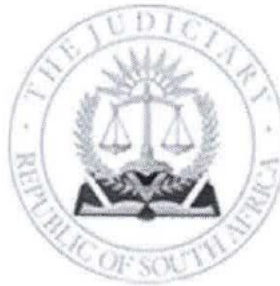


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 5937/2016

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
21-06-2024	[REDACTED]
DATE	SIGNATURE

In the matter between

MADELEEN ROETS

Plaintiff

And

SCHOOL GOVERNING BODY:

DU PREEZ VAN WYK PRIMARY SCHOOL

First Defendant

MEC FOR EDUCATION GAUTENG PROVINCE

Second Defendant

ERHARD KRUGER

Third Defendant

JUDGMENT

Mahosi J

Introduction

[1] This is an action in which damages are sought for bodily injuries. It raises the question whether schools owe a legal duty to act positively to prevent physical harm being sustained by a parent who fell in a hole in the school premises.

[2] The plaintiff is Mrs Madeleen Roets ("Mrs Roets"), a parent of one of the learners of Du Preez Van Wyk Primary School ("the school"). The first defendant is the school's Governing Body ("the Governing Body"). The second defendant is a Member of the Executive Committee for the Department of Education in Gauteng Province ("the MEC"). The third defendant is Mr Erhard Kruger ("Mr Kruger"), the school's principal.

[3] Although Mrs Roets instituted an action against all the defendants, she withdrew her claim against Mr Kruger. The action is defended by the Governing Body and the MEC ("the defendants").

[4] The parties separated the issues relating to merits and quantum by agreement. Accordingly, the issue pertaining to the quantum was postponed *sine die*. The only issue for determination is whether the defendants are liable for the bodily injury sustained by Mrs Roets.

Factual background

[5] On 29 January 2013, at approximately 15:00 and at the school's premises, Mrs Roets was accompanying her daughter to a sports practice when she stepped and fell into an unprotected but obscured hole ("the hole"). Resultantly, she sustained an open fracture and severe laceration of her right ankle. It was for this reason that she instituted this action.

Mrs Roets' case

[6] In her particulars of claim, Mrs Roets pleaded various obligations resting of the defendants arising from the provisions of section 16 read with

20(1)(g) of the School Act¹, all of which were denied by the defendants. Those most relevant in the current matter are to (a) administer and control the school's property, including buildings and grounds; (b) ensure that the school is free of all sources of danger and possible harm to teachers, learners, parents or visitors; (c) act positively to prevent harm being sustained by members of the public visiting the school; and (d) ensure that this school surroundings are devoid of features that could sensibly be regarded as a hazardous, dangerous or unsafe for teachers, learners, parents or visitors.

[7] Mrs Roets alleges that her injuries were brought solely by the negligence or otherwise the unlawful conduct of the defendants' servants in that they failed to: (1) ensure that the school's surroundings and, in particular, the sports field had no unprotected holes nor any other source of danger; (2) bring the presence of the open but concealed hole to her attention; (3) take reasonable steps to secure the exposed hole, and (4) exercise of reasonable care and skill to prevent the incident.

The defendants' case

[8] The defendants filed their plea in which they raised two preliminary points. The first relates to non-compliance with the provisions of section 3 of the Institution of The Legal Proceedings Against Certain Organs of the State Act,² in that Mrs Roets failed to notify the MEC regarding the envisaged claim within six months of the incident. This Court, as per Baqwa J, granted Mrs Roets condonation for the late service of the intention to institute legal proceedings against the MEC on 19 May 2022.

[9] The second point *in limine* relates to a disclaimer allegedly displayed by the Governing Body at the school's entrance and other prominent places around the school's premises when the incident occurred. The disclaimer allegedly drew the public's attention to the fact that the entrance to the school's grounds was at the entrant's own risk and stated that "*the school accepts no responsibility for any injury, loss or damage which you may suffer*

¹ Act 84 Of 1996, as amended.

² Act 40 of 2002, as amended.

during your visit". The parties agreed that this preliminary point would form part of the trial proceedings.

[10] In paragraph 7 of the plea, the defendants dispute the allegation that Mrs Roets was injured at the school on 29 January 2013. Alternatively, pleaded negligence on the part of Mrs Roets in that she was preoccupied with children playing around the sports field and failed to observe her surroundings properly. Further alternatively, it was averred that she sustained the injuries as a result of jumping from the pavilion.

Issue for determination

[11] It became common cause, in the pretrial minute, that Mrs Roets was injured on the school premises on 29 January 2013 and suffered an ankle fracture. Mr Gerber found her lying on a sloped surface behind the pavilion.

[12] It is well established that the defendants and their servants have a legal duty to ensure that the school premises are safe for its users. The question is whether the defendants, in the circumstances, are liable for Mrs Roets' injuries. To answer the question, the Court must determine whether the defendants, acting through their servants, were negligent and can rely on the disclaimer board to avoid liability.

Relevant evidence

For Mrs Roets

[13] Mrs Roets testified in support her case and called her brother, Mr Hendrick Christian Wilkinson (Mr Wilkinson), as a witness. To confirm her familiarity with the school's surroundings, Mrs Roets testified that she is a resident of Bronkhorstspuit, a former scholar of the school, a parent of two children who obtained their primary level education at the school and whom she accompanied to and from school daily.

[14] On the merits of her case, Mrs Roets testified that on 29 January 2013, she and her other two children accompanied her 13-year-old daughter to school for sports practice. Mrs Roets was seated at the top row seats of the

pavilion when her son wanted to go to the bathroom. When her son proceeded to the bathroom, she stood up to follow him. Mrs Roets exited the pavilion from the back. While walking, her foot fell into a hole covered by grass. She then tried to lift her leg and realised it was broken.

[15] To regain strength, Mrs Roets lifted her leg, put it on a sports bag and sat for about two minutes. She then started shifting to her right-hand side, propelling her body by using her "buttocks" for about two to three meters to gain a view of the people. At this point, she saw the school's gardener, Mr Kenneth Malatji ("Malatji"), from whom she requested assistance. Mr Malatji approached her before running toward the sports field to call the teachers.

[16] In response, several teachers and parents came to the incident scene. To assist, the school sister also pushed Mrs Roets' protruding bone back to its position. The ambulance arrived to take her to the hospital. Under cross-examination, Mrs Roets denied telling the teachers that she jumped from the pavilion and chased after her son.

[17] Regarding the disclaimer, Mrs Roets testified that no disclaimer was displayed at the school entrance at the time of the incident, and the old school fence had been renovated and replaced by the palisade. According to her, the defendants only displayed the disclaimer in 2014, after the incident's date.

[18] Mr Wilkinson testified that he is familiar with the school as he was the school's rugby coach between 2009 and 2012, a period during he did not see a disclaimer at the school's entrance. Mr Wilkinson further testified that he learned about the incident on 29 January 2013 when he received a telephone call from his mother after which he drove from Verstek Park, where he stayed, to the school.

[19] Upon arrival, he spoke to a teacher, Mr Breckrek, who informed him that his sister was injured. When he got to Mrs Roets, the latter pointed him toward where she was injured. After searching for the hole, Mr Wilkinson identified the hole by the blood stains. He inserted his leg in the hole to measure it and concluded it was large enough to fit a size eight shoe. Mr

Wilkinson also testified that no one had told him his sister had jumped from the pavilion.

For the defendants

[20] Mr Gerald Gerber ("Mr Gerber") and Mr Malatji adduced evidence on behalf of the respondents. Mr Gerber testified that he commenced his employment at the school in 1998. He was the school's deputy principal and high jump trainer when the accident occurred. Regarding the incident, Mr Gerber testified that the learners alerted him of the injured parent behind the pavilion. He rushed to the scene and was the first teacher to arrive at the incident scene.

[21] Upon his arrival, Mr Gerber found Mrs Roets lying on the surface of a slope behind the pavilion. He moved Mrs Roets downwards to an even surface. Shortly afterwards, other teachers arrived. Mrs Roets told him that she moved from the back of the pavilion to attend to her child, lost balance, fell, twisted her ankle and fractured her ankle.

[22] Under cross-examination, Mr Gerber testified that for one to exit from the back of the pavilion, they had to either jump or hop. He confirmed that he did not see Mrs Roets jumping from the pavilion. Mr Gerber further testified that, when the incident occurred, the school had a disclaimer board at one of the entrances, as others were closed to the public.

[23] Mr Malatji testified that he commenced employment at the school in January 2013 as a general worker. When the incident occurred, he was the first person to arrive at the scene after Mrs Roets' child called him. Upon arriving at the scene of the incident, Mr Malatji realised Mrs Roets was bleeding. He went to call the teachers whilst the child remained with her mother. Thereafter, he went back to conducting his daily duties. Mr Malatji further testified that the school had a disclaimer board at its entrance and other boards inside the school around the lawns warning people against walking on the lawn.

[24] This is the conspectus of the evidence that this Court must evaluate.

Applicable law

[25] The test applicable in an action for damages alleged to have been caused by the defendants' negligence has been stated by the Supreme Court of Appeal in *Groenewald v Groenewald*³ as follows:

"In delictual claim of the nature involved in the present case two separate questions arise:

1. Was the defendant at fault?
2. For what consequences caused to the plaintiff in consequence of the defendant's conduct is the defendant liable in damages to the plaintiff?

For the purpose of answering the first question the defendant would be held to be at fault as long as he intended to cause harm to the plaintiff, even if he did not intend that the consequences of such conduct would be to cause the kind of harm actually suffered by the plaintiff or harm of that general nature. He would also be held to be at fault if the reasonable person in the position of the defendant would have realised that harm to the plaintiff might be caused by such conduct, even if he would not have realised that the consequences of that conduct would be to cause the plaintiff the very harm he eventually suffered or harm of that general nature."

[26] In *Sea Harvest Corporation (Pty) Ltd and another v Duncan Dock Cold Storage (Pty) Ltd*⁴, Scott JA writing for the majority of the Court said:

"[21] A formula for determining negligence which has been quoted with approval and applied by this Court time without measure is that enunciated by Holmes JA in *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E-F. It reads:

'For the purposes of liability *culpa* arises if –

- (a) a *diligent paterfamilias* in the position of the defendant –

³ 1998 (2) SA 1106, at 1112G-J

⁴ 2000 (1) SA 827 (SCA), at 838I – 839C

- (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
- (ii) would take reasonable steps to guard against such occurrence; and
- (b) the defendant failed to take such steps.

However, in *Mukheiber v Raath and Another* 1993 (3) SA 1065 (SCA) the following was said at 1077E-F:

'The test for culpa can, in light of the development of our law since *Kruger v Coetzee* 1966 (2) SA 428 (A), be stated as follows (see Boberg Law of Delict at 390):

For the purpose of liability culpa arises if –

- (a) a reasonable person in the position of the defendant –
 - (i) would have foreseen harm of the general kind that actually occurred;
 - (ii) would have foreseen the general kind of causal sequence by which that harm occurred;
 - (iii) would have taken steps to guard against it, and
- (b) the defendant failed to take those steps.”

[27] Considering the above authorities and the circumstances of this case, four main issues need to be considered:

1. Was there a hole behind the pavilion that occasioned Mrs Roets' injuries? If so,
2. Were the defendants aware of this fact? If so,
3. Did they take reasonable precautions to avert harm to people entering the school?

4. Can the defendants rely on the disclaimer board to avoid liability.

[28] The Court is faced with two mutually destructive versions. In *Stellenbosch Farmers' Winery Group Ltd and Another v Martell & Cie SA and Others*⁵ the Court had the following to say regarding the method to be employed in resolving factual disputes:

“The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the Court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness's reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the Court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.”

⁵ 2003 (1) SA 11 (SCA), at 14I-E.

Submissions of parties

[29] The defendants' counsel argued that because Mrs Roets did not submit evidence depicting the hole, reliance on the presence of the hole at the scene of the incident was not borne out by evidence. In the alternative, he asserted that no negligence could be attributed to the defendants as Mrs Roets authored her own misfortune by jumping from the pavilion.

[30] Mrs Roets denied that she sustained injuries from jumping from the pavilion and chasing her son. She testified that she couldn't jump from the pavilion as her feet were already on the ground when sitting. She further testified that jumping from the pavilion was impossible because of the rooftop above her head, and even if she jumped, it is inconceivable that she would have sustained such injuries, as the pavilion is just 60 cm in height.

Assessment of the evidence

[31] Mrs Roets was a satisfactory witness. Her responses, candour and demeanour on the witness stand demonstrated that she was truthful, credible and reliable. Mr Wilkinson was also a reliable and credible witness. His evidence that he inspected the hole and its size by putting his foot in it was unchallenged and corroborated Mrs Roets' evidence that her foot fell into a hole covered by the grass.

[32] The defendants did not lead any evidence regarding the existence or absence of the hole. Mr Gerber, who was first to arrive at the scene, observed Mrs Roets' injuries and called his doctor to attend to her. He did not investigate how Mrs Roets sustained the injuries. Mr Malatji, who tended the school's garden, also failed to inspect the scene after the incident. In the circumstances, the defendants' reliance on the absence of a photo depicting the hole to argue that there was no hole is not supported by any evidence.

[33] The defendants' evidence is riddled with inconsistencies and improbabilities. Mr Gerber's testimony was unreliable as he could not make his mind up. During examination-in-chief, he testified that he could not recall if Mrs Roets jumped from the pavilion or moved down and twisted her ankle.

When asked to clarify this averment, he said that Mrs Roets did not simply twist her ankle as she had a fracture and blood on her wound. Under cross-examination, he stated that Mrs Roets sustained her injuries from jumping from the pavilion and failed to explain whether there were any blood trails on the grass.

[34] During cross-examination, the defendants' counsel put to Mrs Roets that the defendants' witnesses would testify that she told them that she jumped from the pavilion whilst chasing her son. However, none of the witnesses presented such evidence except Mr Gerber, who could not firmly confirm whether Mrs Roets had informed him that she had jumped, hopped, or walked from the pavilion. Of importance is that there were no eyewitnesses who saw Mrs Roets jumping from the pavilion. Mrs Roets' counsel correctly submitted that it is highly inconceivable that a woman Mrs Roets' age would have attempted to subject herself to such risk.

[35] The defendants' further counsel told Mrs Roets that the defendants would lead evidence that the school children called the teachers to assist her. Mr Gerber testified that an educator called him to attend the scene of the incident. Further, he was the first person to arrive at the scene and did not see any children at the scene. Mr Malatji alleges to be the first person to arrive at the scene after being called by Mrs Roets' son, who remained with her mother when he (Mr Malatji) went to seek assistance. Both defendants' witnesses testified on the policy, which precluded the school parents and children from walking on the school's lawn despite not having proof of it. Mr Gerber testified that the parents coming to the school are not bound by such a policy, whilst Mr Malatji testified that it binds both the learners and their parents. These inconsistencies, in my view, render the defendants' version less credible and improbable.

[36] Regarding all the evidence, this Court has no basis to reject Mrs Roets' version, as it is more credible and probable. The defendants knew or ought to have known about the existence of the hole because it was within the school premises. The reasonable defendants' servants would have foreseen the possibility of the hole causing harm and taken reasonable steps to cover it or

to cordon it off, but they failed to do so. The defendants do not dispute that the grass obscured the hole and provided no evidence that they warned the visitors about it.

[37] The defendants led no evidence to show that Mrs Roets failed to take precautions for her safety. Even if this Court were to accept that she did not walk carefully, rushed to get to her son and ignored her surroundings, the defendants would still not be absolved from their legal duty to safeguard against conditions existing in the school premises causing injury or damage to all the persons using the school's facilities.

[38] The next issue to be determined is whether the defendants can rely on the disclaimer to avoid liability. On the one hand, the defendants alleged that the disclaimer board was displayed at the school entrance when the incident occurred and argued that the disclaimer did not seek to deprive Mrs Roets of judicial redress as she saw it or ought to have seen it. On the other hand, Mrs Roets disputed that it was there.

[39] The parties agreed, in the pre-trial minute, that the documents in the bundle are what they purport to be. However, the contents thereof are not admitted. For the Court to admit the correctness of the contents of the disclaimer, the defendants needed to provide evidence of its authenticity and originality. In the absence of such evidence, the disclaimer constitutes hearsay evidence. The above position was confirmed by the Supreme Court of Appeal (SCA) in *Rautini v Passenger Rail Agency of South Africa*⁶, where it stated that:

“...it is trite that hearsay evidence is prima facie inadmissible. The discovery thereof by the appellant in terms of the rules of Court does not make them admissible as evidence against the appellant, unless the documents could be admitted under one or other of the common law exceptions to the hearsay rule.”

[40] Section 3 of the Law of Evidence Amendment Act⁷ reads:

⁶ [2021] ZASCA 158

⁷ Act 45 of 1988, as amended.

- '(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-
- (a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;
 - (b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or
 - (c) the Court, having regard to-
 - (i) the nature of the proceedings;
 - (ii) the nature of the evidence;
 - (iii) the purpose for which the evidence is tendered;
 - (iv) the probative value of the evidence;
 - (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
 - (vi) any prejudice to a party which the admission of such evidence might entail; and
 - (vii) any other factor which should in the opinion of the Court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice.'

[41] In the current matter, the defendants failed to apply for any of its hearsay evidence to be admitted in terms of section 3 of the Law of Evidence Amendment Act. The only submission relied on was that the disclaimer was displayed at the school's entrance on the day of the incident. To discharge the onus to prove that the disclaimer was indeed displayed, the defendants called Mr Gerber and Mr Malatji who simply stated that it was there.

[42] Mr Gerber's oral evidence was vague and unreliable in that he could not remember the date or year in which he assumed his employment at the school, had no knowledge of the date the disclaimer was first displayed at the school's entrance and failed to produce any proof that it was there on the day of the incident. Similarly, Mr Malatji was not a credible witness, and his evidence appears to have been tailored to corroborate Mr Gerber's in that he could not remember the contents of the disclaimer, which was allegedly written in bold letters and displayed at the entrance of the school that he used daily.

[43] On the contrary, being a resident and community member of Bronkhorstspuit and having good knowledge of the school surroundings and a keen interest in its development, Mrs Roets' evidence regarding the absence of the disclaimer at the time of the incident was more probable than the defendants' evidence. More so, her evidence was corroborated by Mr Wilkinson, who for years participated in the sports events at the school as a rugby coach.

[44] Whether Mrs Roets and Mr Wilkinson testified that they did not see the disclaimer as opposed to saying that it was absent, as raised by the defendants, is inconsequential. What is apparent is that the defendants failed to prove that the disclaimer had already been displayed at the entrance of the school on the date of the incident.

[45] During oral arguments, the defendants' counsel sought to rely on the emblem depicted on the disclaimer, which indicates that from 1907 to 2007, the school had been in existence for one hundred years, to invite the Court to make an inference that the disclaimer was displayed at the school entrance around 2007. It is trite that a Court may only draw inferences that are consistent with all the proven facts, and where one or more inferences are possible, it must satisfy itself that the inference sought to be drawn is the most probable inference.⁸

⁸ *Rautini v Passenger Rail Agency of South Africa* [2021] ZASCA 158; *AA Onderlinge Assuransie-Assosiasie Bpk v De Beer* 1982 (2) SA 603 (A); *Cooper and Another v Merchant*

[46] In the current matter, none of the defendants' witnesses testified on the contents of the emblem depicted on the disclaimer. Additionally, Mrs Roets and Mr Wilkinson were not cross-examined on this aspect. In the absence of the testimony by the author on the correctness of the content of emblem of the disclaimer, the evidence constitutes hearsay evidence and is inadmissible. As such, the defendants cannot rely on the disclaimer to avoid liability.

Apportionment

[47] The remaining question is whether the claim for damages should be apportioned. If so, whether such apportionment should be assessed at fifty percent in accordance with the Apportionment of Damages Act⁹. I do not agree. Mrs Roets has proven, on the balance of probabilities, that she stepped and fell into an unprotected but obscured hole at the school premises, thus sustaining an open fracture and severe laceration of the right ankle. Additionally, she could not have reasonably foreseen that a hole was there. The defendants were negligent in failing to take the necessary steps to ensure that no harm befall Mrs Roets or any person as a result of the unprotected hole. There is, therefore, no reason why they should not be held 100% liable for the damages she suffered.

Conclusion

[48] In my view, the defendants failed to adduce sufficient evidence to rebut the *prima facie* case of negligence put up by Mrs Roets. They further could not discharge the onus of proving, on a balance of probabilities, that the disclaimer was displayed at the school entrance on the day of the incident. In the circumstances, Mrs Roets' fall was occasioned by the negligence of the defendants' servants and she is entitled to be fully compensated for such damages as she may prove in the future. The defendants are liable for the costs of the suit.

[49] Accordingly, the following order is made:

Trade Finance Ltd (474/97) [1999] ZASCA 97 (1 December 1999) para 7; *Govan v Skidmore* 1952 (1) SA 732 (N) at 734C-E.

⁹ Act 34 of 1956, as amended.

Order

1. The defendants are liable to pay the plaintiff 100% of such damages as she may establish in due course arising out of her fall at Du Preez Van Wyk Primary School on 13 January 2013.
2. The defendants shall pay the plaintiff's costs, jointly and severally, the one paying the other to be absolved.



D. Mahosi J
Acting Judge of the High Court

Date of hearing: 20 March 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives through email. The date for hand-down is deemed to be 21 June 2024.

Appearances

For the applicant:	Advocate Kekana
Instructed by:	Mohlolo Mashago Attorneys c/o GW Mashele Attorneys
For the respondent:	Advocate Hlangwane
Instructed by:	State Attorney