

IN THE GAUTENG HIGH COURT, PRETORIA

{REPUBLIC OF SOUTH AFRICA}

CASE NO: 5894/2013

DELETE WHICHEVER IS NOT
APPLICABLE

:

In the matter between:

M [P.....]

First Plaintiff

W [P.....]

Second Plaintiff

And

BIG SKY TRADING 489 CC T/A
MIKE'S KITCHEN

Defendant

JUDGMENT

JANSEN J

[1] This application raises the interesting question whether a restaurant has a legal duty to ensure the safety of children using a playground area provided by it for the entertainment of children visiting the restaurant.

[2] At the outset it should be emphasized that the point was never taken that any of the playground's equipment at the defendant's (Big Sky Trading 489 CC t/a Mike's Kitchen – hereinafter referred to as "Mike's Kitchen) restaurant posed a danger *per se*. The point taken was that the restaurant had omitted to take the necessary precautions to prevent injury to users of the playground equipment. In the instant case, an injury was sustained by a 13-year-old boy playing on the trampoline.

[3] It was common cause and readily conceded by counsel for the plaintiff that all the witnesses had been credible and honest.

[4] The issue to be decided is whether Mike's Kitchen had a legal duty to prevent injury to the child.

[5] The first witness who was called was the 13-year-old boy's mother who readily conceded that her son was difficult to control, disobedient in general and only occasionally obeyed his father.

[6] The mother testified that on the day in question her son begged her to have a milkshake at Mike's Kitchen at the Makhado Mall in Louis Trichardt. It was a Friday afternoon at about 16h30 and they were going away for the weekend and the mother still had to do some shopping and pick up her mother. She left her son at Mike's Kitchen with money for a milkshake and was phoned whilst in Pep Store by an attorney friend, who coincidentally was at Mike's Kitchen, who informed her that her son had injured himself on the trampoline.

[7] The mother testified that she was the first person on the scene at the trampoline and that her son informed her that he had hurt his neck and could not really move. (Contrary evidence was led in that it was testified that the attorney and waiter were first at the scene, but this dispute is irrelevant for purposes of this judgment.)

[8] It is necessary to emphasise that all possible precautions had been taken by Mike's Kitchen to render the trampoline safe. It had netting all around it. The netting at the top of it was so high, according to the boy, that even when he jumped as high as he could and stretched out his arm, he could barely touch the tip. He added that the areas between the springs of the trampoline had been filled with a soft sponge. Furthermore, there were steps leading up to the entrance of the netting around the trampoline with a small entrance and one had to bend down to gain entrance. Two signs were also attached to the front of the netting of the trampoline. One was a height restriction sign and the other made it clear that the trampoline could only be used under adult supervision. By the time the trial took place the signs had been removed from the trampoline which had, in any event, been sold and removed from the playground, but the holes in the netting for the support of the signage was still visible in the photographs produced at the trial.

[9] The boy suffered a neck injury which required the insertion of a plate and which resulted in the boy never being able to participate in contact sport again (which he had thoroughly enjoyed before the

incident). He also had to wear a neck brace for quite a while after the incident.

[10] During cross-examination the mother readily conceded that her son did not fare well at school because he was hyperactive. She reiterated that she and her husband could barely control the boy. Upon questioning as to how Mike's Kitchen was supposed to do so, she could not furnish any answer.

[11] The mother further testified that on occasion they would eat out at Mike's Kitchen but that the boy's father only allowed him to play on the trampoline on isolated occasions. She testified that the rules regarding the use of the playground were erected at the entrance to the playground, on the climbing frames for the small children and on the netting of the trampoline. It was put to the mother that when she and her husband allowed their son to play on the trampoline (and at the date of the accident he already exceeded the height limitation as conceded by her) they, as parents, intentionally breached the rules of the playground. She remained silent for a long time and then admitted that the allegation was true.

[12] The mother further admitted that she had no problem that children who were taller than the height restriction jumped on the trampoline. She also admitted that her son had been chased away from Mike's Kitchen on previous occasions. She testified that he had a BMX-bicycle on which he executed all species of tricks. It bears mention that such tricks are, of course, as dangerous as jumping on a trampoline and that children who injure themselves by falling off bicycles is a common occurrence. The mother was questioned regarding her son's habit of riding on his bicycle to the railing of Mike's Kitchen, jumping over it and playing on the trampoline. She was also questioned about her son burning the netting in the playground with cigarettes. She professed her ignorance of these shenanigans, testified to later by the personnel and owners of Mike's Kitchen.

[13] The mother also admitted that her son was not a proficient reader but at least an average reader. Hence, as at 26 August 2010, the date when he injured himself on the trampoline, he would have been able to read the signs on the netting with ease. When asked

whether, when he turned 14, a few months later, his comprehension of the difference between right and wrong had changed in any way, she answered in the negative. The reason why this question was asked is due to the question when a child is *doli capax*.¹

However, the court agrees with Mr Bergenthuin's submission that both the questions of capacity on the part of a child to commit a wrong, and the issue of fault should be considered subjectively. In the case of *Eskom Holdings Ltd v Hendricks* 2005 (5) SA 503 (SCA) at par [15] the matter of *Weber v Sanlam Versekeringsmaatskappy Bpk* 1983 (I) SA 381 (A) was quoted with approval as was the matter *Jones NO v Sanlam Bpk* 1965 (2) SA 542 (A). The court held that the distinction drawn between on the one hand, the issue of capacity on the part of a child to commit a wrong and, on the other, the issue of fault was accurate. The court further stated the following in this regard: "*(i)n doing so, it declined to follow a view widely held, particularly in academic circles, that there was a need to introduce a subjective element into the concept of negligence in the case of children by requiring no more than a degree of care expected of a child of the age and maturity of the one in question. Instead, the Court in Weber held that the first inquiry, ie as to capacity, was subjective, while the second, ie as to fault, was objective. In other words, once a child was found to have the necessary capacity,*

¹ The age of fourteen is when the boy would be considered *doli capax*. On the date of the incident he was thirteen years and seven months. The court agrees that this approach is archaic as argued by Mr Bergenthuin, the defendant's counsel, and that the question whether a child is *doli capax* should be approached subjectively. For purposes of this judgment, however, this question need not be considered.

[14] The son was called as the next witness. He confirmed that his injury occurred at about 16h30 at Mike's Kitchen where his mother left him to enjoy a chocolate milkshake which he had been craving.

its negligence or otherwise, was to be determined in accordance with the standard of the ordinary (adult) reasonable person."

It was also held in *Eskom supra* at paragraph [16] that the distinction between girls and boys, the prior being presumed to lack capacity between the ages of seven and twelve and the latter between the ages of seven and fourteen (until the contrary has been proved) was probably unjustifiable and that the age of fourteen should be the cut-off point for children of both sexes.

(It is also pointed out that distinctions drawn on the basis of gender are *per se* unconstitutional in terms of the Constitution, in terms of section 9 of Chapter 2: Bill of Rights.)

Further in the *Eskom* matter reference was made to the *Weber* matter *supra* and the following was stated: —

"Experience revealed, Jansen JA said (at 400C–D) that although children may be able to distinguish between right and wrong, they will often not be able to act in accordance with that appreciation; they become so engrossed in their play that they become oblivious of other considerations and acted impulsively. The learned judge accordingly warned 'little old head on your shoulders'. (400F–G.)"

He said a waiter took him outside to the table closest to the trampoline as it was the only table which was unoccupied. Whilst waiting for his milkshake he jumped on the trampoline and did two backward flips successfully, but fell on his forehead and his body flipped over when he tried to do so for the third time. He said that he had hurt himself severely and cried out for help, as it was so painful.

[15] The son further testified that he went to Mike's Kitchen on a regular basis and that he often jumped over the railing, or the part thereof which was broken, in order to join his friends when they sat close to the trampoline drinking milkshakes or eating. He also admitted to smoking outside the restaurant close to the trampoline but said that his friends were the ones who jumped on the trampoline without eating anything and who burned holes in the netting with cigarettes. He admitted that he was often chased from the premises when he tried to jump on the trampoline without being a paying customer of Mike's Kitchen and that his mother or father was contacted by somebody in control if he did so. However, he denied being warned and reprimanded in general to play on the trampoline.

[16] The son stated that whilst he was doing backward somersaults and injured himself, he saw that his milkshake had arrived but that nobody had called him to tell him that it was ready. He said that the attorney friend of the family was one of the first people on the scene and that he begged him not to tell his father about the incident because his father, as he put it colloquially, would "murder" him. He testified that he stated this because his father always instructed him never to try any tricks on the trampoline because he could hurt himself. He also said that he never obeyed his father. He said that "Oom Jan" (Mr Jan Adriaan Kleynhans, the co-owner of Mike's Kitchen restaurant) promised him a free milkshake after the incident and that when he visited Mike's Kitchen later and asked for his free milkshake, he received it after "Oom Jan" had been phoned and informed who was requesting the milkshake.

[17] Under cross-examination he admitted to doing tricks on his bicycle but maintained that he could not hurt himself as he knew what he was doing. Usually, so he testified, there were two managers and thirteen waiters available at Mike's Kitchen. He added that they would check the playground on occasion and that he had often been

chased away by a certain Ms Christina Maseko, a co-owner of Mike's Kitchen.

[18] The first witness to testify for the defendant was Mr Jan Adriaan Kleynhans who testified that he was a co-owner of the Mike's Kitchen restaurant at the Makhado Crossing Shopping Centre. He testified that all waiters had a duty on a rotational basis to monitor the playground in order to check that the children were behaving. He also testified that at all relevant times there were two managers on duty at the restaurant. He confirmed that the requisite playground rule boards were erected at three points: the entrance to the playground; the jungle gym area and on the trampoline's netting. He emphasised that there was a height requirement. A line had also been drawn in the play area in order to assist children to ascertain whether they exceeded the height requirement. The firm rule was that children were only allowed to play under adult supervision.

[19] Mr Kleynhans said that he knew the father of the boy as he regularly repaired his motor vehicles. On the Friday of the accident he was in his office, working, when the attorney came to tell him

that a child had hurt himself on the trampoline. He immediately went to the trampoline and contacted a woman called Maud who operated an emergency service. He testified that he and Ms Christina Maseko had, in the past, discussed the problem of the boy who was often found jumping on the trampoline on his own, and asked to leave as a result. Mr Kleynhans admitted that he never broached the subject with the boy's father as he was his friend but that he asked his co-owner or the managers to chase the child away and to do something about the situation.

[20] According to him the two managers on duty would each have an allocated duty – one as front of house manager and the other as the back of house manager. He testified that the photographs of the trampoline produced at the hearing showed the opening to it closed and secured with rope which he and Ms Maseko had erected to prevent entrance to the trampoline. He also testified that there were only two occasions when children had hurt themselves on the trampoline within the eight year period that it had been erected in the playground area. One was the boy and the second incident

occurred shortly after the boy was injured when a little girl broke her arm.

[21] Mr Kleynhans further testified that even when the boy's parents came to eat at Mike's Kitchen with their son, he instructed his co-owner or the managers that their son was not to be allowed to play on the trampoline. However, it was never put to anybody that this would be his version, a statement with which Mr Kleynhans agreed. In this regard, his evidence was therefore less than satisfactory.

[22] It was put to Mr Kleynhans that even when he was accompanied by his parents it was because of the boy's height that he was not allowed to jump on the trampoline – a fact which Mr Kleynhans admitted. He stated that it was impossible for him to target specific individual naughty children given the fact that he had four to five thousand patrons in his restaurant per month. It was further put to him that he knew the son's father so well that they even entered into personal wagers – a fact which he conceded. He reiterated that he might not have taken up the issue with the parents but that he

discussed it with his co-owners and managers and requested them to take it up with the parents.

[23] Mr Kleynhans also emphasised that he was in the restaurant business – not the child entertainment business and that the playground was an adjunct to the restaurant – a means of alleviating parents' stress and to render an evening more pleasant for parents. He stated that in any event the rules pertaining to the playground were prescribed by his franchise agreement which he followed religiously. He used the analogy of a municipal swimming pool – it was a facility provided by the municipality, but parents were most certainly not exonerated from liability by the municipality. They remained liable to monitor their children.

[24] It was further put to him that a certain Pieter, who was one of the managers who was present on the day of the boy's injury, knew that the boy was at the premises but did nothing to monitor him. However, this was countered by the fact that the son ordered a milkshake and was therefore a paying client.

[25] Mr Kleynhans was once again queried as to why he did not inform the parents of the child's misbehaviour and he reiterated that he left that task to his co-owner and managers because the boy's father was his friend. Although he never expressed the sentiment, logic would also dictate that it is difficult for a family friend to chastise his friend in respect of a child who is known to be hyperactive.

[26] Ms Christina Maseko, the co-owner of Mike's Kitchen, testified next. Her testimony was that she had been in the restaurant business for nineteen years and involved with Mike's Kitchen for eight years. She confirmed the placement of the signs stipulating the playground rules – particularly those on the trampoline. She stated that she did not even know what the boy's parents looked like and often chased him away when he arrived on his own. She said that he never said anything and obeyed her immediately. She said that he had illegally jumped on the trampoline without ordering food or anything to drink on about at least about ten occasions. She testified that she warned the managers and staff against him and that they were duty bound to follow her instructions and did so as far as

she was concerned. She testified that she was unaware he that he was a smoker.

[27] Ms Linda Chihoboya, a waitress at Mike's Kitchen, since 2009, confirmed Mr Kleynhans' evidence. She was present the day of the incident. She also confirmed where the playground signage was displayed. As was the case with all the other witnesses she testified that on the trampoline the larger sign was erected at the top and the smaller sign below the larger sign. She was the one who testified that the boy burnt the netting in the tunnel and jungle gym area. She confirmed that as far as his height was concerned, he was not allowed to play in the playground area. She also testified that she often chased him away.

[28] The defendant then closed its case.

How to resolve conflicting versions:

[29] The cases setting out the manner in which to deal with conflicting evidence are *Stellenbosch Farmers Winery Group Ltd v Martell Et Cie* 2003 (1) SA 11 (SCA) and *Baring Eiendomme Bpk v Roux*

2001 [I] All SA 399 (SCA). The principles set out in these cases are trite and require no repetition. Applying these rules to the evidence above, on the inherent probabilities the signs, as testified by the plaintiffs, were on full display and the boy knew full well that he was not allowed to play on the trampoline, as did his parents.

[30] In order to establish delictual liability five factors are to be established: —

[30.1] an act or omission;

[30.2] which is wrongful;

[30.3] intent or negligence;

[30.4] a causal connection between the act or omission and injury suffered;
and

[30.5] actual injury suffered.

Unlawfulness:

[31] Unlawfulness or wrongfulness is a requirement for delictual liability. Negligent conduct giving rise to loss, unless also wrongful, is not actionable. In *Gouda Boerdery BK v Transnet* 2005 5 SA 490 (SCA) at paragraph 12 the question of wrongfulness in delict was explained as follows: —

"But the issue of wrongfulness is more often than not uncontentious as the Plaintiff's action will be founded upon conduct which, if held to be culpable, would be prima facie wrongful. Typically this is so where the negligent conduct takes the form of a positive act which causes physical harm. Where the element of wrongfulness gains importance is in relation to liability for omissions and pure economic loss. The enquiry as to wrongfulness will then involve a determination of the existence or otherwise of a legal duty owed by the Defendant to the Plaintiff to act without negligence: in other words to avoid negligently causing the Plaintiff harm. This will be a matter for judicial judgment involving criteria of reasonableness, policy, and where appropriate, constitutional norms. If a legal duty is found to have existed, the next enquiry will be whether the Defendant was negligent ... While

conceptually the enquiry as to wrongfulness might be anterior to the enquiry as to negligence, it is equally so that without negligence the issue of wrongfulness does not arise for conduct will not be wrongful if there is no negligence. Depending upon the circumstances therefore, it may be convenient to assume the existence of a legal duty and consider first the issue of negligence. It may also be convenient for that matter, when the issue of wrongfulness is considered first, to assume for that purpose the existence of negligence."

[32] The court is enjoined, objectively, to apply the values of justice, fairness and reasonableness, taking into consideration the *bani mores* which reflect the legal convictions of the community as seen through the prism of the Constitution. In particular, it is very important not to conflate the issues of negligence and wrongfulness, otherwise it may result in the imposition of liability in circumstances where it is unwarranted.

[33] Our courts gingerly accepted the concept that the omission to act could, in certain circumstances, be wrongful. The courts' hesitation was due to the fact that they were loath to create "oewerlose aanspreeklikheid", namely liability without limits.

[34] In this regard it is interesting to have regard to "playground rules" to be found in countries throughout the world. In 1981 the US Consumer Product Safety Commission published the first *Handbook for Public Playground Safety*. The most important safeguard mentioned in it is adult supervision.

[35] It should immediately be emphasised that the case law to which the plaintiff referred the court, relating to abandoned mining areas etc,² find no application in this case, as parents who take their children to a playground know full well which "dangers" exist at a playground in exactly the same way in which they realise that a child may drown in a swimming pool or in the sea.

² *Burton v Real estate Corporation* 1903 TH 430; *Transvaal and Rhodesian Estates Ltd v Golding* 1917 A D 18; *Farmer v Robison GM Co Ltd* 1917 AD 501.

[36] However, one cannot have a shift of cultural understanding of acceptable risk to such an extent that known risk ultimately becomes synonymous with hazard.

[37] Section 28(1)(b) of the Constitution of the Republic of SA, 1996 provides as follows: —

"28 *Children*

(1) *Every child has the right*

(a)

(b) *to family care or parental care, or to appropriate alternative care when removed from the family environment;*

[38] The court in *S v M* (CCT 53/06 [2007] ZACC 18; 2008 (3) SA 232 (CC) (26 September 2007) per Justice Sachs held as follows: —

" *the court spelt out the following guidance on the role of a parent in caring for child: —*

"Indeed, one of the purposes of section 28(J)(b) is to ensure that parents serve as the most immediate moral exemplars for their offspring. Their responsibility is not just to be with their children and look after their daily needs. It is certainly not simply to secure money to buy the accoutrements of the consumer society, such as cellphones and expensive shoes. It is to show their children how to look problems in the eye. It is to provide them with guidance on how to deal with setbacks and make difficult decisions. Children have a need and a right to learn from their primary caregivers that individuals make moral choices for which they can be held accountable."

- [39) Children should be free to play and explore their environment within acceptable limitations but always under adult supervision. Where such supervision is lacking but an entity or person has taken all reasonable steps to ensure the safety of persons in various environments, then such precautions will suffice to safeguard such

an entity or person against any liability arising from injuries which may occur.

[40] Given the mother's ready concession that they, as parents, had no problem in allowing their son to play unsupervised in the playground, in the full knowledge that he exceeded the height restriction, no wrongful conduct can be attributed to Mike's Kitchen. The restaurant gave parents more than adequate warning that parental or adult supervision was required and what the height restriction was.

[41] As was ably argued by Mr Bergenthuin on behalf of the defendant, Mike's Kitchen could not be saddled with a greater legal duty than that which the law imposes on parents. Furthermore, on the day of the accident, the mother knew full well that her son might jump on the trampoline.

[42] As argued, Mr Bergenthuin, there are four basic considerations in each case which influence the reaction of a reasonable man in a situation posing a foreseeable risk of harm to others, namely: —

[42.1] the degree or extent of the risk created by the actor's conduct;

[42.2] the gravity of the possible consequences if the risk of harm materialises;

[42.3] the utility of the actor's conduct; and

[42.4] the burden of eliminating the risk of harm.³

[43] Even had there been an adult standing right next to the trampoline, nothing could have prevented injury to a child who was executing risky tricks. He/she could fall on his neck or head at any moment and nobody standing close or right next to the trampoline would have been in a position to avert such an accident, even had the child been the correct height and age.

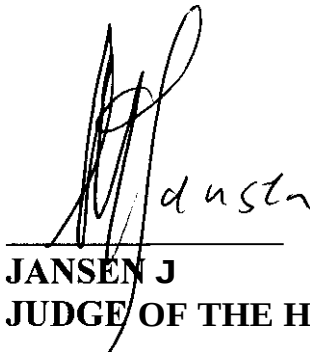
[44] In consequence, it cannot be stated that there was any legal duty on the owners and/or employees of Mike's Kitchen to do more than that which they had already done. Neither can negligence, a causal

Ngudane v South African Transport Services 1991 (1) SA 756 AD at 776 H-1;
Pretoria City Council v De Jager 1979 (2) SA 46 AD at 56 A--C.

connection or any commission or omission on their part be attributed to Mike's Kitchen regarding the boy's injury.

Order

In the result, the action is dismissed, with costs on the scale of a senior advocate.



JANSEN J
JUDGE OF THE HIGH COURT

For the Plaintiffs Advocate JD MARITZ SC and PL UYS
Instructed by Gildenhuys, Malatji Inc (Reference: R Venter/01670794) (012-428 8600)

For the Defendant Advocate JG BERGENTHUIJN SC
Instructed by Van Zyl Le Roux Inc (Reference: MAT31326/MR VAN RENSBURG/EG (012-435 9444))