

SOUTH AFRICA / JUDGMENT

M.L.M obo M.T v MEC for Education, Limpopo Province (1853/2015) [2020] ZALMPPHC 100 (10 December 2020) [2020] ZALMPPHC 100

COURT

Limpopo High Court, Polokwane

BEFORE

EM Makgoba

CASE / FILE NUMBER

1853/2015

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO

DIVISION, POLOKWANE)

(1)

REPORTABLE:

YES/NO

(2)

OF

INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED.

10/12/2020

CASE

NO: 1853/2015

In the matter

between: M[....]
L[....] M[....]
PLAINTIFF
Obo M[....]
T[....]
and
MEC FOR EDUCATION , LIMPOPO
PROVINCE
DEFENDANT

JUDGMENT

MAKGOBA JP

- [1] The Plaintiff instituted an action against the Defendant in her capacity as mother and natural guardian of one T[....] M[....], a learner at [...] in NKOWANKOWA, Limpopo Province, arising out of an alleged assault of the learner by an educator/ teacher, one Mr J J Nkuna. It is alleged that the learner sustained a serious eye injury for which the Defendant as the employer of the said educator is vicariously liable.
- [2] The Plaintiff's claim against the Defendant is for general damages, medical expenses and loss of earning capacity. The merits and quantum were separated in terms of Rule 33(4) of the Uniform Rules of Court and the trial proceeded on the issue of liability only.

Factual Background

- [3] The Plaintiff called six witnesses to prove her case, namely T[....] M[....] (the learner), M[....] M[....] (T[....]'s sister), T[....] S[....] (T[....]'s fellow learner), A[....] M[....] (T[....]'s uncle), Lettie Mpho M[....] (T[....]'s mother) and P[....] R[....] (T[....]'s father). The Defendant called two witnesses, namely Mr Joel Jan Nkuna, a teacher at [...] and Mrs Kensani Mboweni, the school principal.
- [4] T[....] is presently 23 years old. At the time of the incident leading to the present case he was 17 years old and a Grade 7 learner at [...]. He testified that on the 3 March 2014 he was assaulted by a teacher, Mr Nkuna. That there was noise at the locality where he sat in the classroom. After Mr Nkuna had hit one Njabulo he turned to him. Mr Nkuna hit him on his hand with a plastic pipe and in the process he missed the hand and struck him on his left eye. When he complained to Mr Nkuna that the latter injured his eye, Mr Nkuna promised to give him money to buy chips during break. T[....] did not report the incident to anybody at school and even at his home he did not report the incident to his parents.
- [5] After two weeks T[....]'s uncle came to T[....]'s home and noticed that T[....] had an injury on his eye. The uncle then alerted T[....]'s parents who then for the first time noticed that their son was injured on his eye. The following day T[....]'s father, mother and uncle went to [...]. According to T[....] it was on the 17 March 2014 when his parents and uncle came to the school to enquire about his injury. Mr Nkuna denied the alleged assault. However, Mr

Nkuna took T[...] to Dr Mongwe for consultation and thereafter Dr Mongwe referred him to Letaba Hospital for an eye specialist.

- [6] At Letaba Hospital he was transferred to Mankweng Hospital for an eye operation. According to T[...] the operation did not materialize

since no one from the school was willing to accompany him to the hospital. He was given an amount of R500-00 by one Ms Mabuza, a teacher at the school, to buy food and medication. That on two occasions Mr Nkuna gave his sister R500-00 to take to his parents but he did not know the reason thereof. Ever since the report was made at the school, he did not feel free at school because other learners were laughing at him and he had to drop out of school. He did not consider being registered at another school although there were available alternative schools in the vicinity.

- [7] Both M[...] M[...] and T[...] S[...] were in the same class with T[...] in 2014 when the alleged assault on T[...] took place. Both testified that Mr Nkuna hit T[...] on his eye with a brown plastic pipe. Although M[...] stayed in the same home with T [...], she never noticed any injury on T[...]’s eye until their parents were alerted by uncle A[...] M [...]. M [...] testified further that on two occasions Mr Nkuna called her to his office and gave her an envelope to give to her parents but she did not know of the contents thereof. At home her father received the envelopes and she noticed that there was money amounting to R 500.00 but she did not know the reason for offering such money.

- [8] M[...] testified that in the classroom she was seated in a separate row in front of T[...]’s seat. T[...] S[...] testified that he was seated in the third row in front of T[...]’s row. It is not clear from the evidence of these two learners how they observed the assault on T[...] who was behind them in the classroom. None of them gave any evidence to the effect that she or he turned around in order to observe the assault on T [...].

- [9] Mr A[...] M[...] testified that on the 17 March 2014 he visited his sister, Mpho M[...] and when he saw T [...], he noticed that his eye was injured. He learnt from T [...] that T [...] was assaulted by a teacher, Mr Nkuna, at school some two weeks ago. He alerted T [...]’s parents who according to him were not aware of T [...]’s injury on the eye and were surprised. The three of them went to the school where they found the principal, Ms Mboweni, and another teacher, Ms Mabuza. Mr Nkuna was then called to join

them. During their deliberation Mr Nkuna denied having assaulted T [...]. According to A [...] M [...], there arose heated arguments

and anger amongst them and in the process Mr Nkuna ultimately admitted the assault.

[10] They then went back home leaving T[...] behind at the school. On arrival from school later that day, T[...] informed them that he was taken to Dr Mongwe and was given medication. The following day the 18th March 2014 they went back to school. The principal and Ms Mabuza took them together with T[...] to Dr Mongwe who then referred T[...] to the hospital. According to A[...] M[...], Mr Nkuna only admitted having assaulted T[...] because there was a heated argument and tempers ran

very high at that stage. He said that he did not know of any apology tendered by Mr Nkuna and further that he was not aware of any money offered or given to T[...]’s parents as a token of apology.

[11] Mrs Lettie Mpho M[...], testified that she was alerted by his brother, A[...], that T[...] was injured on his left eye. She confronted T[...] who told her that he had been assaulted by the teacher at school. The three of them went to the school and held talks with Ms Mboweni(principal) Ms Mabuza and Mr Nkuna. At some stage during their deliberations their tempers ran very high and then Mr Nkuna admitted the assault although he denied previously. They returned home. The following day they went to Dr Mongwe who examined T[...] in their presence and thereafter referred him to Letaba Hospital. She stated that Nkuna was not there at Dr Mongwe's consulting rooms as he was said to be on sick leave. When T[...] was transferred from Letaba Hospital to Mankweng Hospital it was Mr Nkuna who took him there on two occasions.

[12] Mrs M[...] testified further that on two occasions she received R500-00 from her daughter, M[...] who alleged that it was from Mr Nkuna. However, according to her she did not bother to ask her what the money was for. Furthermore, on a certain day after they attended a meeting at the Circuit Office, Messrs Nkuna, Malungana, Ngobeni and Xihlangu came to her homestead and Malungana gave her husband (P[...] R[...]) an amount of R500-00 alleging that it is from Nkuna who was apologizing for having assaulted T[...].

[13] Mr P[...] R[...] confirmed the version of A[...] and Mrs M[...] that they were not aware of Thulan's injury until they were alerted by A[...]. He confirmed further that at the school Mr Nkuna denied assaulting T[...] but that after heated arguments and with tempers running too high he admitted the assault. He testified that after T[...] was transferred from Letaba Hospital to Mankweng Hospital he could not meet up with his appointments in that they did not have money to take him to the hospital and no one from the school was willing to assist them.

[14] He received R500-00 from the school alleged to be from Ms Mabuza but he himself did not know the purpose of the money and did not even ask. He confirmed Mrs M[...]’s version that there were meetings held with the School Governing Body (SGB) and the Circuit Office in an effort to ask for compensation but they could not reach any agreement. However, an amount of R500-00 was handed over by Malungana who said it was from Mr Nkuna and that the latter was tendering an apology for having assaulted T[...].

Evaluation: Plaintiff's evidence

- [15] T[...] was not an impressive, truthful and honest witness. He was hesitant even in giving his evidence in chief. His counsel struggled in leading him and had some difficulty in extracting the story of what had actually happened to him that led to the injury on his eye. Under cross-examination he hesitated in answering questions and gave longwinded answers to the simple questions put to him. His evidence is full of self contradictions.
- [16] The version of T[...] is improbable. As at the date of the alleged assault on 3 March 2014 he was 17 years old and was old enough to have his own independent thinking and intelligence. However after the alleged assault he did not report the incident to the school principal, more so that he was seriously injured to an extent of a loss of sight of his left eye. He went on to attend school normally and did not report the injury to his parents until the latter were alerted by T[...]’s uncle after a period of two weeks. His parents as well as his sister, M[...] did not notice any injury to his eye although they stayed together in the same house. M[...] attended the same class with T[...] but for the whole two weeks they went to school together without noticing the injury.
- [17] T[...] testified that after the assault he consulted Dr Mongwe twice, on 17 March 2014 and 18 March 2014. This aspect is contradicted by the clinical records kept by Dr Mongwe which show that he was consulted only on the 18 March 2014. Dr Mongwe noted that the patient (T[...]) was allegedly hit with a plastic pipe on the left eye. However T[...] stated that he did not tell Dr Mongwe what caused the injury on his eye. It is also noted by Dr Mongwe that there is a cataract on T[...]’s left eye.
- [18] During cross-examination an allegation appearing in paragraph 6.4 of the Plaintiff’s particulars of claim was put to T[...] for his comment or confirmation. The statement reads thus:
- "6.4. Mr Nkuna pleaded with our client before Mr Ngobeni and Mr Malungana who is a member of the SGB to forgive him for assaulting the minor child for no apparent reason and gave our client an amount of R500-00 to buy grocery."
- T[...]’s response was that he had no knowledge of that.
- [19] I find the evidence of both M[...] and T[...] S[...] to be unsatisfactory and unreliable. Both of them occupied front seats in the classroom whilst T[...] occupied the back seat and some rows away from them. They were not in a position to explain how they could have witnessed what actually happened to T[...] during the alleged assault. M[...] is biased in favour of T[...] as her brother. It is strange why after witnessing the serious assault on T[...] she did not report to her parents. Her statement that she received envelopes containing R500-00 from Mr Nkuna on two occasions is vague and without substance. She is not an independent witness to be relied upon.

[20] The evidence of A[...] M[...] to a large extent agrees with the versions of both parents of T[...]. However their evidence does not take this case any further in that they did not witness the alleged assault on T[...]. Their attempt to give a version that Mr Nkuna ultimately admitted assaulting T[...] is hopeless and farfetched. Mr Nkuna denied the assault and was corroborated by the principal, Ms Mboweni. I make a finding that the three witnesses, all being the relatives of T[...] were biased and were driven by a motive to get compensation from the [...] authorities.

Defendant's Version

[21] Mr Joel Jan Nkuna testified that he is presently the principal of [...]. As at 3 March 2014 he was still a deputy principal. As one of those in school governance he is aware that corporal punishment at school is prohibited. He denied that he assaulted T[...] with a plastic pipe or at all on the 3 March 2014. On the 3 March 2014 he was teaching creative arts when he realized that some learners including T[...] did not do their homework. He requested them to bring their homework

the following day. T[...] then started screaming in class and he requested him to leave. However T[...] did not leave but apologized

and kept quiet.

[22] On the 17 March 2014 when in his office there came three people and T[...]. Upon giving them chairs to sit he realized that they looked sad. When he enquired one of those people said how can we be happy when our children are injured on their eyes. A heated argument ensued and A[...] M[...] lifted a chair in an effort to hit Mr Nkuna therewith. The principal, Ms Mboweni entered Mr Nkuna's office and he left the principal there with T[...] and his parents and uncle. He was later informed by Ms Mboweni that there were allegations that he assaulted T[...] in the classroom. At no stage did he ever admit the alleged assault nor apologise to anyone for the alleged assault. He denied that he gave out any money to any person as a token of apology or sign of admission of the alleged assault.

[23] On the 18 March 2014 and at the request of Ms Mboweni, the principal, he took T[...] to Dr Mongwe for medical attention. At Dr Mongwe's consulting rooms he did not enter the consultation room alone but in the company of T[...] and T[...]’s father. Dr Mongwe referred T[...] to Letaba Hospital for an eye specialist. At Letaba Hospital T[...]’s father helped his son to open a file and the two went together to the doctor for consultation. He only joined them thereafter. He further assisted T[...] and T[...]’s father to be transported to Mankweng Hospital for further treatment. Mr Nkuna denied that he tendered apology and paid the sum of R500-00 to T[...]’s parents through one Mr Malungana.

[24] The evidence of Mr Nkuna is clear, coherent and straight forward. He answered all questions put to him perfectly and without any hesitation. He is in my view an honest and reliable witness whose credibility is beyond reproach.

- [25] Ms Mboweni, the principal, testified and corroborated the version of Mr Nkuna in all material respects. She denied that Mr Nkuna admitted the alleged assault at any stage. Furthermore she denied that there was any money paid to T[...]'s family as a sign of apology or admission of the assault by Mr Nkuna.
- [26] Ms Mboweni testified that as at 3 March 2014 she was still the principal of Bombeleni Primary School. She never received any report of assault on T[...] until the 17 March 2014 when T[...]s parents and uncle came to the school. On the 17 March 2014 while in her office she heard a noise from Mr Nkuna's office and she went there. When she entered she found a male person holding a chair trying to hit Mr Nkuna therewith. Mr Nkuna left the office and when she enquired what was going on she was told that T[...] had been assaulted by Mr Nkuna. She asked those people to leave and that she would attend to the matter. The following day she requested Mr Nkuna to take T[...] to Dr Mongwe for medical treatment.
- [27] Dr Mongwe referred T[...] to an eye specialist because according to Dr Mongwe, T[...] had a cataract in his left eye. Mr Nkuna and Ms Mabuza assisted in taking T[...] to Letaba Hospital for treatment by an eye specialist. Several meetings with the SGB and Circuit Office were held at the insistence of T[...]s parents but nothing peaceful was achieved because T[...]s parents were angry and persistent that they needed to be compensated. Compensation could not materialize because Mr Nkuna never admitted assaulting T[...]. She denied that Mr Nkuna paid an amount of R500-00 through Mr Malungana to T[...]s father as a token of apology. Ms Mboweni testified further that T[...] was withdrawn from the school by his father, who also directed that his son should stop undergoing further medical treatment at Mankweng Hospital.
- [28] The evidence of Ms Mboweni is also clear, coherent and corroborates the evidence of Mr Nkuna in all material respect. She is a reliable and honest witness.

Medical Evidence

- [29] Both parties tendered medical evidence in the form of clinical records and hospital records. The clinical records tendered by the Plaintiff were submitted as evidence with consent of the Defendant and same was admitted into evidence as Exhibit "A". These clinical records are those of Dr Mongwe who treated the learner, T[...], on the 18 March 2014. Dr Mongwe recorded the following:

"Allegedly hit with a plastic pipe on left eye on 03/03/2014

Painful and tearing

'L' eye for ± 2 weeks

'L' Eye - Cataract,

No lacerations or bruises on the Eyeball."

[30] The Defendant, with consent of the Plaintiff submitted the hospital records of Letaba Hospital and Mankweng Hospital. Same were admitted into evidence as Exhibit "B". The following recording is made in respect of the Letaba Hospital records:

"Diagnosis : - Traumatic cataract

Glaucoma

Clinical history: Patient came to us on Monday 24-03-2014 c/o poor vision of the left eye after he was hit by an elbow of another learner accidentally while playing and sustained left eye injury on the 3/03/2014"

The Mankweng Hospital records are as follows:

Main complaint: Poor vision left eye hit by someone with an elbow accidentally.

White spot inside left eye."

[31] The clinical records by Dr Mongwe and the hospital records of both Letaba Hospital and Mankweng Hospital are mutually destructive with regard to the history leading to the cause of the injury to T[...]'s left eye. Consequently, this Court is unable to make a finding as to whether the injury was caused by the hitting with a plastic pipe or the accidental hitting with an elbow. No evidence was led during the trial as to who gave the history of hitting with a plastic pipe to Dr Mongwe and who gave the history of hitting with an elbow to the hospital medical team.

Onus of Proof

[32] In an action of this nature the test is that the Plaintiff should prove on a balance of probabilities that he was assaulted and that the injury sustained on his eye was as a result of the assault by Mr Nkuna. The Plaintiff had to establish first, the conduct of the Defendant (i.e Mr Nkuna) of which she or he complained; second the wrongfulness of that conduct; third fault on the part of Mr Nkuna; fourth that she or he suffered harm and fifth, a casual connection between such harm and the Defendant's conduct that is the subject of its complaint[1].

[33] In the present case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the Plaintiff and where there are two mutually destructive stories, she or he can only succeed if she or he satisfies the Court on a preponderance of probabilities that her or his version is true and accurate and therefore acceptable. This, the Plaintiff has failed to do in this case.

[34] The guidelines for evaluating the evidence of witnesses was given in Stellenbosch Farmers Winery Group Ltd and Another v Martell et Cie and Others[2] wherein it was held that "to come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities"

In National Employers' General Insurance Co Ltd v Jagers[3] it was said: "Where there are two mutually destructive stories, the plaintiff can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities ... "

[35] On considering these conflicting versions of the Plaintiff and Defendant's witnesses in the present case, I find that the version of the Defendant is more probable than that of the Plaintiff.

Order

[36] The Plaintiff has failed to discharge the onus of proof on a balance of probabilities and accordingly the claim cannot succeed.

In the result the Plaintiff's claim is dismissed with costs.

EM MAKGOBA

JUDGE PRESIDENT OF THE HIGH

COURT, LIMPOPO DIVISION,

POLOKWANE

APPEARANCES

Heard on

: 23, 24 & 27 November 2020

Judgment

delivered on

: 10 December 2020

For the Plaintiff

: Adv. M.J Mojela

Instructed by

: T Mamitwa Attorneys

c/o Shiviri Manzini Masetla Inc

For Defendant

: Adv.MB Madavha

Instructed by

: State Attorney

[1] See MTO Forestry (Pty) Ltd v Swart N.O 2017 (5) SA 76 (SCA) at para 12

[2] 2003 (1) SA 11 (SCA) at 14J - 15D

[3] 1984 (4) SA 437 (E) at 440E-G

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