

SOUTH AFRICA / JUDGMENT

J.M obo M.M v Imerys Refractory Minerals SA (Pty) Ltd (1958/2018) [2023]

ZALMPPHC 104 (6 November 2023)

[2023] ZALMPPHC 104

COURT

Limpopo High Court, Polokwane

BEFORE

Kganyago

CASE / FILE NUMBER

1958/2018

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Policy

REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

LIMPOPO

DIVISION, POLOKWANE

CASE

NO: 1958/2018

REPORTABLE:

YES/NO

OF

INTEREST TO OTHER JUDGES: YES/NO

REVISED

In

the matter between:

J[...]

M[...] OBO M[...] M[...]

PLAINTIFF

And

IMERYS

REFRACTORY MINERALS SA {PTY} LTD

DEFENDANT

JUDGEMENT

KGANYAGO J

- [1] The plaintiff who is acting in a representative capacity of her minor child has instituted an action against the defendant. The defendant is operating an open cast mine at Ga-Malepe village. The plaintiff's child slipped and fell in one of the open pit which the defendant used mine on, but had ceased mining as it had reached its life span. The minor child sustained some injuries as a result of slipping and falling whilst walking to go and fetch the cattle which were at the deep end of the pit. The plaintiff is claiming damages against the defendant as a result of the injuries sustained by the minor child

when he fell into the open pit. The basis of the plaintiff's claim as stated in her particulars of claim are that the defendant

had a duty to restore and rehabilitate the mined area for sustainable use, to preserve, safely secure and proclaim hazardous spaces,

prevent, prohibit and keep under protection entry and access to the hazardous mined area by members of the public and animals including a regulated entry and access.

- [2] The defendant is defending the plaintiff's claim. Except for admitting the description of the plaintiff, jurisdiction and letter of demand, the remainder of the defendant's plea is that of a bare denial. The defendant is also specifically denying that the minor child has suffered damages as alleged by the plaintiff. The parties have agreed in their pre-trial minutes to separate merits and quantum.
- [3] The plaintiff was the first witness to testify. She testified that she is the biological mother of the minor child. When the minor child was injured on 12th September 2017 she was not there. The minor child together with M[...] T[...] were sent to go and look for the cattle at a dam which is situated at the deep end of the pit which is a place where the defendant used to conduct mine activities. The place where the pit is situated they call it quarry six.
- [4] On arrival at quarry six the minor child and M[...] saw that the cattle were drinking water down inside the pit. They decided to walk into the deep end of the pit in order to fetch the cattle. As they were walking downward into the pit, the minor child slipped and rolled downward to where the cattle were drinking water. The minor child sustained some injuries as a result falling into the deep end of the pit. M[...] carried the injured minor child home. On arrival at home, a car was hired which took the minor child to the clinic. At the clinic due to the injuries which the minor child had sustained, he was taken to Dilokong hospital. At Dilokong hospital they found that the minor child was having a crack on his scull and was bleeding, and he was transferred to Mankweng hospital.

- [5] She knows the place where the child got injured. They used to go to that place to collect cow dung in order to prepare the floors of their homes. That place is situated within the mine premises. Currently the area has been fenced and you will no longer be able to access it. Prior to the incident the area was not fenced. It was fenced by the defendant after the incident. The defendant used to mine on that spot, but currently they are no longer mining there and have moved to mine at another area. Cattle were moving freely to that area in order to drink water. At the time of the incident the minor child was 9 years old.
- [6] The plaintiff was cross examined and she stated that she knows quarry six very well, and that they were collecting cow dung at the deep end of the pit at the pool where cattle were drinking water. She stated that the pit is deep and steep as the defendant had used excavators when digging the pit. That the cattle were using a specific access route in order to access water at the pool, and the people were also using the same route that was being used by cattle. She conceded that it is dangerous to walk in that area. She stated that currently it is only mine employees who are able to access that area as there are security guards who are patrolling that area. However, the plaintiff stated that any person can go to that area looking for their cattle. The plaintiff denied that prior to the incident the area used to be fenced. She also denied that the fence was removed by community members every time the defendant put it. The plaintiff conceded that she is the one who had told the minor child to go and fetch the cattle at quarry six. She stated that she did not tell the minor child that quarry six was a dangerous place as the minor child used to go to that area.
- [7] M[...] T[...] was the second witness to testify for the plaintiff. He testified that on 12th September 2017 he and the minor child were sent by the plaintiff and their grandmother to go and look for the cattle at the dam which is situated at quarry six. On that date he was 15 years of age. On arrival at the quarry he and the minor child were walking on the benches of the quarry when they saw the cattle down at the dam which is inside a pit which used to be a mine. They left the benches and went to use another access route to the dam which was being used by cattle and people. As they were walking and descending to the dam, he suddenly saw the minor child rolling downwards towards the dam. At the dam the minor child hit the ground with his head.
- [8] The witness went to the dam to check the minor child, and he found that the minor child was lying on the ground, unconscious with an open wound on his head. The witness carried the minor child back to his homestead and handed him over to the plaintiff and his grandmother. The plaintiff hired a motor vehicle and the minor child was taken to hospital. That day it was for the first time the witness went to quarry six. The witness denied that quarry six was fenced and stated that he did not see any fence around quarry six. The dam is in a bushy area and that is where the cattle drink used to drink water. When the minor child fell, it was only the two of them and nobody had pushed the minor child before he fell.

- [9] The witness was cross-examined and he conceded that the excavated ground was very high, and that there was no easier route to go to the dam where the cattle were, except to use the path that was being used by cattle. The witness stated that the minor child was walking in front of him before he fell, and he does not know what caused the minor child to fall, but from what the minor child had told him after, he had slipped. The witness stated that he saw quarry six as a dangerous place after the incident.
- [10] A inspection in loco was held at quarry six Imerys mine on 31st August 2023. This is an old open cast mine which has reached its lifespan. There are no mine activities which are currently taking place at quarry six. The layout of quarry six is that it is a big deep hole that was dug when mining activities were still taking place. Quarry six has been partially fenced. The fence start on the eastern side up to the western side. The southern side which has not been fenced had what looked like steps going down the deep bottom of the hole, it is also bushy and has no access route of going to the bottom of the hole. At the deep bottom of the hole, there is a portion which had some water and looks like a small dam. That small dam is surrounded by reeds and grass which start on the eastern side to the western side. On the southern side the water start from the wall which looks like steps and there are no grass or reeds. The small dam is situated at an area which looks like a valley with scattered trees. On that valley there is also what looks like side path coming from the north eastern side of the hole.
- [11] M[...] pointed to where he was allegedly standing with minor child when they saw the cattle at the bottom of the hole at the dam. They were standing on the northern side of the hole at a spot which looks like a reef, and had no access route to go to the bottom of the hole. M[...] and the minor child had to walk to the eastern side where they gained access at the two big trees. Thereafter, the two started walking towards the dam using a side path that is being used by cattle. On the eastern side in the direction of the dam, there are two rocks, one white and one brown. As the two were passing the brown rock, the minor child slipped and started rolling towards the deep bottom of the hole.
- [12] Due to some security reasons, we were not allowed to go beyond the fence of quarry six. All these observations were done whilst we were outside the fence. We therefore could not estimate the distance from where the minor child started rolling up to where he landed. We also were not able to see the type of soil and/or ground the two were walking on immediately prior to the accident. According to one employee of the mine, quarry six was fenced around 2019. Outside the fence next to the quarry one could see fresh cow dung and cattle that were freely roaming in the mine premises. On the northern side there were some loose stones on the ground which tend to be slippery, and looks like those that ended up there when the mine was still in operation.

- [13] On return from the inspection in loco, M[...] was recalled to the witness box. He denied that on the way to the quarry there were markings of a fence that was previously erected. He stated that according to his observation the fence never existed. He stated that if any employee of the mine could come and testify that a fence was previously erected around quarry six prior to the incident, that employee will be lying.
- [14] The minor child was the third witness to testify for the plaintiff. He testified that at the time of the incident he was 9 years old. On 12th September 2017 he and M[...] were sent to go and look for the cattle at quarry six. On arrival at quarry six they saw the cattle at the bottom of the hole. After seeing the cattle, they walked to where the cattle were. As they were walking he slipped, fell and lost consciousness. When he regained his consciousness, he was in hospital. He was injured on the head. He was not pushed by
- M[...]. It was not the first time he went to quarry six to look for cattle. He knew the area very well. He does not remember how long did he stay in hospital. The path that they have used to go to the bottom of the pit was the shortest route as there was another path which was longer.
- [15] The minor child was cross-examined and he stated that he had not yet fully recovered from the injuries that he had sustained on 12th September 2017. That he is sometimes feeling dizzy, and one of his ears does not hear properly. The minor child stated that they used that route as for them it was safe since it was being used by cattle. However, when it was put to him that he had slipped because the place was not safe for people and cattle walk there, he conceded to that. The minor child stated that there was no other safe path that they could have used to go where the cattle were. When asked whether he knew of other safer routes, he stated that they were there, but little bit dangerous as the area is rocky and having some ditches.
- [16] The minor child stated that the route that they were using on the date of accident is the same route that he used every time he went to quarry six. The minor child stated that he does not remember seeing a broken fence at quarry six, and that if there was a fence which was broken by the people he could have seen some signs of the broken fence, but there were none. The minor child stated that on the previous occasions when he went to quarry six he was in the company of his grandmother, and his grandmother knew that the route that they were using was dangerous. That concluded the plaintiff's evidence and she closed her case.
- [17] The defendant's first witness to testify was Pertunia Mankgele. She testified that she is being employed by the defendant as a health and safety officer since 2014. Her daily responsibilities are to enforce compliance health and safety measures, doing inspections and risk assessment. They are having a community liaison officer who is the link between the mine and the community. The mine premises has been fenced, and members of the community are not allowed to enter the mine premises unless they got permission after following certain procedures.

- [18] In the mine premises they are still having some graves where the community members will come and perform some rituals. The cattle from the nearby villages also enter the mine premises. If members of the community want to access the mine premises, they must inform the communication forum. If community members are found on the mine without permission, they will be taken to the office of the mine security for questioning. Members of the community are aware of these procedures.
- [19] At quarry six the mining activities were stopped during 2010. A big trench was erected and also a fence installed to prevent access by the people and animals to the disused mine. Signs were also put, and security guards were patrolling on daily basis. Since she started working at the defendant's mine she had never seen anyone walking at quarry six. No other incident had ever occurred at quarry six except the one of the 12th September 2017. When this incident happened, it was for the third time they have been putting a fence around quarry six, as the other fences were removed by unknown community members. After the inspection in loco of the 31st August 2023, the following day when she went to quarry six she found that the fence had been flattened, and two poles of the fence were missing. The community members knew that they must first get permission in order to enter the mine premises, failing which they will be trespassing.
- [20] The witness was cross-examined and she conceded that quarry six is a big hole and it had not yet been rehabilitated. The witness also conceded that the mine had duty to restore and rehabilitate the mined area for sustainable use, to preserve, safely secure and proclaim hazardous spaces, and that they have always been doing that. Further that the mine had a duty to prohibit and keep under protection entry and access to the hazardous mined area by members of the public and animals, and that they have always been doing that. She conceded that the mine is not having the closing down certificate for quarry six. She also stated that they have fenced quarry six to ensure that the area was safe for everyone. She denied that the fence was only erected in 2019, but that for the first time it was erected in 2012 and it got stolen, the second time in 2015 and it got stolen within a week, and for the third time was in 2019. She conceded that if the fence was erected, the minor child would not have fallen into the pit.
- [21] Kamogelo Mokwena was the defendant's second witness to testify. He testified that he is been employed by the defendant as a health and safety officer since August 2014. He became aware of the incident of the 12th September 2017 the following day. He was instructed by the HR department to go and take photos of the scene. He went to the scene in the company of community members and mine security. He did not know where the incident took place, but it was pointed to him by those who knew the place. He did not ask them how the accident came to their knowledge. He did not see any blood on the area where it was shown to him as the place where the minor child had fell.

- [22] The witness was cross-examined and he conceded that he was not there when the accident happened, and that quarry six has not been issued with a closing down certificate. He conceded that the defendant had a duty to erect a fence around quarry six.
- [23] Hendrik Jones was the defendant's third witness to testify. He testified that he is the operation manager at the defendant's mine since 2019. During 2017 he was responsible for the health safety costs control and other things. His duties entails ensuring that the mine was maintained in a safe manner and had competent staff.
- [24] He is aware of the incident of 12th September 2017. He received a telephone call from a certain lady informing him about the incident. He told the said lady that they will launch an investigation into the matter. The outcome of the investigation was that a child had fell at quarry six which was a dangerous area. At the time of the incident quarry six was not fenced. They were having a problem with fencing of the area, as when it was fenced, the fence was either stolen or damaged. They were still looking at other methods of putting the fence, but it was not urgent at the time as community members have been informed about the danger at quarry six. There were also security guards that were patrolling the area.
- [25] This was the first incident to have happened at the defendant's mine, and they did not foresee it happening. They have never seen children playing around quarry six. That the closing down certificate can only be obtained after the mine had ceased operating, and that the mine is still in operation. Inspectors from the Department of Mineral and Energy visit the mine on regular basis to check whether the safety measures were being followed by the defendant. Rehabilitation of the mine will start the day the mine ceases its operation. A closing down certificate will be issued after all the stake holders were satisfied that the mine has been rehabilitated. The witness was not cross-examined, and that concluded the evidence of the defendant and it closed its case. Both parties have addressed the court of the merits of the case.
- [26] It is not in dispute that quarry six is a disused mine which had not been rehabilitated. Even though the disused mine is within the mine premises, the members of community from the nearby villages and their animals are able to access the mine premises without first obtaining permission from mine authorities. When the inspection in loco was done, cattle from the nearby villages were seen roaming freely in the mine premises. This led to community members entering the mine premises in search of their livestock. Further the defendant's witnesses had testified that in the mine premises there are still graves of the families of the people who were relocated when the mine started operating, and this again is the reason why members of the community were accessing the mine premises in order to visit the graves of their relatives and perform some rituals.

[27] The defendant had conceded that the quarry six is a dangerous area to be. Knowing that the area is dangerous and is being accessed by both people and their livestock, the question is whether the defendant had a legal duty to ensure that quarry six was safe for the members of the community and their livestock who were accessing that area. In *Cape Town City v Bakkerud*[1] Marais JA said:

“Any attempt to decide whether a particular omission will potentially ground liability by merely measuring it against the standard of conduct to be expected of a reasonable person will fail for a number of reasons. First, that test is sequentially inappropriate. It is, of course, the classic test for the existence of blameworthiness (culpa) in law of delict. But the existence of culpa only becomes relevant sequentially after the situation has been identified as one in which the law of delict requires action. Secondly, the application of the classic test for culpa to the solution of the anterior question is calculated to produce consequences which are likely to be too burdensome for society to acquiescence in shouldering them. The hypothetical reasonable person (diligence paterfamilias) would have to be credited with a reasonable sense of ethical or moral responsibility and a propensity to act in accordance with it. To use his or her likely reaction to the situation as the yardstick by which to measure whether or not action is required by law would be tantamount to converting every reasonable perceived ethical or moral obligation to act into an obligation or duty imposed by law. But that is the very equation against which the law has thus far set its face”.

[28] From the defendant’s own version it was aware that quarry six was a dangerous area, and members of the nearby communities and their livestock were having access to that area. Some of them will be going to that area to pick up cow dung, and some to look for their cattle. The cattle were attracted to the area by the small dam which was at the deep end of the pit which was where they drink water. That will result in the community members walking to the deep end of the pit in order to fetch their cattle. The defendant alleges that prior to the incident it had erected the fence around quarry six two times, and

the fence was either stolen or flattened. That in itself shows that the defendant was aware that it had a legal duty to make quarry six safe as the livestock was allowed to roam freely in the mine premises and community members were coming to the mine premises to perform rituals on the graves of their relatives. This court therefore, has come to the conclusion that the defendant had a legal duty to keep quarry six safe for the members of the community and their livestock.

[29] The next question which must be determined is whether the plaintiff has proved any negligence on the part of the defendant. On 12th September 2017 when the minor child fell into the pit and got injured, there was no fence around quarry six. According to the defendant’s first witness they have employed security guards to patrol the area in order to make the area safe. The defendant’s

first witness has also testified that the last time the fence was erected around quarry six prior to the incident was in 2015. For two years prior to the incident quarry six was left to be a danger to the community members and their livestock. No evidence was presented as to why quarry six was left being a danger for two years except that they were still looking at other method of keeping it safe. The defendant did not see any urgency in attending to that. If indeed the fence

was stolen, no evidence was presented as to what other initiatives were taken to make the area safe. After the incident the fence was erected during 2019, and surprisingly from 2019 to date of the inspection in loco which was the 31st August 2023, the fence has not been tampered with and was still standing.

[30] At the time of the incident, the minor child was aged 9 years old and therefore doli incapax. The minor child's version was not challenged when he testified that on the date of the incident it was not the first time he went down into the pit to fetch cattle even though he used to go with his grandmother. On the date of the incident the minor was in the company of M[...] who was 15 years on that date. Two minor children who were below the ages of 16 years were able to access a dangerous place unattended. If security guards were patrolling the area how did the two minor children and the cattle that they went to fetch be able to enter the pit which is a dangerous area unnoticed. The cattle were at the deep end of the pit

for some time, and if indeed there were security guards who were patrolling the area on the day in question, they would have noticed

the cattle.

[31] For the mere fact that the defendant was aware that quarry six was a dangerous area to be, it was left for two years without fence or taking other measures to make the area safe despite knowing that the area was frequented by members of the community and their livestock amounts to an unlawful act of omission. It is not sufficient to merely state that they were still looking for other alternatives without stating those alternatives, and also stating the reasons for the delay. Two years is quite substantial if indeed the safety of the people and the animals was their concern and priority, as they knew that the place was dangerous. The plaintiff has therefore succeeded in proving that the defendant's failure to make sure that quarry six was safely secured amounted to negligence on the part of the defendant.

[32] In the result the following order is made:

32.1 The plaintiff's claim on merits succeed and the defendant is held liable 100% for any agreed or proven damages suffered by the plaintiff.

32.2 The defendant to pay the plaintiff's costs on party and party scale.

JUDGE OF THE HIGH COURT OF SOUTH

AFRICA, LIMPOPO DIVISION, POLOKWANE

APPEARANCES: Counsel for the plaintiff : FM Maluleka Instructed by : F.M Maluleka Inc Counsel for the defendant : Adv Geyer HF Instructed by : Webber Wentzel attorneys Date heard : 29th September 2023 Electronically circulated on : 6th November 2023

[1] 2000

(3) SA 1049 (SCA) at para 9

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