

SOUTH AFRICA / JUDGMENT

A.D v MEC for Education, Eastern Cape Provincial Government (541/2013) [2020] ZAECHBHC 29 (21 December 2020) [2020] ZAECHBHC 29

COURT
Eastern Cape High Court, Bhisho

BEFORE
Hartle

CASE / FILE NUMBER
541/2013

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IN
THE HIGH COURT OF SOUTH AFRICA
(EASTERN
CAPE HIGH COURT, BHISHO)
Case No. 541/2013
In

the matter between: A[...]
 D[...]
 Plaintiff
 and
 MEC FOR EDUCATION,
 EASTERN CAPE
 PROVINCIAL
 GOVERNMENT
 Defendant

JUDGMENT

HARTLE J

- [1] The plaintiff (as substituted) was a grade 8 learner at the Khotso Junior Secondary School (“the school”) in Lusikisiki when on 1 February 2013 the cross beam of a loose standing soccer goal post assembled by fellow learners fell on him at the school during a break and injured him. He claims damages as result of the incident.
- [2] At the commencement of the trial and at the request of the parties I issued an order separating the issues of liability and quantum.
- [3] The damage causing incident is pleaded by the plaintiff to have occurred during a “long-break sporting activity” at the school’s playgrounds, whilst he (then still a minor) was in the care of the defendant’s employees. It is averred that he was struck on the head by a falling steel pole and became unconscious.
- [4] It is further alleged that during the incident there was not a single educator or non-educator in sight. Also alleged, no doubt to emphasize the significance that no supervising educators were present at the time, is that the plaintiff was only brought to the hospital for medical attention and care almost three hours after he was so harmed.
- [5] The plaintiff proceeds against the defendant on the basis of the provisions of section 60 (1) – (3) of the Schools Act, No. 84 of 1996 (“the Schools Act”), which read as follows:
- “60 (1) The State is liable for any damage or loss caused as a result of any act or omission in connection with any educational activity conducted by a public school[1] and for which such public school would have been liable but for the provisions of this section.[2]*
- (2) The provisions of the State Liability Act, 1957 (Act No. 20 of 1957), apply to any claim under subsection (1).
- (3) Any claim for damage or loss contemplated in subsection (1) must be instituted against the Member of the Executive Council concerned.[3]
- [6] It is well established that teachers owe children under their control and care at school a legal duty to act positively to prevent physical harm being sustained by them through misadventure.[4] Public and legal policy, in accordance with constitutional norms, make it reasonable in this peculiar context to place such a duty on teachers at schools to prevent such harm coming to learners in their care.
- [7] In his particulars of claim the plaintiff pleaded various obligations resting on schools and teachers (and vicariously the defendant)

arising from the provisions of sections 24 (a), 28 and 29 of the Constitution,[5] read with section 20

(1)

(g) of the School Act, and the regulations for safety measures at schools[6] developed, promulgated, and implemented in terms of section 61 of the Schools Act (“the safety regulations”), all of which were admitted by the defendant. Those most relevant to the situation in casu are the following:

1. to provide, promote and secure a learning school environment that is safe for occupation by both educators and learners at the school;[7]
2. to keep school grounds free of dangerous objects;
3. to maintain and keep potentially hazardous recreational and sporting equipment in good working and hazard free order;
4. to ensure gradually improved environmental safety for both learners enrolled and educators employed at a public school;
5. to take such reasonable and necessary steps for the safeguarding of the public-school premises, as well as the protection of the people therein;[8]
6. to take reasonable measures to insure against accidents, injuries, general medical expenses and hospitalization;[9]
7. to ensure proper preparation and supervision of learners at the school’s playgrounds during breaks and sporting activities;[10] and
8. to take reasonable steps to prevent reasonably foreseeable or predictable or preventable harm to learners in the care of public schools.

[8] The plaintiff pleaded that the injuries sustained by him when the steel pole fell on his head in the peculiar circumstances were caused by the sole negligence of the defendant’s employees (the responsible educators at the school), the various grounds of negligence alluded to flowing from the legal obligations enumerated above.

[9] The defendant’s plea, which was amended during the trial without objection from the plaintiff, is one of a denial of liability and in essence a rejection that the incident is one that comes within the ambit of section 60 (1) of the Schools Act. In amplification of his denial the defendant pleads that:

1. the incident complained of occurred during a long break as a result of a portable goal post breaking off and injuring the plaintiff. Whereas the defendant initially pleaded that the pole had broken off from a welded spot, the amended plea explains that “the poles were instead movable and not welded and were placed on the side of the school building. The particular place where poles were kept was behind the school building and “out of sight of the teachers”; [11]

2. also explained by way of the amendment is that at that time there was no sporting ground for the school, such activities being offered at a nearby teacher's training college;
3. further alleged in the amended plea is that it was the learners themselves who would remove these poles without the knowledge of the teachers;
4. the defendant and/or its employees could not reasonably foresee that the accident would have occurred when it did;
5. the school break is not for sporting activities It is meant for both the learners and the educators to have their lunch. It is further alleged in this respect that there is no constant supervision of the learners during such breaks as would apply during academic or sporting exercises;
6. the activities of the learners during break time are not supervised. The reason for this is that at the same time that the learners are supposed to have their lunch, the educators are to be having their lunch as well; and
7. the plaintiff was therefore (by virtue of the explanation foregoing) not at the time in the care of the employees of the defendant.

[10] It is necessary to point out that "school activity" is defined in both the Schools Act and the regulations as meaning any official educational, cultural, recreational, or social activity of the school within or outside the school premises. It is further

plain from the provisions of regulation 8A (2) (b) of the safety regulations that public schools are required to take measures to ensure the safety of learners during any school activity including ensuring, where reasonably practicable, that learners are under the supervision of an accompanying educator at all times. Leave aside the fact that the defendant admitted such an obligation and failed to lead any evidence to suggest why it was not practicably

possible to ensure even a limited measure of teacher supervision during school breaks, allowing some of the teachers to rest and take refreshment whilst only one or two of them kept watch, it is in my view absurd to suggest that school breaks do not constitute a "school activity" within the meaning of the definition and that teachers can let down their guard simply by reason of being on a break. Breaks are by necessary implication a component of the whole activity of operating a school. Accordingly, the plea by the defendant that it is permissible to leave learners unsupervised during breaks because educators are having their lunch, and the purported corollary thereof that learners are therefore not in the care of the defendant's employees at such times, is in my view simply contrary to the law and an untenable proposition.

[11] The crisp evidence adduced at the trial by the plaintiff himself, a fellow learner who was also in Grade 8 at the time together with the plaintiff, and the principal of the school (who testified in support of the defendant's case) is uncontentious.

[12] On the day in question, during the long break, some boys were playing soccer on an open field close to the school toilets. The learners, as they did every other day, so the evidence of the plaintiff and his fellow learner went, had themselves assembled one set of goal posts comprising of three poles and an additional pole at the back, holding

up the other three poles. The side poles were not anchored to the ground but were themselves portable. As was explained by him “the cross beam was just hanging on a pole, that was just standing there to keep it in position”.

[13] The plaintiff who was himself not participating in the game of soccer, was standing next to the goal post together with a group of spectators when the ball, kicked by one of the boys practicing pre-game penalty shootouts, struck the goal post. This impact caused the cross beam to dislodge and it fell on to him, evidently rendering him unconscious as a result.

[14] His fellow learners tried to revive him by pouring water over him. When this failed, and upon realizing that the situation had become serious, they ultimately reported to the principal who conveyed the plaintiff to the hospital in her own private motor vehicle.

[15] Both the plaintiff and his fellow learner confirmed that the playing of soccer during break times was a regular occurrence (“a daily practice”) and that the teachers did not watch or supervise such play. Similarly, on the day in question when the misadventure occurred, no teacher was present to keep watch because they were having their lunch in the school building. Indeed, as is reflected in the amplification of the plea above, it is the defendant’s case that the teachers were under no legal obligation to supervise the learners during the break at all.

[16] The explanation given by the principal in her testimony is that the poles which make up the soccer goal posts utilized by the school for this sporting activity, when not in use, were stored alongside the toilets on the school premises and were carried by the learners during organized official practices or games to the nearby training college where they were erected strictly under the supervision of a coach. The poles were not locked away but were accessible to the learners who, so it transpired, had as a regular practice and unbeknown to the teachers, assembled the component parts themselves for purposes of practicing or playing during breaks.

[17] The plaintiff and his fellow learner did not hesitate to concede that the teachers would most likely have been unaware of the boys’ soccer ritual. Furthermore, they clarified that the learners themselves would have had no expectation of the teachers that they would maintain a presence while they practiced or played because their games happened during break time when according to their knowledge the teachers were in the staff room enjoying their recess.

[18] There was no suggestion that the boys had been specifically forbidden to tamper with the goal post components where they were casually stored, but the principal emphasized that soccer was not practiced on the school premises at all but would only happen (at the college where the posts would be erected under the supervision of the coach) on the instruction of or with the permission or involvement of a teacher. Moreover, even when the children walked across to the fields

of the training college for official games and practices, there would be a consent form that parents would be required to sign to confirm their approval of their leaving the school's premises for these purposes. Asked by the court whether the children were ever warned not to involve themselves in the self-assembly of the goal post components she merely explained that they would go (to the training college) with the posts where they would be erected in the presence of a teacher, not on their own, but acting on the teacher's instructions.

[19] She confirmed that the cause of the pole falling (as per the outcome of the school's inspection) was that "this pole was not properly erected there because the place where this was, the poles were mounted (that is where the accident happened), was not meant for playing (soccer)".

[20] The principal averred that had it been brought to her attention that the boys were practicing penalty shoot-outs at the school she would have ensured that there was a teacher (coach) on hand to supervise them on such occasions. She explained the school's protocol thus:

"MR MASETI: As the Court pleases. Your last point, ma' am, you were saying, if you knew that the boys were playing soccer, you'd have assigned a teacher who coaches soccer, to supervise."

MS CSHAKA: That's correct, M' Lady. Boy's did not usually go to just and play, if there would be a reason for

practices or a match, they would sit down and discuss that, so that, we can know that there is somebody in charge who is a coach, who will be with the boys. In any sport, when children were to play away from school, each Taxi that carries children, would be manned with a teacher, who will be in charge of that Taxi. Students were not allowed to go on their own. If I was aware that there was some practice that was taking place, I would have arranged something but I did not even hear that they were playing there, as a team, on the day. They were doing this on their own, I just gave assistance, as a child was brought injured. "

[21] As for what the children got up to during break it appeared to be accepted (from the side of the learners as well) that breaks were to be utilized for a specific purpose. The children were to eat their lunches. The teachers were not available to supervise them for sporting activities during such intervals unless by special arrangement. Teachers would also eat their lunches during the break or use the time to prepare for ensuing lessons.

[22] The principal could provide no answer to the proposition put to her by Mr. Luzipo who appeared for the plaintiff that the safety regulations promulgated under the School's Act required of her and of the school to basically ensure full- on supervision of learners at

school at all times notwithstanding the breaks, neither did she engage with him concerning why she thought it might not be reasonably practicable to maintain continuous supervision over learners during these interludes. In re-examination however she explained why she believed that the school had no obligation towards the plaintiff for the harm suffered by him under the circumstances:

“MR MASETI: One slight (inaudible) from me. Ma ’ am, you were taken through the regulation 8 of the South African School ’ s Act 84 of 1996 , where my learned colleague indicated that, in public schools, measures must be taken for the safety of the learners during any school activities.

MS TSHAKA: I believe this implies only when children are going for activities that were organised but in this instance these children went away on their own, to go and play. Teachers were also having their meals, as i t was a break t ime.

MR MASETI: Simply put then, there was no school activity taking place at that t ime.

MS TSHAKA: That’ s correct, i t was break for everyone, learners and educators. That school is a big school, teachers can ’ t be everywhere to reach these children because it ’ s a big school, hence children are gathered in a certain accommodation, if there is an activity that has to take place.”

[23] I have already referred above to my views on the issue of the legal duty on the teachers to supervise the learners even during breaks and the artificiality of excising from school activities the intervals that constitute the breaks. The point is that the damage was sustained during an educational activity conducted by a public school as defined, for which the State is liable pursuant to the provisions of section 60 (1) of the School’s Act.

[24] The question which remains to be decided however is whether the school and its teachers were negligent in the circumstances and liable for the damages suffered by the plaintiff as a result of his injuries.

[25] The requirements for liability are succinctly expressed in *Kruger v Coetzee*[12] as follows:

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

- (i) would foresee the reasonable possibility of his conduct injuring another 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.

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

[26] Mr. Maseti who appeared on behalf of the defendant submitted that it was not an absence of constant supervision per se that is decisive of the issue of whether the defendant's employees have breached their duty of care or whether the degree of supervision in place was below par, but that it depends essentially upon the risks to which the children are exposed in their particular surroundings. He referred this court to the court's observations in *Rusere v The Jesuit Fathers*[13] concerning the application of the test as follows:

"The duty of care owed to children by school authorities has been said to be to take such care of them as a careful father would take of his children. This means no more than that schoolmasters, like parents, must observe towards their charges the standard of care that a reasonably prudent man would observe in the particular circumstances."[14] And that...

"In my opinion, however, the duty to keep children of this age (i.e. children between the ages of 7 and 10) under constant supervision

depends essentially upon the risks to which they are exposed in their particular surroundings. No doubt a reasonable man who is in charge of a number of young children at the seaside would be guilty of negligence if he were not to keep them under constant observation. To contend, however, that children of this age should never be more than momentarily out of sight of a responsible person even when they are in normal and familiar surroundings which are devoid of features that could sensibly be regarded as hazardous, is, I think, to exact too high a duty of care from the bonus paterfamilias."[15]

[27] Mr. Maseti also referred this court to the judgment in *Knouwds v Administrateur Kaap*[16] which illustrates the aspect of the standard of care expected from a paterfamilias in charge of children. In that case a lawnmower was being used on the grounds of a school just before school started in the morning. The plaintiff's 8-year-old daughter was injured when she fell on the lawnmower while she and a friend were racing each other. Having regard to the well-known conduct of young children, the court held that it should have been foreseeable to those involved that the children could for one reason or another have stumbled into the lawnmower and that the risk to which the children were exposed that day was such that they should have been kept constantly under supervision.

[28] With reference to *Rusere*, Friedman J held that while it was unnecessary for school employees to have the children in their care and under supervision for every moment of the day, the degree of supervision expected from the school personnel naturally depended on the risks to which the children were exposed.

[29] At the other end of the spectrum is a case that was referred to by Pickering J in *Gora*. [17] This concerns the matter of *Long and Another v Jacobs*. [18] In that scenario the plaintiff who was attacked with a hammer by a 13-year-old learner in her class sustained serious injuries. It appeared that the plaintiff was invigilating a class writing a comprehension test and observed that the learner in question was not writing. She approached him only to discover that the learner was drawing in his journal. She requested him to stop. He refused to do so. She then observed that there was a death certificate in the journal, made out in her

name. Naturally alarmed at what she had seen she approached the Head of the General Education Band at the school, Ms. Hutchings, to report the incident. The learner was called out of the class to meet with Ms. Hutchings in the corridor. Hutchings then took the learner to the principal, Mr. Long. Hutchings told the principal that the learner had made death threats against the plaintiff. The principal told the learner to sit on the chair outside his office, instructing him not to leave whilst he studied the journal. He described that what he saw in the learner's journal was the "stuff of nightmares." He then caused the police to be called. When he returned to where the learner was supposed to be, he found that he was gone. The learner had indeed left and proceeded back to the classroom where he attacked the teacher.

- [30] The court found that the principal, by placing the learner on a chair outside his office unsupervised, and letting him out of his sight and control, should reasonably have foreseen the probability that the learner would slip away to his classroom and carry out the imminent death threats. The principal should have taken reasonable measures to ensure that it did not happen by asking him to wait in his office in his presence or getting a senior educator to supervise him. His failure to take these measures was held by the court to constitute negligence on the part of the principal.
- [31] In this instance, there can in my view be no doubt that a diligent paterfamilias in the position of the school principal would have foreseen the possibility of the learners, unsupervised and left to their own devices for a long break and having free access to the goal post kit, might assemble it for themselves. The principal herself acknowledged the hazard of the poles lying in an open space because there was no particular place to store them and the fact that they could only be mobilized safely on a terrain made for soccer where the assembly of the posts would usually happen under the strict oversight of the responsible teacher.
- [32] An absence of knowledge on the part of the teachers that the children regularly practiced their soccer and penalty shoot-outs using the goal posts on the school premises, or the fact that they could not themselves see the poles where they lay or that they were not asked for permission to use the equipment or to construct a goal post from them does not exonerate them from liability. The question is rather whether the diligent paterfamilias in their position would have sensibly regarded the children's surroundings as hazardous and taken steps to guard against any misadventures arising therefrom. In casu, there was firstly no reason not to have exercised any supervision at all over the children. The bizarre notion entertained by the defendant that because it was break time the plaintiff was not in the schools' care is a serious misapprehension of their duty to take care of learners during normal school hours. Supervision by even a single teacher during break would certainly have drawn attention to the practice that had arisen whereby the boys would help themselves by constructing a goal post from the equipment lying at their free disposal. Secondly a diligent paterfamilias in their position would recognize the inherently dangerous nature of steel poles openly laying next to the toilets no doubt frequented by learners during

school break especially, begging assembly by robust boys raring to practice and play soccer during break. I can hardly image a situation where learners entirely unsupervised during break would sit and eat their lunch until the bell rings without seeking to move their limbs or engage in play as is the most natural thing to do.

- [33] Mr. Maseti referred this court to the recent judgment in *M v Member of the Executive Council for Education, EC Province and another*[19] as being “on all fours” with the present matter but I disagree that it bears any similarity. The learner in that matter suffered a burn wound when boiling water from a kettle spilled on him in a classroom. The court accepted that the learner (in grade 2 at the time) had unexpectedly returned to the classroom during break whereas the children had been dismissed and had left to enjoy their lunch on the playground. The learners were aware of the rule that during break they were not to return to the classroom. The class teacher had removed her kettle she kept in the classroom from the cupboard where it was stored when she was alone. She added water and boiled it to make a beverage for herself. She had placed the kettle on the floor of the classroom at a convenient plug point. During break the learner had returned to the classroom, tripped over a school bag that was placed together with other bags in the front of the class to maximize space around the desks in the relatively small classroom in relation to the large number of learners, knocked over the kettle in the process and was burnt on his left arm. The court held that the essential questions to be determined were, firstly, whether the teacher should have foreseen the reasonable possibility of her conduct in using a kettle to make herself a beverage in the absence of the learners could lead to the occurrence of the incident and, secondly, whether she took reasonable steps to avoid such occurrence. The court came to the following conclusion:

“[37] The consideration of these questions must avoid an application of the wisdom of hindsight. In my view the two questions posed must be answered in favour of the second defendant, as:

37.1 she must have foreseen the possibility of injury to a learner through the use of a kettle, that is why she kept the kettle in a cupboard and only used it during break time when the learners were absent from the classroom;

37.2 she waited until break time and after the learners had left the classroom to make her beverage;

37.3 she only placed the amount of water in the kettle required to make her beverage;

37.4 learners were not expected to return to the classroom as it was a rule that they were not to do so during break time;

37.5 L’s return to the classroom was an unexpected event and not in the form of a regular occurrence;

37.6 using the kettle during break time in the absence of the children did not expose L, or indeed any other learner, to any great degree of risk;

37.7 it was not, in the circumstances, expected of the second defendant to maintain the constant type of vigilance she would ordinarily maintain while the learners were in the classroom or, for instance, on a school outing.

[38] I am thus satisfied, on the accepted evidence, that the second defendant did not negligently breach the duty of care she owed L.”

[34] In the present instance the defendant’s employees must have foreseen the likelihood of children generally being injured on the playground in the absence of any supervision being exercised over them at all during break and should also have foreseen that the goal post components were fair game and easily accessible to the children who might fiddle with them and try to assemble them themselves. Also reasonably foreseeable in my view is the fact that if the parts were

assembled on the school’s grounds especially without the supervision of the responsible teacher that they would not be safely

mounted on the relevant terrain that was plainly not earmarked for the game of soccer or its practice. As to the existence of a duty to take reasonable steps to guard against the occurrence of injury generally, or the children interfering with the steel poles and putting themselves in the way of harm in trying to assemble the loose parts, or of an assembled post not being able to be properly or safely anchored at the school premises, the easiest thing would have been for the children firstly to be supervised during the breaks and for the inherently dangerous parts to have been safely stacked away in a place where the children did not have free and unsupervised access to them.

[35] Mr. Luzipo who appeared on behalf of the plaintiff referred me to a case in point which is the judgment of the court of appeal in the matter of Rabie.[20] In that matter a minor child, (C), was a grade 8 learner at the Waterkloof High School in Pretoria. On the morning of 31 July 2000

(C) participated in a game being played in the school grounds during and shortly after morning break. The game entailed a child getting on to a cricket net which had been pulled tight by other children, and then being tossed up into the air and afterwards being caught in the net when he came to land. (C) was tossed into the air but he was not caught in the net when he came to land. He fell to the ground and sustained serious head injuries. This happened after break when the children should have been in their classrooms.

[36] The cause of action in that matter was primarily directed at the school’s duty to keep learners under supervision as is the case in the present matter. The plea did not deny the occurrence of the dangerous activity which gave rise to (C) becoming injured but alleged that it took place after break when the learners were expected to have been in their classrooms and that it occurred at a place where learners were forbidden access unless under the supervision of a sports coach.

- [37] The pleadings admitted that it was foreseeable that learners could be injured in the course of unsupervised activities, and the consequent legal duty on the duty on the school to control and supervise the children was also admitted. The issue was whether or not staff members of the school were in negligent breach of the duty. In that instance, in order for effective supervision before commencement of school in the mornings, during breaks and when learners left their classrooms at the end of the school day, a system was devised for placing members of staff at strategic positions throughout the school, and a roster was accordingly prepared for such purpose.
- [38] The court a quo held that the school foresaw that during school hours the children could take part in dangerous activities in the school grounds, which could include a dangerous game like the game with the cricket net and that such games or activities could take place at more remote areas in the school grounds which supervision was more difficult. The requirements of foreseeability and preventability were thus met. The court of appeal agreed. Further, the evidence in that matter revealed that during and after morning at least 40 to 50 children were out of bounds in the vicinity of the cricket nets, pavilion, and side screen, and that they were not being supervised. If there had been a member of staff at the designated position in that area, he or she could not have failed to have seen them. The most probable inference was that the defendant failed to take the requisite preventative steps. The school was therefore held in negligent breach of its legal duty, and its negligence was causally related to the consequences which followed.
- [39] The facts of that matter are similar to the present situation where no semblance of supervision whatsoever was put in place to meet the contingency of children involving themselves in dangerous activities during the ordinary course of play during the long break.
- [40] In Dlamini[21] the MEC for the Department of Education, Mpumalanga, was held liable for injuries sustained by learners occasioned by a stand on which a water tank had been positioned. The accident also happened during a school break. At the time of the accident there were no teachers or educators nearby to take care of or supervise the learners, again a similar scenario to the present one
- [41] In MEC for the Executive Council for Education of the Gauteng Provincial Government v R D obo RK[22] a metal soccer goal post fell onto a learner whilst he was attempting to jump off the goal post on which he sat whilst hanging the net. The structure toppled on to the learner who sustained serious head injuries. In that instance the practice of the school was for the staff of the school (the administrative assistants) to fit the nets to the goal post by tipping the goal post over (meaning that they were placed “face down”) and the staff would then simply tie the net around the goal post and the rear part thereof. After the nets had been fitted, they would then lift the poles back into position. In that instance the goal posts were positioned on the soccer field of the school to which the school children including the plaintiff and his soccer team mates had unfettered access. The court held that the importance of the foregoing related to the fact that a dangerous situation had been created on the soccer field to which all the school children had access.

[42] This meant that the school should have foreseen the reasonable possibility of this dangerous situation injuring one of the learners like the plaintiff and causing him damages. Objectively speaking, so the court held, the goal post and unstable steel structure on a soccer field accessed by learners, which had the potential to tip over when interfered with, posed a risk to the children. The risk would have materialized when, for example, the soccer children climbed on to the goal post to fit the nets, as was the case, according to the plaintiff, on the day in question. Similarly, the risk would have materialized by a child swinging from the goal post, as it was alleged the defendant did on the day he was injured.

[43] Either way the court a quo held that the risk of injury to a learner was a real one and should have been foreseen by the school. The court of appeal noted that “a loose standing steel structure on a soccer field would also have been an invitation to young children, for example to “fool around” on or with the goal post by

tipping it over. That is how children are, and the school should have realized that and probably did so. The goal post was ‘an

accident waiting to happen”’. The court held that the school did foresee the danger. This emerged from the evidence led on behalf of the appellant as to why the children were not allowed to hang the nets. That, according to the practice of the school was to be attended to only by the ground staff of the school. Furthermore, it was written into the code of conduct of the school, to which all parents and learners, including the plaintiff, subscribed that they were not allowed to play, hang on or misuse any of the equipment of the school. The court of appeal observed that this supported a finding that the school probably realized, generally speaking, that sports and other equipment generally posed a danger to learners. It also confirmed that the school specifically realized that the goal posts in particular created a dangerous situation and that the school should have taken precautions to prevent harm to learners resulting from the dangerous situation.

[44] In that instance in order to guard against that risk materializing, the school had put in place certain procedures with which its members of staff were required to comply. Importantly, school children on the soccer field especially at or near the goal post, were required to be supervised at all times. The nets when required for a game, were

required by school policy and practice to be fitted by the ground staff, and not by the learners themselves.

[45] The court went further and held that the school failed to discharge its duty to supervise the children near the goal post.

[46] This situation is not dissimilar to the present matter in the sense that the school abdicated its responsibility to keep supervision over the children over lunch break at all and in relation to their unfettered access to the steel poles. Despite the protocols in place regarding the use at the college premises of the components making up

the goal posts they were not locked away but remained entirely accessible to the children and posed an inherent danger to them.

Their presence on the school premises begged the assembly thereof by eager children desirous of practicing the game of soccer at the school premises where the game was not approved for safety or appropriate environment reasons. The construction of the posts on the school premises under circumstances where they could not be anchored securely to the ground also posed an inherent risk of harm to the children included the plaintiff who was an innocent observer of the game on the playfield where he was legitimately entitled to be during the school break when he was injured.

[47] In the premises I am satisfied that the school breached the positive duty to prevent physical harm coming to the plaintiff under the circumstances and is causally liable for the damage suffered by the plaintiff.

[48] In the premises I issue the following order:

1. The defendant is found liable to compensate the plaintiff for his proven damages sustained when a goal post fell on him at the Khotso Junior Secondary School on 1 February 2013.
2. The defendant is to pay the costs of the action to date insofar as they relate to the merits of the case, such costs to include the costs of two counsel, where applicable, and the costs of the heads of argument prepared on behalf of the plaintiff.
3. The issue of quantum is postponed sine die.

B HARTLE

JUDGE OF THE HIGH COURT

DATE OF HEARING:

9 & 10 September 2020

DATE OF JUDGMENT: 21 December 2020*

*Judgment delivered electronically on this date by email to the parties.

APPEARANCES:

For the plaintiff: Mr. S Luzipo instructed by Z Y M Ndzabela care of S Z Sigabi & Associates, King William's Town (ref. Mr. SZ Sigabi). Email address : zymndzabelainc@telkomsa.net / szsigabi@sainet.co.za

For the defendant: Mr. M Maseti instructed by the State Attorney, East London (ref. Mrs. Yako 663/13-P10) Email address: noyako@justice.gov.za

[1] It is common cause that the school is a public school.

- [2] It is was not placed in contention that the defendant would be liable for proven damage or loss provided the claim was brought

within the ambit of this sub-section.

- [3] If a claim falls within the purview of sub-section 1 a claimant is obliged in terms of section 60 (3) to institute the claim against the MEC concerned, as representing the State. See *Parktown High School for Girls v Hishaam and Another* 2019 (4) SA 188 (SCA) at [7].
- [4] *Minister of Education v Wynkwardt N.O.* 2004 (3) SA 577 (C) at 580 A – C; *Hawekwa Youth Camp v Byrne* 2010 (6) SA 83 at [25], *Gora v Kingswood College and Another* 2019 (4) SA 162 ECG at 7; and *M v Member of the Executive Council for Education, Eastern Cape Province and Another* (2367/2014 / [2020] ZAECPEHC 23 (21 July 2020) at para 25.
- [4] *Minister of Education v Wynkwardt N.O.* 2004 (3) SA 577 (C) at 580 A – C; *Hawekwa Youth Camp v Byrne* 2010
- (6) SA 83 at [25], *Gora v Kingswood College and Another* 2019 (4) SA 162 ECG at 7; and *M v Member of the Executive Council for Education, Eastern Cape Province and Another* (2367/2014 / [2020] ZAECPEHC 23 (21 July 2020) at para 25.
- [5] Act No. 108 of 1996.
- [6] 2001 and amended in 2006 and 2007.
- [7] Section 24 of the Constitution provides that everyone has the right to an environment that is not harmful to their health or wellbeing. In *Dlamini v MEC for Education, Mpumalanga Provincial Government* (888/2016) [2017] ZAGPPHC 814 (20 December 2017) the court applied the safe environment clause (paragraph 3 and 17). See also *MEC for Gauteng responsible for Education v Rabie* (A758/06) [2008] ZAGPHC 71 (7 February 2008) at para 4.
- [8] See regulation 5 (1)(a) of the regulations for Safety Measures at Public Schools (“the safety regulations”) which states that the HOD or principal of any public school may and for such time frames as may be necessary, take such steps as he or she may consider necessary for the safeguarding of the public-school premises, as well as for the protection of the people therein.
- [9] Regulation 8 A (2)(a) and (b) of the regulations provide that a public school must take measures to ensure the safety of learners

during any school activity including: (a) Insuring against accidents, injuries, general medical expenses,

hospitalization, and theft that may occur, depending on the availability of funds; and (b) Ensuring where reasonably practical, that learners are under the

supervision of an accompanying educator at all times.

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[10] This obligation is similarly based on regulation 8A (2)(b) referred to in footnote 9 above. It is the plaintiff's case that this obligation in particular is decisive of the matter.

[11] I suspect that this is a mistake and that what was meant to be conveyed was that their removal and assembly prior to the incident

was not noticed by the teachers, or at least could not have been seen by them because of where they were during the long break. I imagine though that they could have been seen by anyone looking for them on the school premises because, as the principal explained

during her testimony, there was no place to store them. They were simply stacked in an open place next to a container which was nearby the toilets.

[12] 1966 (2) SA 428 A at 430 [E] – [H].

[13] 1970 (4) SA 537 (R). See also Gora, Supra, at para [36].

[14] Rusere v The Jesuit Fathers, Supra, at 539 D.

[15] Supra at 539 F-G.

[16] 1981 (1) SA 544 (C).

[17] Supra, at paras [34] – [36].

[18]

[2012] ZASCA 58.

[19] Supra.

[20] Supra.

[21] Supra.

[22] (A5004/2018) [2019] ZAGPJHC 126 (17 April 2019).

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