

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

CASE NO: 966/16

Reportable: YES / NO

Circulate to Judges: YES / NO

Circulate to Magistrates: YES / NO

Circulate to Regional Magistrates: YES / NO

In the matter between:

R[...] A[...]

Plaintiff

and

**THE HEAD OF THE DEPARTMENT OF EDUCATION,
NORTHERN CAPE PROVINCE**

First Defendant

FRANS HAEL t/a FRANS HAEL BUSDIENSTE

Second Defendant

DE CONDUCAO (DAWID) DE KOKER

Third Defendant

THE A[...] PRIMARY SCHOOL

Fourth Defendant

**THE MEMBER OF THE EXECUTIVE COUNCIL OF
THE NORTHERN CAPE DEPARTMENT OF EDUCATION**

Fifth Defendant

Heard on: 15 March 2022

Delivered on: 6 September 2024

JUDGMENT

RAMAEPADI AJ

INTRODUCTION

- 1 This case concerns a matter affecting a significant number of learners in this country, and a majority of whom are from disadvantaged backgrounds – the transportation of learners from home to school and back (“learner transportation”).
- 2 In particular, the case concerns the liability of the State in terms of section 60(1) of the South African Schools Act, 84 of 1996 (“the Schools Act”) for damage or loss caused as a result of an act or omission in connection with any educational activity conducted by a public school.
- 3 It is not in dispute that by virtue of section 60(1) of the Schools Act, the State, represented in this case by the first and fifth defendants (the HoD and the MEC for Education in the Northern Cape) is liable for the delictual damages suffered by the plaintiff on 3 May 2006 when she was pushed or fell from a moving Nissan bus with registration letters and numbers B[...] 2[...] N[...] (“the Bus”), which was operated by the second defendant and driven at the time by the third defendant (“the *accident*”).
- 4 The issue of liability was decided in favour of the plaintiff on 15 May 2019 in terms of a Consent Order. In terms of the Consent Order, it was ordered *inter alia*, that:
 - 4.1. The First and Fifth Defendants, on the one hand and the Second Defendant, on the other hand, are thereby declared to be joint

wrongdoers in terms of Section 2(2) of the Apportionment of Damages Act, 34 of 1956, and the court would make a just and equitable apportionment, having regard to the degree in which each joint wrongdoer was at fault in relation to the damages suffered by the Plaintiff.¹

4.2. The First and Second Defendants, jointly and/or severally the one paying the other to be absolved, accepts 100% liability towards Plaintiff in respect of her agreed and/or proven damages arising out of an incident which occurred on 03 May 2006.²

4.3. The quantum is postponed *sine die*.³

5 Subsequent thereto, and on 14 March 2022, the quantum of the plaintiff's claim was settled. In terms of the Consent Order, it was ordered *inter alia*, that the first, fifth and second defendants, jointly and/or severally the one paying the other to be absolved, would pay to the plaintiff the sum of R10 000 000.000 (Ten Million Rand).

6 Accordingly, all that remains of this case, is the question of a just and equitable apportionment of the plaintiff's claim.

7 Adv Sibeko SC who together with Adv Merabe appeared for the first and fifth defendants urged me to declare that the second defendant is 60% at fault for the accident, whereas the first and fifth defendants are 40% at fault. He contended that a 60/40 apportionment in favour of the first and fifth defendants would be a just and equitable apportionment in the circumstances of this case.

8 Adv Coetzee SC who appeared on behalf of the second defendant on the other hand, contends differently. He contends that the first and fifth

¹ Consent Order of 15 May 2019 para 2

² *Ibid* para 3

³ *Ibid* para 6

defendants' liability in terms of section 60(1) of the South African Schools Act is not delictual in nature, but statutory, which is not dependent on fault on the part of the first and fifth defendants. He contends that absent any requirement of fault on the part of the first and fifth defendants, then there is no need for any fault apportionment herein. Accordingly, so he contends, the only just and equitable relief in the circumstances is that there should be no apportionment.

- 9 Accordingly, the only issues for determination in this case are: first, whether to apportion fault between the first and fifth defendant on the one hand and the second defendant, on the other. Second, the percentages of the apportionment.
- 10 In the discussion below, I deal with each of the issues summarised above. Before doing so, it is necessary to first make a brief observation about the condition of learner transportation in the country and various instruments regulating land-based public transport and in particular, learner transportation services. Thereafter, I analyse the pleadings and then, the applicable legislative framework.

OVERVIEW OF LEARNER TRANSPORTATION

- 11 It is common knowledge that thousands, if not millions of learners across the country leave their homes every morning to attend school in areas outside their communities. They do so by means of transport facilities dedicated for the conveyance of learners to and from school, some of which are registered and subsidised by the relevant provincial Education departments, whilst others are not. Nonetheless, they assist learners in accessing education.
- 12 A majority of these learners are from disadvantaged communities who go out of their communities for what they perceive as a better education offered by the schools in the affluent areas, or simply because there are no schools in their communities to accommodate them.

- 13 It is mainly the unregistered scholar transport services that are often characterised by overloading, unroadworthy vehicles, non-compliance with the transport laws and, the general non-adherence to the policies and guidelines for the transportation of learners.
- 14 Section 85(2)(b) of the Constitution mandates the National Department of Transport (the DoT) to develop and implement transport policy. On 23 October 2015 the DoT promulgated the National Learner Transport Policy (the National Policy),⁴ which was developed in collaboration with the Department of Basic Education and other stakeholders. The National Policy recognises the need to have a uniform approach to scholar transportation, and the fulfilment of the constitutional mandate of the DoT to provide a safe and efficient transport system.⁵
- 15 The National Policy is applicable to the transportation of learners from grades R to 12, including learners with disabilities as defined in the South African Schools Act, and aims to improve access to quality education by providing safe, decent, effective, integrated and sustainable learner transport.⁶
- 16 In some instances, provincial education departments have been providing transport to learners who do not have access to their nearest schools. The purpose of this is to improve access to education and to ensure that learners reach their schools in a healthy and safe condition in order to enable effective learning.

⁴ Government Notice No. 997 published in Government Gazette No. 39314 of 23 October 2015 “the National Policy”)

⁵ s 2 of the National Land Transport Act, 5 of 2009 (“the NLTA”) provides:

“The purpose of this Act is –

- (a) to further the process of transformation and restructuring the national land transport system initiated by the Transition Act;
- (b) to give effect to national policy;
- (c) to prescribe national principles, requirements, guidelines, frameworks and national norms and standards that must be applied uniformly in the provinces and other matters contemplated in section 146 (2) of the Constitution; and
- (d) to consolidate land transport functions and locate them in the appropriate sphere of government.”

⁶ para 1.3 and 1.6.1 of the National Policy

17 The National Policy envisaged that its implementation would be undertaken in line with the provisions and principles of cooperative governance as set out in section 41(1)(h)⁷ of the Constitution of the Republic of South Africa, 1996 (“the *Constitution*”). In terms of this framework:

17.1 National government will oversee implementation of the Policy in consultation with the relevant stakeholders, including provinces, municipalities and school governing bodies (SGBs).

17.2 Institutional mechanisms made up of provincial departments of transport and education, SGBs, municipalities and law enforcement authorities, will be established at provincial level to foster integrated planning, effective monitoring and delivery of learner transport services. These mechanisms will endeavour to achieve the objectives set out in the Policy; and

17.2 Planning of learner transport must be discussed by provincial and municipal planning structures to ensure that it is integrated with provincial strategies and municipalities in terms of provincial land transport frameworks and integrated transport plans (ITPs). These must take into account road safety measures, transport infrastructure and operational matters that have an impact on the delivery of learner transport services.

Categories of learner transport services

⁷ section 41(1)(h) of the Constitution provides:

“All spheres of government and organs of state within each sphere must cooperate with one another in mutual trust and good faith by –

- (i) fostering friendly relations;
- (ii) assisting and supporting one another;
- (iii) informing one another of, and consulting one another on, matters of common interest;
- (iv) coordinating their actions and legislation with one another;
- (v) adhering to agreed procedures; and
- (vi) avoiding legal proceedings against one another.”

- 18 There are two categories of learner transport services. The first category is the dedicated learner transport services, which consists of four (4) sub-categories.
- 18.1. First, the subsidised group, which is made up of a group of operators who are providing a dedicated learner transport service and are receiving subsidy either from the Department of Basic Education (DBE) and/or DoT. Learners are picked up and dropped off at designated points.
 - 18.2. Second, non-subsidised group, which is made up of operators who are providing a dedicated learner transport service, but are not receiving subsidy.
 - 18.3. Third, Class i, which is made up of operators who enter into contractual agreements with parents and perform door-to-door services.
 - 18.4. Fourth, class ii, which is made up of operators who have special arrangements with learners. The learners organise themselves into groupings and are picked up and dropped off at designated points. Learners pay fares on a per trip basis.
- 19 The second, is a category of non-dedicated services, which consists of two groups.
- 19.1. The first, is the subsidised group, which is made up of a group of operators who are providing general public transport services and are transporting learners with special subsidised tickets.
 - 19.2. The second, is the non-subsidised group, made up of a group of operators who are providing a non-dedicated learner transport service and are transporting learners without any government subsidies.

20 Irrespective of the category in which they fall, *i.e.* whether subsidised or non-subsidised, dedicated or non-dedicated, all learner transport services are a necessary and integral part of the right to education guaranteed to everyone by section 29(1)(a) of the Constitution.⁸ In *Juma Masjid*,⁹ the Constitutional Court described the right to basic education as follows:

“[The right to a] basic education is an important socio-economic right directed, among other things, at promoting and developing a child’s personality, talents and mental and physical abilities to his or her fullest potential. Basic education also provides a foundation for a child’s lifetime learning and work opportunities. To this end, access to school – an important component of the right to a basic education guaranteed to everyone by Section 29(1)(a) of the Constitution – is a necessary condition for the achievement of this right.”¹⁰

21 It is on the backdrop of this framework, having regard to the facts of this case, that I turn to consider the issues presented in this case.

FACTUAL BACKGROUND

22 The facts of this case are fairly uncomplicated. They emerge from the pleadings filed off record and are mainly common cause between the parties.

22.1. On 3 May 2006 the plaintiff (R[...] A[...]) who was at the time, a grade 5 learner at the A[...] Primary School (“the School” or “the fourth defendant”) was pushed or fell from a moving Nissan bus with registration letters and numbers B[...] 2[...] N[...] (“the Bus”), which was

⁸ s 29 of the Constitution provides:

“(1) Everyone has the right –

(a) to a basic education, including adult basic education; and

(b) to further education, which the state, through reasonable measures, must make progressively available and accessible”.

⁹ *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others (Centre for Child Law and Another as Amici Curiae)* [2011] ZACC 13; 2011 (8) BCLR 761 (CC) “*Juma Masjid*”

¹⁰ *Id* at para 43

operated by the second defendant and driven at the time by the third defendant ("the *accident*").

22.2. At the time of the accident aforesaid, the plaintiff together with the other learners of the School were being conveyed as passengers in the Bus from the School to their respective destinations in New Town, Postmasburg.

22.3. It is the plaintiff's case that the conveyance of the learners by the second defendant:

22.3.1. was in terms of a contract concluded between the Department of Education, Northern Cape Province ("the Department") and the second defendant.

22.3.2. in the alternative, the plaintiff pleads that the conveyance of the learners by the second defendant was at the request or instance of the Department in fulfilment of its obligations to enable learners to attend school and to be able to travel from their places of residence to school and back;

22.3.3. was a school activity as envisaged in section 60 of the South African Schools Act; and

22.3.4. in terms of section 60(1) of the Schools Act, the State is liable for any delictual damage or loss caused as a result of any act or omission in connection with any school activity conducted by a public school and for which such public school would have been liable but for the provisions of section 60.

22.3.5. in the further alternative, and in the event that the conveyance of the learners to and from the School was not a school activity, then and in that event, it is the plaintiff's case that:

22.3.5.1.the School is liable jointly with the first defendant (the HoD, Northern Cape Department of Education) to the plaintiff for any delictual damages or loss caused as a result of any act or omission in the conveyance of the plaintiff and other learners at its behest or as a result of its request;

22.3.5.2.the second and third defendants owed a legal duty to learners, including the plaintiff, who were conveyed by the second defendant from the School to their respective destinations,

22.3.5.2.1.not to convey primary school learners, including the plaintiff, in an overloaded bus, alternatively not to load and convey more learners (passengers) than the available sitting capacity of the bus;

22.3.5.2.2.not to allow learners to stand in the bus during trips when the bus was not in a fully stationary position;

22.3.5.2.3.not to allow learners, specifically primary school learners, to approach the door of the bus before it was completely stationary;

22.3.5.2.3.not to allow learners to stand up from their seats and approach the door of the bus before it was completely stationary;

22.3.5.2.4.not to allow learners or any passenger to operate the mechanism that opens and closes the doors of the bus;

22.3.5.2.5. not to allow learners to stand at the front of the bus where the door and mechanism that opens and closes the bus-door is situated;

22.3.5.2.6. not to allow learners to open the door of the bus whilst the bus is in motion, more so when other learners and/or passengers are standing at the door of the bus or in close proximity to the door;

22.3.5.2.7. not to allow the learners to exit the bus or jump from the bus whilst it is in motion, alternatively before it has come to a complete stop;

22.3.5.2.8. not to allow learners to be subjected to negligent conduct in the driving of the bus or in the manner the bus is conducted when the learners are on board that could cause them harm when providing public transport to the learners to and from school.

22.4. It is the plaintiff's case that the first and fifth defendants (the HoD and the MEC), alternatively the first and fourth defendants (the HoD and the School), owed the learners of the School, including the plaintiff, who were being conveyed by the second defendant from school to their respective destinations a legal duty:

22.4.1. to ensure that the primary school learners, including the plaintiff were conveyed in a manner that was safe;

22.4.2. not to allow learners to be conveyed by means of a bus service if their safety could not be determined and controlled or managed;

22.4.3. to ensure that learners were not subjected to negligent conduct in the driving or the manner in which the bus is conducted

when the learners are on board, that could cause them harm when being conveyed from school;

22.4.4. to ensure that proper and adequate transport was made available for the conveyance of primary school learners, including the plaintiff;

22.4.5. to ensure that proper control was exercised to ensure that the bus or vehicle transporting the primary school learners, including the plaintiff, was not overloaded;

22.4.6. to ensure that measures were taken to exercise proper control over primary school learners (during trips) to prevent the learners from harming themselves or causing harm to other learners when they were transported by means of second defendant's bus from school.

22.5. Plaintiff further pleads that it was foreseeable that a learner, including the plaintiff, carried on the bus would suffer harm and damages if:

22.5.1. the bus was overloaded with learners, alternatively if more learners were transported than seats were available on the bus so that a learner or learners would have to stand during the trip;

22.5.2. learners, specifically primary school learners, were allowed to stand near or at the door of the bus when it was not in a completely stationary position (standing still);

22.5.3. learners, specifically primary school learners, were allowed to approach the door of the bus before it was not in a completely stationary position (completely standing still);

- 22.5.4. learners were allowed to stand up from their seats and approach the door of the bus whilst it was not completely stationary, but in fact in motion;
- 22.5.5. learners or any other passenger were allowed to operate the mechanism that opens and closes the doors of the bus whilst it was in motion;
- 22.5.6. learners were allowed to stand at the front of the bus where the door as well as the mechanism that opens and closes the bus's door is situated whilst the bus was in motion;
- 22.5.7. learners were allowed to open the door of the bus whilst the bus is in motion, more so when other learners and/or passengers are standing at the door of the bus or in close proximity of the door;
- 22.5.8. learners were allowed to exit the bus or jump from the bus whilst it is in motion, alternatively before it has come to a complete stop;
- 22.5.9. not to allow learners to be subjected to negligent conduct in the driving of the bus or in the manner the bus is conducted when the learners are on-board and being conveyed that could cause them harm and damages when providing public transport to the learners to and from school;
- 22.5.10.to ensure that the primary school learners, including the plaintiff were conveyed in a manner that was safe;
- 22.5.11.to ensure that the learners were not subjected to negligent conduct in the driving of the bus or in the manner the bus is conducted when the learners are on board that could cause

them harm and damages when being conveyed by bus from school;

22.5.12.to ensure that proper and adequate transport were made available for the conveyance of the primary school learners, including the plaintiff;

22.5.13.to ensure that proper control was exercised to ensure the bus or vehicle transporting the primary school learners, including the plaintiff, was not overloaded;

22.5.14.to ensure that measures were taken to exercise proper control over primary school learners to prevent the learners from harming themselves or causing harm to other learners when they were being transported by means of the second defendant's bus from school.

22.6. It is further the plaintiff's case that the accident was the direct consequence of the defendants' breach of the legal duty they owed to learners of the School, including the plaintiff;

22.7. After the accident the plaintiff was taken to hospital by ambulance for medical treatment of the injuries she sustained in the accident, where she was hospitalised from 3 May 2006 to 10 May 2006, whereafter she was transferred for rehabilitative treatment;

22.8. As a result of the accident, the plaintiff sustained a fracture of her right tibia and fibula, neurovascular damages and subsequently had to undergo a Trans Femoral amputation of her right leg. The full nature and extent of the injuries sustained by the plaintiff in the accident are set out in the medico-legal report of Dr JF Greyling (Orthopaedic Surgeon).

- 22.9. The plaintiff's aunt in her capacity as Curator -Ad-Litem to the plaintiff whilst she was still a minor, lodged a claim against the Road Accident Fund ("the RAF"). The plaintiff's claim was limited to R25 000.00.
23. Initially, the first and fifth defendants denied liability on the basis *inter alia*, that the transportation of the learners to and from school was not a 'school activity' for purposes of section 60 of the Schools Act, whilst the second and third defendants' simply denied liability without further elaboration.
24. The first, second and fifth defendants no longer persist with their denial of liability to compensate the plaintiff for the damages she suffered as a result of the accident. Hence the two Consent Orders, which by agreement between the parties were made orders of this Court.

Should the damages awarded to the plaintiff be apportioned between the defendants?

25. As already indicated above, despite conceding to the first and fifth defendants' liability in terms of section 60(1) of the Schools Act to compensate the plaintiff for the delictual damages she sustained in the accident, Adv Sibeko SC contended that the Court should apportion the plaintiff's damages between the first and fifth defendants on the one hand and the second defendant, on the other hand. In summary, his argument for why the damages recoverable by the plaintiff should be apportioned between the defendants runs as follows:

25.1. On the 15th of May 2019 Justice Mamosebo made the following order in this matter:

- "2. The First and Fifth Defendants, on the one hand and the Second Defendant, on the other hand, are thereby declared to be joint wrongdoers in terms of Section 2(2) of the Apportionment of Damages Act 34 of 1956, and the court would make a just and equitable apportionment, having regard to the degree in which

each joint wrongdoer was at fault in relation to the damages suffered by the Plaintiff.” [My underlining]

- 25.2. In paragraph 7.7 of the particulars of claim, the plaintiff averred that ‘the second defendant and its employee owed a legal duty to learners, including the plaintiff, who were conveyed by the second defendant’s Nissan Bus from the School to designated destinations *inter alia*, not to allow learners to be subjected to negligent conduct in the driving of the Nissan Bus or in the manner the Bus was conducted when the learners were on-board and being conveyed that could cause them harm and damages. . .; not to allow learners, specifically primary school learners, to stand near or at the door of the Bus when it was not completely stationary; not to allow learners to exit the Bus or jump from the Bus whilst it was in motion, alternatively before it had come to a complete stop; not to allow learners to open the door of the Bus whilst the Bus was in motion, more so when other learners and /or passengers were standing at the door of the Bus or in close proximity to the door of the Bus . . .’
- 25.3. In response to the averments in paragraph 7.7 of the particulars of claim, the second defendant pleaded a bare denial, without explaining the bases of the denial.
- 25.4. But for the conduct of the driver of the Bus (the third defendant) in failing to supervise the learners who were being conveyed in the Bus, the accident would not have occurred.
- 25.5. There is a continuous duty on the part of the school to supervise the learners.
- 25.6. Section 60 of the Schools Act though imposing strict liability on the State, it does not absolve the second defendant from liability.

- 25.7. This matter implicates section 29(1) of the Constitution – the right to basic education and is therefore a constitutional matter.
- 25.8. Section 172(1)(b) of the Constitution confers wide discretionary powers on a court deciding a constitutional matter within its powers, to make an order that is just and equitable.
- 25.9. An order that will be just and equitable in the circumstances of this case, is an order declaring that the first, second and fifth defendants are jointly liable to the plaintiff for the damages sustained in the accident that occurred on 3 May 2006 and, apportioning the damages 60/40 in favour of the first and fifth defendants.
26. Adv. Coetzee on behalf of the second defendant on the other hand, contends that:
- 26.1. The first and fifth defendants' liability for the damages suffered by the plaintiff is not delictual in nature but is statutory. Once the strict conditions of section 60 of the Schools Act are met, then the first and fifth defendants become liable for the full extent of the loss or damage suffered by the plaintiff.
- 26.2. The position of the first and fifth defendants is analogous to that of the Road Accident Fund under the Road Accident Fund Act, 1996. Liability is not based on fault on the part of the first and fifth defendants.
- 26.3. Section 60(1) of the Schools Act was enacted to protect victims who suffer delictual damages at the hands of indigent schools that may not be able to compensate the victims for the loss suffered.
- 26.4. Because the first and fifth defendants' liability is not based on any fault on their part, then they cannot be joint wrongdoers together with the second defendant.

26.5. Since apportionment is based on fault, in the absence of fault, then there is nothing to apportion.

26.6. The only factor which the Court should take into account in exercising its discretionary powers in this case, is section 60 of the Schools Act, which imposes strict liability on the State for delictual or contractual damage or loss caused as a result of any act or omission in connection with any school activity conducted by a public school.

26.7. Adv Coetzee SC contends that the only just and equitable relief the Court may grant is that there should be no apportionment and that each party should pay their own costs.

THE FIRST ISSUE IN THE CASE: SHOULD THE COURT APPORTION THE DAMAGES BETWEEN THE DEFENDANTS?

23. It may come as a surprise in light of the Order of 15 May 2019 that apportionment is still an issue for determination by the Court. This is for the reason that in terms of paragraph 2 of the Order of Justice Mamosebo, the court has already declared the first and fifth defendants on the one hand and the second defendant, on the other hand, to be joint wrongdoers in terms of section 2(2) of the Apportionment of Damages Act, 34 of 1956 (“the Apportionment of Damages Act”). Further, the court has already pronounced itself on the question of apportionment of damages, having regard to the degree in which each joint wrongdoer was at fault in relation to the damages suffered by the plaintiff. This is plain from paragraph 2 of the Order.

24. Despite the wording of paragraph 2 of the Order of Justice Mamosebo, it is doubtful that the Order intended to make a ‘declaration’, in the sense of deciding, that the first and fifth defendants on the one hand and the second defendant, on the other hand, are joint wrongdoers for purposes of section 2 of the Apportionment of Damages Act without first determining the fault element.

25. This is for the reason that delictual liability in our law is based on fault. This is made clear in various judgments of our courts.

25.1. In *Thoroughbred Breeders' Association*,¹¹ the SCA made clear that delictual liability in our law is based on fault.

“Although our law recognises an action for damages for breach of a statutory duty where the statute was intended to give a right of action (See McKerron *The Law of Delict* 7th ed at 276), where it does not the Courts may yet hold that the breach may be evidence of negligence. Compare *Rawles v Barnard* 1936 CPD 74 at 77 and *Olitzki Property Holdings v State Tender Board and the Premier of the Province of Gauteng* (SCA, 28.3.2001, as yet unreported, - at para [13]). Our Courts have not by judicial decision built up a new branch of the law of civil wrongs relating to breach of statutory duties imposed by legislation akin to the English Factories Acts. It may well be that for that reason our Legislature decided to omit from the definition of ‘fault’ in the Act a reference to breach of statutory duty such as was found in the English 1945 Act. Furthermore, liability for delict in our law is based in general on fault, unlike in English law where in an appreciable number of torts strict liability exists. That would explain why our Legislature omitted any reference to other acts or omissions which give rise to strict liability and was content to make apportionment available only in cases where fault in its ordinary sense was present, subject only to the inclusion of contributory negligence for the reason given in the next paragraph. Moreover, as Lord Diplock said (at 674H) in *Boyle v Kodak Ltd (supra)* it is difficult to apportion the respective shares of responsibility for damage of parties who were not blameworthy in any way and who are only regarded as being at ‘fault’ because of the application of strict liability to their case. We therefore do not think that the differences between the definitions of ‘fault’ appearing in the English and South African Acts indicate an intention on the part of our Legislature to make

¹¹ *Thoroughbred Breeders' Association v Price Waterhouse* 2001 (4) SA 551 (SCA)

the Act apply not only in the context of actions *ex delicto* but also of those *ex contractu*.¹² [My underlining]

25.2. The same view was expressed by the Constitutional Court in SATAWU.¹³

“... [T]he Apportionment Act is based on an apportionment of fault, in particular negligence, and is thus inapplicable to cases of strict statutory liability ...”¹⁴

25.3. In *South British Insurance Co Ltd*,¹⁵ the then Appellate Division made clear that ‘apportionment’ is about determining the respective degrees of negligence of the parties in the following terms:

“*Prima facie*, therefore, the Legislature used the word ‘fault’ throughout the section as embracing a negligent act or omission causally linked with the damage in issue. The ‘damage’ referred to in the expression ‘at fault in relation to the damage’ is, of course, the damage mentioned earlier in para 1 (a) namely damage caused partly by the claimant’s fault and partly by the fault of another. In that initial stage of the enquiry causal negligence is the only criterion: in order to bring his case within the section at all, the claimant must first show that the damage which he has suffered was at least partly caused by the negligence of another. That is to say, the word ‘fault’ in the first portion of para. 1 (a) undoubtedly means negligence causally linked with the damage. Because of the provisions of para. 1 (b), ‘fault’ may be so linked irrespective of who had the last opportunity to avoid the consequences of the other’s fault. Para. 1 (b) eliminates the ‘last opportunity’ rule as a criterion of sole cause. Despite such a last opportunity in the one party, the other party’s fault is, in terms of para. 1 (b), to ‘be regarded’ as having partly caused his damage. Here again the word ‘fault’ means

¹² Id at para 17 of the majority judgment of Marais JA, Farlam JA and Brand AJA

¹³ *SATAWU and Another v Garvas and Others* 2013 (1) SA 83 (CC) “SATAWU”

¹⁴ Id at para 74

¹⁵ *South British Insurance Co Ltd v Smit* 1962 (3) SA 826 (A)

negligent act or omission and is again in terms causally linked with the damage. So also, where sub-sec. (2) – which obtains ‘in any case to which the provisions of sub-sec. (1) apply’ – mentions ‘persons at fault’ (*persone wat skuld het*) the reference is to persons whose negligent acts or omissions are causally linked with the damage in issue.

In all cases falling within para. 1 (a), the damages recoverable by the claimant

‘shall be reduced by the court to such extent as the court may deem just and equitable having regard to the degree in which the claimant was at fault in relation to the damage’.

Although the paragraph thus refers only to the claimant, it is, I think, plain from a consideration of the section as a whole that what the Court has to measure is the conduct of all parties whose fault caused the damage. Postulating a single defendant, the determination of the ‘degree in which the claimant was at fault in relation to the damage’ will also automatically determine the degree in which the defendant was at fault in relation to the damage.

It follows from all the foregoing that, when the Court reaches the stage of apportionment, it is *ex hypothesi* dealing with ‘fault’ – that is to say, a negligent act or omission – which is causally linked with the damage in issue. . . . In directing the Court to have ‘regard to the degree in which the claimant was at fault in relation to the damage’ (*met in agneming van die mate van die eiser se skuld met betrekking tot die skade*) the Legislature, in my opinion, requires the Court to assess the degree of the claimant’s negligence in relation to the damage which has been caused by the combination of that negligence and the negligence of the defendant. That is not to say that the Court is to embark upon the impossible task of determining degrees of causation. What the Court is required to do is to determine, having regard to the circumstances of the particular case, the respective degrees of negligence of the parties. In assessing ‘the degree to which the claimant was at fault in relation to the damage’ the Court must determine in how far the claimant’s acts or omissions, causally linked with the damage in issue, deviated from

the norm of the *bonus paterfamilias*. In thus assessing the position, the Court will, as explained above, determine the respective degrees of negligence, as reflected by the acts and omissions of the parties, which have together combined to bring about the damage in issue.”¹⁶

26. The case-law referred to above are *ad idem* that apportionment is really about the determination of the respective parties’ degree of fault or negligence which brought about the damage. It is for this reason that I do not see how the court could have determined in paragraph 2 of the Consent Order of 15 May 2019 that the first and fifth defendants on the one hand and the second defendant, on the other, are joint wrongdoers for purposes of the Apportionment of Damages Act, when it had not determined their respective degrees of negligence which is causally linked with the damage.
27. As Adv Coetzee correctly put it, the assessment or determination of the defendants’ respective degrees of negligence for the purpose of apportionment cannot be thumb-sucked. It must be based on the evidence before the court. In this case, no evidence was presented, which could have enabled the court to determine, let alone to assess the negligence or fault of the respective defendants. This makes it even more difficult to imagine how the court could have been able to determine that the first and fifth defendants on the one hand and the second defendant, on the other hand, were both negligent and that their negligence was causally linked to the plaintiff’s damages.
28. It is no answer to suggest that the Court should determine the defendants’ respective degree of negligence or fault based on the pleadings. That is impermissible. The role of pleadings is to define the issues, but do not constitute admissible evidence,¹⁷ especially in a case like this, where liability is disputed on the pleadings. The court could not in the circumstances have determined the negligence or fault of the defendants based on the pleadings.

¹⁶ Id at 835-836

¹⁷ See for example, *Road Accident Fund v Taylor and Related Matters* 2023 (5) SA 147 (SCA) at para 30

29. Presumably, what paragraph 2 of the Consent Order of 15 May 2019 was intended to convey, therefore, was that the plaintiff's pleaded case is that the first, second and fifth defendants are jointly and/or severally liable for the damages she sustained in the accident. I say 'presumably' because this is not what paragraph 2 says. Paragraph 2 suggests something different. It suggests that the court has made a 'declaration' or a determination that the first, second and fifth defendants are joint wrongdoers in the sense that their conduct or omission was causally linked to the plaintiff's damages. I say the court could not have done that without evidence.
30. However, to the extent that paragraph 2 of the Consent Order of 15 May 2019 was intended to determine the defendants' negligence in relation to the damages suffered by the plaintiff in the accident, then the court was clearly wrong in making a determination on the negligence of the defendants without evidence. It appears that the court simply gave in to a request by the parties to make the draft order an order of court, in circumstances where the court should not have done so.
31. A court is not under an obligation to endorse a draft order or a settlement agreement simply because the parties so request. Before making a draft order or settlement agreement an order of court, the court must first be satisfied that the order it is about to make, is legally competent. This was made clear by the Constitutional Court in *Eke v Parsons*,¹⁸ where Madlanga J cautioned courts against a practice of being mechanical in the adoption of the terms of a settlement agreement as follows:

"This in no way means that anything agreed to by the parties should be accepted by a court and made an order of court. The order can only be one that is competent and proper. A court must thus not be mechanical in its adoption of the terms of a settlement agreement. For an order to be

¹⁸ 2016 (3) SA 37 (CC) para 25-26 "*Eke*"; see also *Airports Company South Africa v Big Five Duty Free (Pty) Ltd and Others* 2019 (2) BCLR 165 (CC) at para 13 "*ACSA*"; *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 331 (CC) at para 25; *Mafisa v Road Accident Fund* 2024 (4) SA 426 (CC) at para 42; *Maswanganyi v Road Accident Fund* 2019 (5) SA 407 (SCA) at paras 15-16

competent and proper, it must, in the first place, 'relate directly or indirectly to an issue or lis between the parties'. Parties contracting outside of the context of litigation may not approach a court and ask that their agreement be made an order of court. On this *Hodd* says:

'(I)f two merchants were to make an ordinary commercial agreement in writing, and then were to join an application to court to have that agreement made an order, merely on the ground that they preferred the agreement to be in the form of a judgment or order because in that form it provided more expeditious or effective remedies against possible breaches, it seems clear that the court would not grant the application.'

That is so because the agreement would be unrelated to litigation.

Secondly, 'the agreement must not be objectionable, that is, its terms must be capable, both from a legal and a practical point of view, of being included in a court order'. That means its terms must accord with both the Constitution and the law. Also, they must not be at odds with public policy. Thirdly, the agreement must 'hold some practical and legitimate advantage'." [Footnote omitted].

32. In this case, the court made an order that is legally incompetent. It declared the first and fifth defendants to be joint wrongdoers with the second defendant and, directed that the plaintiff's damages should be apportioned between them based on their respective degrees of fault in relation to the damages. There are two fundamental problems with paragraph 2 of the Order, which make it unimplementable.

32.1. First, as correctly contended by Adv Coetzee SC, the liability of the first and fifth defendants to compensate the plaintiff in this case is statutory, not delictual in nature. For this reason, so it is argued, the first and fifth defendants cannot be joint wrongdoers with the second defendant. This contention finds support in various judgments of our courts.

32.1.1 In *Smith v Road Accident Fund*,¹⁹ the SCA in a similar vein found that the Road Accident Fund (“the Fund”) in that case cannot be a joint wrongdoer with the negligent driver because its liability is statutory in nature.

“That statute (Apportionment of Damages Act) does not, . . . create a cause of action in s 2(1). What it does is to provide a means of sharing the burden of damages between joint wrongdoers in delict. *Prima facie*, the Fund is not such a wrongdoer when an unidentified driver or owner is involved because its liability is essentially statutory, proof of delict alone being, by reason of the regulations to the Act, wholly insufficient to establish a cause of action against it. . . The Fund cannot be a joint wrongdoer with the negligent driver.”²⁰

32.1.2 The position of the Fund is pretty much analogous to that of the first and fifth defendants in this case. The liability of the first and fifth defendants to compensate the plaintiff for the damages sustained in the accident is purely statutory in nature. It derives from section 60(1) of the Schools Act. For this reason, the first and fifth defendants cannot be joint wrongdoers with the second defendant in relation to the damages suffered by the plaintiff in the accident.

32.1.3 Similarly, in *Mosholi v Putco (Pty) Ltd*²¹, the High Court found that since the liability of the Road Accident Fund for the compensation of victims of road accidents is statutory, not delictual in nature, and for that reason, is not a joint wrongdoer for purposes of the Apportionment of Damages Act.

¹⁹ 2006 (4) SA 590 (SCA)

²⁰ *Id* at para 10

²¹ 2011 (5) SA 38 (GNP)

- 32.2. I did not understand Adv Sibeko SC on behalf of the first and fifth defendants, to dispute that the liability of his clients to compensate the plaintiff for the damages she sustained in the accident is purely statutory in nature, not delictual. Once it is so, then it follows that they cannot be joint wrongdoers with the second defendant because there is no fault or negligence on their part, which is causally linked to the damages suffered by the plaintiff.
- 32.3. Second, because apportionment is based on fault in its ordinary sense the purpose of which is to measure each of the parties' degree of fault or negligence, absent 'fault' or negligence on the part of the first and fifth defendants as it is the case here, then there cannot be apportionment of liability between the first and fifth defendants on the one hand, and the second defendant on the other hand.
33. This Court cannot give effect to paragraph 2 of the Consent Order of 15 May 2019 by apportioning liability between the defendants in circumstances where no factual or legal basis exists for the apportionment.
34. Confronted with these difficulties, Adv Sibeko SC sought refuge in this Court's powers under section 172(1)(b) of the Constitution when deciding a constitutional matter within its powers to make an order that is just and equitable. Relying on the Constitutional Court judgments in *Hoerskool Ermelo*,²² and *EFF*²³, Adv Sibeko SC argued, correctly so in my view, that this Court's powers to make a just and equitable order is not limited to declarations of invalidity. The remedial powers under section 172(1)(b), so the argument continued, are wide enough to include an order apportioning liability between the defendants.

²² *Head of Department, Mpumalanga Department of Education and Another v Hoerskool Ermelo and Another* 2010 (2) SA 415 (CC)

²³ *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another* 2018 (2) SA 571 (CC)

35. That is so as a statement of law. The power of a court in terms of section 172(1)(b) of the Constitution to make a just and equitable remedy was elegantly explained by the Constitutional Court in *Hoerskool Ermelo*, as follows:

“The power to make such an order derives from s 172(1)(b) of the Constitution. First, s 172(1)(a) requires a court, when deciding a constitutional matter within its power, to declare any law or conduct that is inconsistent with the Constitution invalid to the extent of its inconsistency. Section 172(1)(b) of the Constitution provides that when this court decides a constitutional matter within its powers it ‘may make any order that is just and equitable’. The litmus test will be whether considerations of justice and equity in a particular case dictate that the order be made. In other words the order must be fair and just within the context of a particular dispute.”²⁴

36. Adv Sibeko SC placed heavy reliance on the following statement by Jafta J in the EFF decision (*supra*) in support of the argument that this Court has wide powers under section 172(1)(b) to order apportionment of damages between the defendants:

“The power to grant a just and equitable order is so wide and flexible that it allows courts to formulate an order that does not follow prayers in the notice of motion or some other pleading. This power enables courts to address the real dispute between the parties by requiring them to take steps aimed at making their conduct to be consistent with the Constitution . . .”²⁵

37. It is well established that making a just and equitable remedy in terms of section 172(1)(b) of the Constitution involves the exercise of a discretion in the true sense. This was confirmed by the SCA in *Special Investigating Unit v Phomella Property Investments (Pty) Ltd.*²⁶

²⁴ *Hoerskool Ermelo* at para 96

²⁵ *Id* at para 211

²⁶ 2023 (5) SA 601 (SCA)

“This court has confirmed that the discretion exercised under s 172(1)(b) of the Constitution is a true one:

‘The exercise of a remedial discretion under s 172(1)(b) of the Constitution . . . constitutes a discretion in the true sense. It may be interfered with on appeal only if [the appeal court] is satisfied that it was not exercised judicially, or had been influenced by wrong principles or a misdirection of the facts, or if the court reached a decision which could not reasonably have been made by a court properly directing itself to all the relevant facts and principles. Put simply, the appellants must show that the High Court’s remedial order is clearly at odds with the law’.”²⁷

38. The fact that the discretion under section 172(1)(b) is wide and flexible, does not mean that the court is at liberty to make an order which is unreasonable or at odds with the law. The discretion under section 172(1)(b) must be exercised judicially and in accordance with the facts and the law.
39. Based on the facts and the law, the liability of the first and fifth defendants in this case is not based on fault or negligence on their part. It is statutory in nature. As I have already demonstrated above, apportionment is about sharing liability based on each party’s degree of fault or negligence in relation to the damages suffered by the plaintiff.
40. Without fault or negligence on the part of the first and fifth defendants, then there cannot be any apportionment of liability between the first and fifth defendants on the one hand, and the second defendant on the other. An order for apportionment of liability would plainly be at odds with the law.
41. More fundamentally though, there is simply no basis in fact, for any apportionment. There is no evidence before the Court that would form a basis for the apportionment. Even on the pleadings, the fault or negligence aspect of this case is disputed by both defendants.

²⁷ Id at para 12; *Central Energy Fund SOC Ltd and Another v Venus Rays Trade (Pty) Ltd and Others* 2022 (5) SA 56 (SCA) at para 43

42. Once it is so, then it follows that there is no basis whatsoever for apportionment of liability between the defendants. Any order for apportionment as suggested by Adv Sibeko SC will self-evidently not be in accordance with justice. It will be based on a misdirection on the facts and the law.

ORDER

43. In the result I make the following order:

1. There is no apportionment of liability between the first and fifth defendants on the one hand, and the second defendant on the other hand.
2. Each of the defendants shall bear their own costs.

M J Ramaepadi

Acting Judge of the High Court of South Africa, Northern Cape Division, Kimberley

APPEARANCES

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Adv. J Merabe

Instructed by:

STATE ATTORNEY

Kimberley

For the Second Defendant:

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