premises was ongoing and required a higher degree of risk prevention.

[79] Mr Managa contended that the evidence of the plaintiffs' expert witness should be rejected as unreliable because he did not interview any people who witnessed the incident, and his factual account of the incident was provided to him by the plaintiffs' attorneys. In *Bee v Road Accident Fund*⁷ the court quoted from the judgment in *The State v Thomas* (CC 19/2015) [2016] NAHCMD 320 (19 October 2016) which referred to the expert reports of two psychiatrists and said:

'When dealing with expert evidence the court is guided by the expert witness when deciding issues falling outside the knowledge of the court but within the expert's field of expertise; information the court otherwise does not have access to. It is however of great importance that the value of the expert opinion should be capable of being tested. This would only be possible when the grounds on which the opinion is based is stated. It remains ultimately the decision of the court and, although it would pay high regard to the views and

⁷ *Bee v Road Accident Fund* 2018 (4) SA 366 (SCA) (29 March 2018) para 29.

opinions of the expert, the court must, by considering all the evidence and circumstances in the particular case, still decide whether the expert opinion is correct and reliable.'

[80] The factual account of the incident provided to Mr du Preez by the plaintiffs' attorneys was correct and it was a factual account that was common cause. The gate fell on and injured the learners who were on their way to the portable toilets at the time. Mr du Preez's mandate was to investigate and ascertain the technical reason why the gate fell. His expert evidence was unchallenged. His opinion and conclusions were supported by his technical findings. Having considered the totality of the evidence, I am satisfied that Mr du Preez's expert opinion and conclusions are reliable and may be accepted.

[81] Axiomatically, I accept Mr du Preez's opinion that the probable cause of the gate falling was the lack of a stopping mechanism on both or either side of the gate to prevent it from rolling off its track and tipping over. I accept his opinion that the standard of professional workmanship on both the wall and gate was poor; the welding on the gate was sub-standard; and that there was no proper quality control, inspection and sign off for the wall and gate where the sub-standard nature of the workmanship and work would have been noticed. I also accept his conclusion that proper construction practices were not followed with clear regulatory non-compliance in certain respects.

[82] Mr Managa also contended that the cause of the incident is not a result of the school's negligence because the wall and gate were designed and constructed by the contractor. Accordingly, any negligence should be attributed to the contractor and not the school. This argument does not take account of the following pertinent facts.

[83] Mr du Preez's expert evidence was unchallenged. The principal was asked if he had ascertained the cause for the gate falling from the contractor and he was evasive in furnishing a response. The best response which was eventually elicited from him was that he did not know what caused the gate to move off its rail that day.

He also indicated his acceptance of Mr du Preez's opinion and conclusions which he considered valuable and unbiased.

[84] The principal's responses are illustrative of the MECs absence of evidence or a version regarding the probable cause of the gate falling in circumstances where the school would have been best placed to inform the Court of the nature of the remedial steps and action taken immediately after the incident and the outcome of any investigations to prevent a re-occurrence.

[85] The legal duty owed to learners by the principal and the school must require at a minimum that mitigatory measures were implemented immediately after the incident to ensure that such an incident did not reoccur and yet no evidence was adduced in this regard. The evidence by Ms Mkhumbuza that the men depicted in photograph 00 were employed by the contractor and they installed and repaired gate, is the only evidence which faintly suggests that remedial action was taken.

[86] One would have assumed that the contractor would be called upon to immediately ascertain the cause for the gate falling and to repair it. Surprisingly, no evidence regarding this repair or the contractor's view on the cause is adduced. More surprisingly, no investigation regarding the cause of the gate falling is instituted by the school or the district school safety unit in circumstances where at least two minor learners sustained severe injuries.

[87] It is apposite at this point to reiterate a few of the expert witness' conclusions.

(a) quality control is of paramount importance and this responsibility rests with the person who appointed the contractor and that person is usually the architect or designer.

(b) the design in total was not done by a competent person or that person did not manage and inspect the work diligently. There was either no specification in relation to quality required or nobody with experience and training, diligently exercising the function of quality control. quality control and

sign off was not done by a qualified and experienced person confirming that it accords with the design or drawing specifications.

(c) the wall was not constructed in accordance with SANS 10-400K.

(d) for a wall of this magnitude, it is a requirement of SANS 10-400 for there to be an approved drawing by the local authority.

[88] The principal testified that they did not retain the services of an architect or designer. The school governing body acting through the SCM provided the design specifications to the contractor to design and construct the wall and gate. The SCM also performed the role of quality control and sign off. In the performance of this role, he candidly conceded that the SCM members had no technical expertise. They executed this obligation from a layperson's perspective and considered that the wall and gate satisfied their specified requirements and was fit for their purposes.

[89] The principal conceded that it would have been easy to summon the district school safety unit, but he could provide no clear reason why this was not done prior to the incident. The school's own safety officer was also not called upon to contribute to any aspect of the construction project.

[90] It is inexplicable that safety would not be a paramount consideration for the principal or SCM during an infrastructure project which entails the construction of a 2.7m free standing wall and equivalent height solid steel gate on public school property.

[91] I am therefore of the considered view that the SCM members and the principal were negligent when they performed the role of quality control and sign off for the wall and gate.

[92] In terms of the South African Schools Act⁸ (the Act) and the regulations issued in terms of s61, activities that are hazardous to learners or prohibited by the

⁸ The South African Schools Act No 84 of 1996.

Act should not be allowed on school property.⁹ A public school must ensure, where reasonably practicable, that learners are under the supervision of an accompanying educator at all times.¹⁰ Supervision is defined as ‘the management and control of learners at school and during school activities.’¹¹ School design for additions, alterations and improvements must comply with all relevant laws, including, inter alia, the national building regulations¹² and SANS 10-400.¹³

[93] Consequently, I am also of the view that the principal and SCM members breached their obligations in terms of the Act by failing to obtain proper drawings and/or designs for the wall and gate; failing to obtain local authority approval for the wall; failing to ensure that the wall and gate complied with SANS 10-400 and the national building regulations before signing off on its construction. The budgetary constraints of the school do not afford it a defence to the various issues of regulatory and statutory non-compliance identified.

[94] As a result of their negligent actions, they created a dangerous environment for the learners. They should have foreseen that by failing to engage the services of appropriately qualified and competent professionals to oversee or project manage the construction project, they increased the risk and likelihood of some or all aspects of the construction work being non-compliant and sub-standard because of their inability to discern otherwise.

[95] Educators are not, generally, qualified to assess, detect or recognise structural defects or deficiencies in the design or construction of walls and gates. It is inconceivable that they could not have objectively considered that their inability to determine whether the wall or gate was structurally sound could not have foreseeably resulted in their approval and sign off of a wall and/or gate that would in fact collapse and injure learners.

⁹ Section 36 (4) (b) of the Schools Act.

¹⁰ Regulation 8A (2) (b) of the regulations for Safety Measures at Public Schools

¹¹ In the regulations for Safety Measures at Public Schools.

¹² Regulations issued in terms of s17 of the National Building Regulations and Building Standards Act No 103 of 1977.

¹³ Regulation 18 (14) of the regulations relating to Minimum Uniform Norms and Standards for Public School Infrastructure.

[96] The duty to keep learners of a young age under constant supervision depends essentially upon the risks to which they are exposed in their particular surroundings.¹⁴ The factual circumstances of this matter should have required that the learners SHN and BAN were accompanied when they went to the portable toilets.

[97] The principal acknowledged that the portable toilets should have been located on the school side of the wall and the portable toilets were in fact moved there before the end of the week in which the incident occurred. He also testified that phase two of the construction project was happening at the school and he conceded that construction work posed an increased risk to the learners' safety. It was in fact for this reason that phase one of the construction project took place during the school holidays.

[98] Ms Mkhumbuza also testified that construction work was occurring at the school. She could see that it was construction work on the same wall in the distance. Additionally, we have Mr du Preez's opinion that the school will be regarded as a construction site even though the construction project is carried out in phases and that children should not be allowed in or near a construction site.

[99] Apart from the risk created by the wall and gate alluded to earlier, and without taking into account Ms Hlongwane's evidence that the safety issues about the gate were known, these aforementioned facts demonstrate that the school property was potentially dangerous and unsafe for the learners because of the construction taking place on it which required a higher degree of supervision in certain circumstances. One of those circumstances, in my view, would be when SHN and BAN wished to go to the portable toilets which were located outside the wall near the sports field.

[100] Therefore, Ms Mkhumbuza was negligent when she failed to supervise or arrange supervision for SHN and BAN when they were given permission to go to the portable toilets.

¹⁴ *Rusere v The Jesuit Fathers* 1970 (4) 537 at 539E-F; *Minister of Education and Another v Wynkward* NO 2004 (3) SA 577 at 583H-I.

[101] It matters not that the principal and/or educators did not foresee the exact manner of the learners' injuries. As stated in *Member of the Executive Council of Gauteng Responsible for Education v Rabie*:¹⁵

'The foreseeability test does not require foresight of the exact manner of the occurrence or the precise form of the dangerous activity or game or event which gives rise to the damage, anymore that it requires foresight of the specific damage which in fact eventuates,'

[102] Ultimately, the risk of harm must have been a real risk, which a reasonable person would not have brushed aside as being farfetched.¹⁶

[103] This tragic incident could have been averted if appropriately qualified personnel, adhering to professional standards administered with due professional skill and expertise, had been appointed to prepare the requisite drawings/designs and to oversee and project manage the construction project to ensure that it was executed in accordance with the approved drawing/design and applicable legislation. Alternatively, if the learners were supervised at the time, the educator or staff member may have been able to prevent the learners from being harmed when the gate fell. Further alternatively, if the portable toilets had been located on the school side of the wall on the day of the incident it is unlikely that SHN and BAC would have been injured in this manner.

[104] In the premises, I am satisfied that a reasonable person in the position of the principal and/or educators would have foreseen the reasonable possibility of their actions resulting in harm to a learner in their care. No steps were taken to prevent such harm and it is not unreasonable to expect that a regulated public school comply with applicable legislation and adhere to professional standards administered with

¹⁵ *Member of the Executive Council of Gauteng Responsible for Education v Rabie* (A758/06) [2008] ZAGPHC 71 (7 February 2008) para15.

¹⁶ *Dlamini v Member of the Executive for the Department of Education Mpumalanga Provincial Government* (885/2016) [2017] ZAGPPHC 814 (20 December 2017) para 34.

due professional skill and expertise when undertaking infrastructure construction projects on school property.

[105] In the circumstances, I am satisfied that the plaintiffs have established, on a balance of probabilities, that the learners SHN and BAC sustained severe injuries at the school on 16 January 2020 when the newly constructed and installed gate fell on them. The learners' injuries were caused by the negligence of the MECs employees who could have taken reasonable steps to avert this harm and they failed to do so.

[106] The general rule in matters of costs is that the successful party is entitled to be awarded costs, and this rule should not be departed from except where there are good grounds for doing so.

[107] In the circumstances, I make the following order:

(a) The defendant is found liable to compensate the plaintiffs for their proven damages arising from the injuries sustained by the learners S[...] H[...] N[...] and B[...] A[...] N[...] when the gate fell on them at R[...] Primary School, Soshanguve on 16 January 2020.

(b) the defendant shall pay the plaintiffs costs of action to date insofar as these costs relate to the merits of the case.

(c) the issue of quantum is postponed sine die.

T NICHOLS
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

This judgment was handed down electronically by circulation to the parties' representatives via email, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand-down is deemed to be 10H00 on 22 May 2023.

HEARD ON: 7,8,9 and 11 November 2022
JUDGEMENT DATE: 22 May 23
FOR THE PLAINTIFFS: Adv J Nkosi
INSTRUCTED BY: MWIM & Associates
Ref: MWIM/GALAKI/EDEH/0051
Email: edehpaul@mwimlaw.co.za / osmwim@gmail.com
FOR THE DEFENDANT: Adv P Managa
INSTRUCTED BY: The State Attorney, Pretoria
Ref: 2017/2020/Z64/jb
Email: rsebelemetsa@justice.gov.za /