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

CASE NO: 40579/2021

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES / NO

(3) REVISED

DATE: 2024.10.21

SIGNATURE

In the matter between: -

MPHO ELVIS MHLONGO

Plaintiff

VS

**THE MEMBER OF THE EXECUTIVE COUNCIL OF
GAUTENG DEPARTMENT OF EDUCATION**

Defendant

JUDGMENT

MABUSE J

[1] This matter came before me as a claim by the Plaintiff against the Defendant for payment of money following an incident that took place at Nantes Primary School in Eersterust, here in Pretoria, on 9 November 2017. This claim is resisted by the Defendant.

THE PARTIES

[2] The parties in this matter are as follows:

[2.1] the Plaintiff, Mpho Elvis Mhlongo (“Mr Mhlongo”), is an adult male of house nr. 5[...], M[...], Eersterust, Pretoria. He sues in this matter in his personal capacity.

[2.2] the Defendant, Member of the Executive Counsel of Education (“the Defendant”) is sued herein in its representative capacity as the MEC responsible for the administration of the Department of Education in the Gauteng Province, with its offices situated at [...]th Floor, East Wing, 3[...] S[...] Street, Johannesburg, Gauteng Province.

[3] There was an application at the commencement of the trial in which Mr A.K. Maluleka, counsel for the Plaintiff, applied for a separation of the merits from quantum in terms of Rule 33(4) of the Uniform Rules of Court (“the Rules”). Adv V. Mnisi, counsel for the Defendant, had no objection against the granting of the said application. The application was accordingly granted and the issues relating to the merits were separated from the issues relating to the quantum. The quantum-related issues were postponed *sine die*.

THE BACKGROUND

[4] In his particulars of claim the Plaintiff pleaded his case as follows. At the time of the incident in question, the Plaintiff was a learner at Nantes Primary School (“Nantes”), whose principal at the time was a certain Lucracia Griffiths (“Ms Griffiths”). At all material times, Nantes was a public school under the control of the Defendant.

[5] On or about 9 November 2017, the Plaintiff was playing in the premises of the said school. Whilst thus playing, a fellow learner kicked him in head, resulting in him hitting a steel pipe with his head.

[6] As a result of the said assault, the Plaintiff sustained the following injuries:

- [6.1] traumatic brain injury with loss of consciousness;
- [6.2] fracture of the frontal skull bone;
- [6.3] fracture of the right greater sphenoid wing; and
- [6.4] large extradural hemorrhage with mass effect. Associated with severe global cerebral oedema, acute obstructive hydrocephalus and mid-line shift.

[7] As a result of the aforementioned injuries, the Plaintiff was admitted for medical treatment at Mamelodi Hospital, wherefrom he was transferred to Steve Biko Hospital and later to Kalafong Hospital. According to his particulars of claim, he was treated as follows:

- [7.1] he was incubated and ventilated;
- [7.2] he was sedated;
- [7.3] brain scan was conducted;
- [7.4] physiotherapy;
- [7.5] pain management;
- [7.6] radiological examination;
- [7.7] neurological observation;
- [7.8] neurological surgery.

[8] As a consequence of the said injuries, the Plaintiff suffered, and continues to suffer:

- [8.1] severe headaches;
- [8.2] memory and concentration problems;
- [8.3] emotions and psychological trauma;
- [8.4] scarring.

[9] The aforementioned injuries and consequent conditions suffered by the Plaintiff were caused by the wrongful and negligent breach of the said legal duty by one or more or all of the teachers and employees of Nantes, who were negligent in one or more or all of the following respects:

[9.1] they failed to ensure that a playing environment for learners in general, and Mpho in particular, is safe;

[9.2] they failed to supervise learners in general, and Mpho in particular, while playing on the school grounds;

[9.3] they failed to ensure that learners, and Mpho in particular, are not exposed to potentially dangerous playing equipment, especially steel posts which hit Mpho's head after he was kicked on the head;

[9.4] they failed to put sufficient measures in place to ensure that learners are adequately supervised whilst playing on the school grounds;

[9.5] they failed to exercise reasonable care to ensure that learners do not assault each other, whilst playing on the school grounds, when with the exercise of reasonable care and skill, they could and should have done so.

[10] As a consequence, the Plaintiff has sustained some damage. It is for the foregoing reasons that the Plaintiff claims from the Defendant payment of some money.

[11] The teachers, principal, and other employees who were employed by the Department of Education, Gauteng Provincial Government, to render services, at the material time were acting within their scope and cause of their employment with the Defendant.

[12] By reason of the said employment, the teachers, principal, and other employees of the said school, assumed an in loco parentis role and were under legal duty to take reasonable measures to ensure that its learners are adequately supervised whilst playing on the school grounds, to ensure that school environment or school playground, where learners play, is safe for

learners at all times. Once it is clear that the danger or harm would have been foreseen and guarded against by the deligens paterfamilias, the duty to take care is established and it only remains to ascertain whether it has been discharged.

- [13] According to Adv. Maluleka, the Plaintiff's case is based on the failure by the School Staff to supervise the children or learners within the school premises.
- [14] The Defendants' defence is that on the date and time of the incident, the Plaintiff, having been on suspension by the school from 7 November 2017 to 13 November 2017, was not supposed to be within the school premises. He was therefore unlawfully on or in the school premises. The Plaintiff unlawfully gained access into the school premises.
- [15] In its plea the Defendants pleaded as follows. On 7 November 2017 the Plaintiff was served with a notice of suspension and was effectively suspended for stabbing another learner with a pen, and furthermore, for having stolen a laptop belonging to a teacher at Nantes Primary School.
- [16] The Plaintiff's suspension was duly communicated to him and his parents through a notice of suspension. This notice of suspension was accompanied by a letter to the Plaintiff and the parents were invited to a scheduled disciplinary meeting.
- [17] In terms of the notice of suspension, the Plaintiff was prohibited from entering the school premises from 7 November 2017 to 15 November 2017. The Plaintiff's suspension was to be in effect for 7 days. He was, however, allowed to return to school only for the purposes of writing examinations on 13 November 2017. A formal disciplinary hearing was to be held on 15 November 2017 at 18h00 within the school premises.

[18] Consequently, on 9 November 2017, the Plaintiff was not supposed to be within the school premises due to his ongoing suspension. So, when the incident took place within the school premises, on 9 November 2017, the Plaintiff was in violation and breach of his terms of suspension and the school's disciplinary code and procedure.

[19] On 9 November 2017, the Plaintiff gained access into the school premises by jumping over the school fence. He did not use the school's main gate. He also did not obtain proper authorization from Ms Veronica Jacobs ("Ms Jacobs"), who was the security officer at the school main gate on that particular day. The duties of Ms Jacobs were:

[19.1] to look after the children in the school premises;

[19.2] to control access by the school children and everybody into the school premises;

[19.3] she testified that she was coming out of the office when she noticed the Plaintiff trying to get out of the school premises by jumping over the school fence. She grabbed him whilst he was in the process of doing so. She asked him what he was doing because she knew that he was not supposed to be on the school premises. The Plaintiff told her that he was hungry and that he had fainted. She explained further to him that he was not supposed to be on the school premises. She took the Plaintiff to Mr Gaven Nation, also a teacher at the same school, before going back to her post;

[19.4] she testified that she knew the Plaintiff very well. She did not know how the Plaintiff got into the school premises on 9 November 2017, because he did not use the school's main gate to do so;

[19.5] she had been called to the principal's office on 7 November 2017, where she had been informed that the Plaintiff had been suspended and was therefore not supposed to be on the school premises;

[19.6] this evidence by Ms Jacobs that the Plaintiff was on suspension as on 9 November 2017; that he was in the school premises where and when he was not supposed to be there; that in accessing the school premises the Plaintiff did not use the main gate of the school and that she grabbed him while he was trying to leave the school premises by jumping over the school fence, was not disputed.

[20] On 9 November 2017, after he had gained access to the school premises, unlawfully, and gambling on the school premises, he was kicked by another learner on the ribs or stomach. In the process, his head bumped against the wall.

[21] The Defendant pleaded further that:

[21.1] at all material times during the school breaks on 9 November 2017, there was always a teacher who was doing rounds and duty on the playground. On that particular day, there were two teachers who were on playground duty. These allegations are duly supported by the evidence of Ms Yvonne Tyron Poonsami ("Ms Poonsami") who testified that on 9 November 2017 she was doing playground duty at the said primary school. She did this duty with a Mr Smith, her senior;

[21.2] on 9 November 2017, while doing playground duty, she came across a group of boys who had gathered at the corner of a tennis court. She approached them. A few of them dispersed. She called two of the boys, namely Jacobs and Tshifiwa, and asked them what was going on. They told her that they were looking for a ball behind the wall. She asked them if everything was in order and they said yes;

[21.3] during cross-examination, she testified that at the time of the incident she was not where it took place. She did not see it. Her evidence that she did playground duty on that day; that Mr Smith also did playground duty on the same day; that there are two educators on any given day assigned to do playground duty; that on that day, as she was doing playground duty, she spoke to Jacobs and Tshifhiwa, that she enquired from them if everything was in order, was not challenged.

[22] Earlier, the Plaintiff's second witness, one Tshifhiwa Bradley Sehope ("Tshifhiwa"), told the Court that he knew the Plaintiff; that the Plaintiff was his best friend; that he and the Plaintiff grew up together and that they stay in the same neighbourhood. He also knows a certain Montelo Jacobs. He and the said Montelo Jacobs, who was also a learner at Nantes, grew up together.

[23] He testified about the incident in which the Plaintiff was involved on 9 November 2017. He testified that on 9 November 2017, during break, they were at the tennis court. By "they" he referred to "the learners". Some learners were playing soccer while others were gambling. The Plaintiff came into the tennis court. Montelo also came into the tennis court after the Plaintiff. Upon his arrival in the tennis court, he slapped the Plaintiff a few times in the face. The Plaintiff walked out of the tennis court and went to lean against the wall. Montelo approached him and kicked him in his head. The Plaintiff collapsed. White stuff came out of his mouth. Another friend of his and him picked the Plaintiff up and took him to the principal's office. The principal then was Ms Griffiths. The principal took the Plaintiff to the sick room.

[24] Montelo was angry that someone had stolen his hat. He kicked everybody. There was no teacher around. Now and then there would be a teacher doing rounds on some days but there was none on 9 November 2017. He and the

Plaintiff were not in the same class. The Plaintiff was at school the whole morning of 9 November 2017.

- [25] His evidence that there was no teacher doing supervision in the playgrounds was left unchallenged. On a question by the Court he testified that there was no teacher. He was not sure whether there was a teacher or not because the field is big. He did not know. Unless there was another Bradley, he should be certain that there was an educator patrolling the school playing fields because Ms Poonsami testified that she spoke to him and Mr Jacobs. Ms Poonsami's evidence was not challenged on this aspect. Equally important, Ms Poonsami's testimony that she called and spoke to Bradley and Jacobs on 9 November 2017 in the playgrounds was not put to Bradley to challenge.
- [26] Ms Griffiths was the principal of Nantes at the time of the incident. She was the Defendant's first witness. She testified that although he had been on suspension from 7 November 2017 to 14 November 2017, the Plaintiff was at school on 9 November 2017.
- [27] During cross-examination, she testified that the teachers or educators who supervised the learners in the playground cannot stand still at one point. They walk around the school premises. She is very strict with regards to supervision of the learners in the school's playgrounds.
- [28] According to counsel for the Plaintiff, educators assumed their responsibilities for learners as soon as they step into the school premises and they are responsible throughout the day. The responsibilities of educators extend to extra-curricular activities or extensions away from the school. When an educator assumes responsibilities over the minor, he or she does so *in loco parentis* or in the position of the parent. Accordingly, educators have a legal responsibility or a duty to take care of the learners and to ensure that a safe and secure environment exists and the learners are under constant

supervision and control of the educators. What precisely is a safe and secure environment is not explained, nor is it the expression, constant supervision: “does it mean that each learner must be attached to an educator to ensure the safety of such a learner? Does it mean that for each learner there must be forever or always an educator to ensure that such a learner is constantly supervised?”

[29] According to Mr Maluleke, the role of the *loco parentis* encompasses twofold responsibilities; the first, being the duty of care which includes a physical and psychological wellbeing of the learner; the second, maintaining order within the school premises, which extends to an educator’s rights to discipline the learner.

[30] The duty of care can be regarded as more than simply a duty. It is regarded rather as a legal obligation to protect learners and make sure that no harm comes to them, which is the care of the navigators. The primary objectives of educators, as professionals, is to take over the role of parents in order to educate learners, through their specialized skill of the subject taught and their vocational guidance they have received.

[31] Quite evidently, the Plaintiff’s case is based on two factors, and those are:

[31.1] that an incident in which the Plaintiff sustained some bodily injuries took place in the school premises on 9 November 2017; and

[31.2] that during the time of this incident, or at the material time this incident took place, there was no teacher in sight who was assigned to do supervision of the learners in the playgrounds.

[32] From the following paragraph [12], in his heads of argument, it is clear that Adv. Maluleka read extensively some literature on the subject. This is:

[32.1] *“The status of an educator as being in loco parentis, is regulated through the South African Schools Act (Act No. 84 of 1996), the Employment of Education Act (Act No. 76 of 1998), as well as the South African Council of Educators Act (Act No. 31 of 2000), wherein the rights and duties of educators are also listed.”;*

[32.2] I doubt if this is a proper way or professional way of referring the Court to legislation. I have often seen seasoned counsel preparing for the Court a bundle of authorities, containing copies of the legislations on which such counsel relies, if that counsel relies on a section of any legislation; he will state that section. A seasoned counsel will also include copies of the authorities and the marked or highlighted paragraphs of such authorities on which he relies. Whether a matter is reported or not, seasoned counsel will provide copies to the Judge. He will not, as Mr Maluleka has done, throw a mass of information at a Judge and, while expecting a Judge to have regard to the legislation he relies on, expect the poor Judge to look for a needle in a haystack. The purpose of seasoned counsel placing a bundle of authorities before the Judge, is to make the Judge’s task of research easier and not onerous, like it was the case in this matter;

[32.3] *In casu*, Mr Maluleka has not even referred the Court to the sections of the legislations on which he relies for the convenience of the Court. The result is that I went through all the legislations he has cited and found nothing useful for the purposes of the judgment. I found nothing that Advocate Maluleka relied on. The problem with such an exercise is that it unnecessarily waste the judge’s time;

[32.4] For instance, in paragraph [16] of his heads he stated that:

“In 2002 in Wynkwaart v Minister of Education (Cape of Good Hope, case nr. 4168/1999)”. The Court is not given a copy of the said judgment. This

judgment is obviously not reported. Assuming that the judgment is on Saflii, the poor Judge now exhausts his energy and time in searching the said judgments in the years 2021, 2022, and 2023 but still does not find it. What a wanton waste of time. Mr Maluleka is hereby advised to improve his *modus operandi*;

[32.5] even worse, he has in paragraph [J] of his heads of argument, referred the Court to a list of authorities without providing the Court with copies of such authorities. He has failed to point out the paragraphs in those authorities on which he relies and how they advance the Plaintiff's case. How is the Court expected to use such authorities in his favour?;

[32.6] in paragraph [K] of his heads of argument he sets out his references. This is discouraging.

[33] In order to succeed with a claim for negligent liability, the Plaintiff must allege and prove that a *diligens paterfamilias* in the position of the Defendant would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss and failing to take reasonable steps to guard against such an occurrence. The Plaintiff must prove that the Defendant failed to take such steps.

[34] The *locus classicus* case on the principles set out in paragraph [33] supra is ***Kruger v Coetzee 1966 (2) SA 428 (A) at page 430E*** where the Court had the following to say:

“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 patrimonial loss; and

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

(b) the defendant failed to take such steps.”

The above matter dealt with negligence. According to this judgment, it is required of the Plaintiff to prove not only that the possibility of harm should have been foreseen but also that there were various other steps that the Defendant should have taken. In other words, that there were available to the Defendant reasonable steps that he should and could have taken in order to avoid harm, but which he failed to take; that the Defendant has taken reasonable steps, but such steps were not successful or enough to avoid or prevent harm, the onus rest on the Plaintiff to establish further steps that the Defendant could and should have taken.

[35] The onus is on the Plaintiff to prove that a reasonable person in the position of the Defendant:

[35.1] would foresee the reasonable possibility of his conduct, whether such conduct constitutes an act or omission, injuring another in his person or property and causing him patrimonial loss;

[35.2] would take reasonable steps to guard against such occurrence and that the Defendant failed to take such steps.

In ***Griffiths v Netherlands Insurance Co of SA Ltd, 1976 (4) SA 691 (A) at 695 F-G*** the Court, per Corbett JA, had the following to say:

“Generally, culpa, or negligence, arises if a paterfamilias in the position of the party concerned would foresee the reasonable possibility of his conduct injuring another in his person or property and causing patrimonial loss, and would take reasonable steps to guard against such occurrence, and the party concerned in fact fails to take such steps.”

See also ***Ngobane v South African Transport Services 1991 (1) SA 756 (AD) at page 776 D-G***. Whether a reasonable man would have taken steps to

guard against a foreseeable harm, in my view, involves a value judgment. The contributor, Professor JC van der Walt, in Joubert (Ed) The Law of South Africa Vol. 8 SV, Davisod**, paragraph 43 at 78 commenced in this regard that:

“Once it is established that a reasonable man would have foreseen the possibility of harm, the question arises whether he would have taken measures to prevent the occurrence of the foreseeable harm. The answer depends on the circumstances of the case. There are, however, four basic considerations in each case which influence the reaction of the reasonable man on a situation posing a foreseeable risk of harm to others:

- (a) the degree or extent of the risk created by the actor’s conduct;*
- (b) the gravity of the possible consequences if the risk of harm materialises;*
- (c) the utility of the actor’s conduct; and*
- (d) the burden of illuminating the risk of harm.”*

[36] Applying the law to the facts, it is evident that Nantes has foreseen harm and for that reason has, as a reasonable man, taken appropriate steps to avoid the harm. The mere fact that Nantes has seen it appropriate to deploy two teachers to patrol in the playgrounds, indicates undeniably the fact that Nantes had foreseen the risk of harm to the learners in the playground. Such harm may consist in the selling of drugs within the school premises; a criminal jumping over the fence and robbing the learners; or someone standing outside the fence and selling drugs to the learners inside the school premises. Nantes has done well by adopting proper measures to avoid such harm befalling the

learners by deployment of two teachers on any given day to supervise the learners in the playing grounds and the playing grounds themselves.

[37] On the evidence of Tshifhiwa, that on normal days there would be educators patrolling the playgrounds, even if he testify further that there were no educators doing patrol duty on 9 November 2017; the further uncontested evidence of Ms Poonsami that she did supervision of the learners with Mr Simon on 9 November 2017, as well as the evidence of Ms Griffiths that daily there are teachers who are deployed to the playgrounds to do supervision of the learners and the playgrounds, it can hardly be contended that the first two considerations would not prompt Nantes to take steps to prevent any of the occurrence, and may move and many more set out in the presiding paragraph, from taking place. It can hardly be contended that the Nantes did not take any risk of harm taking place within the school premises, as serious.

[38] When regard to (a) and (d), I rely on the judgment of ***Moubray v Syfret 1935 AD 199 at 202*** where the court had the following to say:

“That in order to determine whether in a particular case there was or was not negligence, we must take into account all the surrounding circumstances, time, place, custom, local habits, as well as the special and peculiar facts of the case.”

The mere fact that a learner who was on suspension had the ability to enter the school grounds undetected and even attend classes; the fact that the same learner would even steal another teacher’s laptop and go away with it, are factors that the school has to take into consideration. The mere fact that the learner, like in the present case, could engage in fights which result in injuries in either of them and the fact that learners could gamble in the school premises are, in my view, relevant factors to be taken into account in certain circumstances to determine whether the steps taken by Nantes to avoid the

risk of injury to the learners or school property were reasonable. On the facts of this case, and having regard to the grounds of negligence as set out in paragraph [9] supra, I am of the view that it cannot be contended that any recreator or educators or staff members of the Nantes breached any of their legal duty on 9 November 2017.

[39] As I already have pointed out, the Plaintiff did not testify. No evidence of the Plaintiff's injuries was placed before the Court. Perhaps evidence on this aspect of the case was reserved for later attention. It is unclear whether the Plaintiff's head hit the wall as pleaded by the Defendant or is still part as pleaded in the Plaintiff's cause of action, after being kicked.

[40] The Plaintiff was not the only learner on the school grounds on that particular day. It will be naive to think that the attention of the educators, who were doing playground supervision, should be focused on him. The educators had to focus on what they saw as they were walking or taking rounds. Even Ms Griffiths, the school principal at the time, testified during cross-examination, that during the playground supervision, the educator who does that duty does not stand still at one place. He moves around within the school premises. This evidence by the school principal, in my view, demonstrates that the school has taken steps to ensure that on a daily basis a teacher or two teachers are assigned the task to do supervision of the school playground.

[41] This incident took place despite the fact that Ms Poonsami and Mr Smith took rounds in the school playgrounds and everywhere in the school premises to supervise the learners. The fact that the incident took place is not indicative that the said educators did not do their duty properly on that day. It only shows that both Mr Smith and Ms Poonsami are not God or are not air. They cannot be everywhere in the school premises.

[42] In view of the fact that the school had, by deploying Ms Poonsami and Mr Smith to supervise the school playgrounds, and that notwithstanding that deployment the incident still took place, there is a duty on the Plaintiff to prove what more the Defendant should and could do to avoid the incident. The Plaintiff has failed in this regard.

[43] There is no evidence by the Plaintiff that, when patrolling the playgrounds, the Defendant's educators could and should have adopted an alternative method and what that method is that they failed to adopt. There is no evidence by the Plaintiff that even if the Defendant had deployed all the teaching staff at Nantes, which they failed to do, the said incident could have been avoided. This Court is left in doubt as to whether there were other reasonable steps which the educators could and should have taken to prevent the incident in which the Plaintiff was involved from taking place. This means that the negligence on the part of the Defendant has not been proved.

[44] As a consequence, the following order is hereby made:

On the merits, the Plaintiff's claim is hereby dismissed.

**PM MABUSE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

Appearances:

Counsel for the Plaintiff:

Adv. A.K. Maluleka

Instructed by:

KS Dinaka Attorneys

On behalf of the Defendant:

Adv. V. Mnisi

Instructed by:

State Attorney Pretoria

Date heard:

16 May 2024

Date of Judgment:

21 October 2024