

SOUTH AFRICA / JUDGMENT

Mphela v MEC of Education Limpopo Province (HCAA08/2022) [2023]

ZALMPPHC 115 (5 December 2023)

[2023] ZALMPPHC 115

COURT

Limpopo High Court, Polokwane

BEFORE

Kganyago, Muller, Manzini

CASE / FILE NUMBER

HCAA08/2022

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FLYNOTES:

DELICT – Schools – Injured

learner –

On

official school sporting competition at another school –

Versions differing how appellant was suddenly attacked resulting

in loss of vision in one eye – Sufficient numbers of

educators accompanied pupils – Even on appellant's

version educators would not have foreseen that appellant would be

attacked – Appellant seeking to show how incident

could have

been prevented and not taking into consideration circumstances

under which incident happened – Appeal dismissed.

REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

LIMPOPO

DIVISION, POLOKWANE

CASE

NO: HCAA08/2022

1.

REPORTABLE: YES / NO

2.

OF INTEREST TO OTHER JUDGES: YES / NO

3.

REVISED.

DATE: 05/12/2023
In
the matter between: EMMANUEL
LEFOHLA MPHELA APPELLANT
And
THE
MEC OF EDUCATION LIMPOPO PROVINCE RESPONDENT

JUDGEMENT

KGANYAGO J

- [1] On 14th May 2016 the appellant was a learner at Kgokolo high school. On that date the appellant and other learners from Kgokolo high school went on an official school sporting competition at another school in Zebediela area. Whilst attending that event, the appellant was attacked allegedly by another learner and other unknown people wherein he was allegedly pepper sprayed in front of his teachers on his right eye. That resulted in the appellant's right eye being permanently blind.
- [2] The appellant has instituted an action against the respondent alleging that educators from Kgokolo high school who have been accompanying the learners to the sporting event were negligent in that they allowed the learner to move around without being monitored; they failed to arrange sufficient security personnel to assist in taking care and/or controlling the movement of the learner; they failed to adhere to the applicable policies for the monitoring of learners during sporting activities; they failed to save the appellant from being attacked by unknown people from the community; and they failed to assist the appellant by arranging an ambulance for him after he was badly assaulted. The appellant further alleges that the educators of Kgokolo high school were acting within the scope and course of employment of the respondent.
- [3] The respondent had defended the appellant's action. In its plea the respondent had admitted that the educators of Kgokolo high school were acting within the course and scope of their employment with the respondent. The respondent has also admitted that there was a school tour on 14th May 2016, and has pleaded that the appellant and other learners went to the tavern without the knowledge and permission of the educators whilst the competition was still on. At the tavern the appellant was amongst the learners who were gambling with dice. The respondent had further pleaded that the educators had a duty to provide safety and protection to the learners within the premises of the school and not at the tavern where the incident occurred.

- [4] At trial in the court a quo the parties have agreed on the separation of liability and quantum. Quantum was postponed sine die. The appellant was the first witness to testify. He testified that during 2016 he was a learner at Kgokolo high school and was in grade 10. On 14th May 2016 he was part of the learners of Kgokolo high school who went on a school trip to a school in Zebediela. It was about 130 learners who went on that trip and they were using two buses. They travelled to Zebediela with one educator known as madam Teffo.
- [5] On arrival at the school that they were visiting, they convened at the assembly with the learners of that school who might have been 520 in number. He saw two educators from Kgokolo high school who were also in attendance and that was Mr Motswane and madam Teffo. At the assembly they were allocated classrooms which were going to be used as changing rooms for the learners who will be involved in various sporting activities. They were also told that those who will be playing soccer will be playing outside the school premises, whilst females will be playing within the school premises.
- [6] The males who play soccer changed into their soccer outfit and went to the soccer field that was outside the school premises. At the soccer field there were about 260 to 300 people. He also saw Mr Motswane and another educator who was unknown to him, and he did not know from which school was the educator coming from. For the entire period he was at the soccer ground, he did not see any educator going around the soccer field to check whether the learners were safe. There was no access control to control as to who might come to the soccer field as a spectator. He did not know whether all the spectators who were watching soccer were learners. It was possible for any member of the community to have come to the soccer field as a spectator.
- [7] As he was watching soccer he heard a noise and saw some commotion at the soccer field. He went closer to where there was some commotion. When he arrived at the scene where there was some commotion, he saw that one of the learners from their school was injured. They called Mr Motswane alerting him about the injured learner, but he is not sure whether Mr Motswane heard them as he was about 25 metres from where the incident took place. The appellant asked the injured as to what had happened, and the injured told him that he was pepper sprayed.
- [8] The people who were around the injured were screaming asking for water to assist the injured. Whilst the appellant was still looking for water, he was also pepper sprayed in his eyes. Thereafter he was hit on the face with an object, but does not know what kind of an object, and he fell down to the ground. As he was lying on the ground, he felt being kicked on the face and he lost his consciousness. When he regained his consciousness he was in hospital. Mr Motswane visited him in hospital the following day. Thereafter he was transferred to Mankweng hospital. At Mankweng hospital, the school principal Ms Mafiri in the company of the appellant's father and uncle visited the appellant. The appellant has lost sight of his right eye as a result of the assault of the 14th May 2016. He was told by the doctor that he was hit on the right eye with a bottle. He did not see the bottle that hit him.

- [9] The appellant was cross-examined and he conceded that at the time of the incident he was almost 21st years of age. He also conceded that given his age, he did not need Mr Motswane to tell him where to go and not to go. The appellant further conceded that he used to watch soccer matches at his school and around his village, and that he was not been accompanied by his mother and father at those games as it was not important for them to be there, and not that he was an adult. The court provisionally admitted an unsigned statement by the appellant which the respondent's counsel was permitted to cross-examine him on that statement. The appellant disputed most of the things that were contained in the unsigned statement.
- [10] When it was put to the appellant that according to the hospital records of Magatle hospital, it has been recorded that he was wheeled in from the casualty on a stretcher, accompanied by a porter, friends, an educator and fully conscious, he responded by stating that he did see anything when he was taken to hospital. He conceded that he had regained his consciousness, does not remember when, but it was the following day. It was put to the appellant that Mr Motswane will testify that during the soccer match, the appellant and other learners went to the shebeen to drink liquor. The appellant denied that and stated that he did not go anywhere.
- [11] The appellant stated that he did not see educators Mr Tshwene, Mr Madileng, Magaba and Mr Mekwa accompanying them to Zebediela. The appellant further stated that Magaba was unknown to him, and that he only saw madam Teffo and Mr Motswane. The appellant denied that at Mankweng hospital he had told the school principal Ms Mafiri in the presence of the appellant's father, uncle and chairperson of the SGB that he had sustained the injuries when the people of Zebediela attempted to rob him of his shoes, but that he told the principal what he had testified in court.
- [12] Morerwane Fanuel Mphela testified as the appellant's only witness. He testified that on 14th May 2016 he was part of the learners from Kgokolo high school who went on a school trip to Zebediela. He was in the same bus that has been boarded by the appellant and madam Teffo when they left their school in the morning. On arrival at Zebediela they were taken to the assembly where they were informed that the females will be playing within the school premises, whilst the males will be playing outside the school premises. The learners that they have found at Zebediela might have been about 300. The educators that he saw from their school were 2.
- [13] They went to the soccer field that was outside the school premises. At the soccer field he was seated on the side of the goalpost, whilst the appellant and others were seated on the left side of the goalpost. Whilst seated he was called and informed that the appellant had been injured. He rushed to where the appellant was, and upon arrival he found the appellant lying on the ground. They requested Mr Motswane to assist them in taking the appellant to hospital, but Motswane told them that he was not going to transport injured people on his vehicle, and also that he needed money for fuel. There were only 2 educators at the soccer field, there was no any other form of supervision to check whether the learners were safe

and playing in a manner that was not harmful towards each other.

- [14] They then approached a passer-by to assist them in transporting the appellant to the hospital. The passer-by requested payment in the amount of R200.00. He was having R100.00 and other learners made a contribution to make it R200.00, and the appellant was taken to hospital. The witness only assisted in putting the appellant in the vehicle, and did not go with them to hospital. The witness denied that on the day in question the appellant had drank any alcohol. The witness further testified that at the soccer field he did not see any parents or security to guard them against anything that would threaten the safety of the learners.
- [15] The witness was cross-examined and he conceded that he did not know the educators from Segaela high school, the school that they were visiting. He conceded that he will not dispute that the educators from Segaela high school were at the soccer field. He also conceded that he will not dispute that Mr Tshwene, Mekwa, Mr Madileng from Kgokolo high school were on that trip, but that he did not see them in the bus in which he was a passenger, and will not know about the other bus. The witness stated that Magaba was unknown to him, and he cannot say whether he had seen him. The witness stated that when the appellant was injured, Mr Motswane was on the other side of the goalpost, but it was not far from where the incident took place. The witness stated that he did not see how the appellant was injured, but that when he arrived at the scene he found him lying on the ground, and he went to Mr Motswane to ask him to assist them.
- [16] The witness stated that when he approached Mr Motswane he found him standing and watching the game that was about to finish. Mr Motswane did not go to where the appellant was injured, but started assisting other learners to board the buses. He stated that it was not true that the appellant was not assaulted at the soccer field. That concluded the evidence of the appellant and he closed his case.
- [17] Sarah Mamatjie Mafiri was the respondent's first witness to testify. She testified that she is the principal of Kgoloko high school. On 14th May 2016 there was a school trip, and the educators who have accompanied the learners are Mr Motswane, Mr Chuene, Mr Megwa, madam Teffo, madam Madileng and Mr Thobejane. The learners that went on that trip were 130 in number. The school trip was a sporting event for netball and soccer. The school trip was authorised as the circuit manager had signed letters authorising the trip.
- [18] At around 20h00 she received a call from madam Teffo informing her that one of the learners (appellant) has been injured. However, madam Teffo did not inform her how the appellant got injured. As the school principal she notified the chairperson of the SGS Mr Mashilo about the incident. She also informed Mr Mashilo to call a meeting in order to discuss the incident. At the meeting it was decided that the appellant should be visited at the hospital, and also notify the appellant's family. The witness, Mr Mashilo, the appellant's father and uncle went to the hospital to visit the appellant.

- [19] On arrival at the hospital they found that the appellant was injured on the right eye and forehead. At the hospital the appellant told her that he was injured when two people wanted to rob him of his shoes. He was unable to fight these two people as he was drunk. These two people attacked him with stones and a bottle, and from there he did not see what happened thereafter. The appellant's father, Mr Mashilo and the appellant's uncle were present when the appellant told her all those things.
- [20] The witness was cross-examined and she conceded that she did not accompany the learners on the school trip. She stated that before the trip can be undertaken, they write down the names of the educators that will be undertaking the trip. She therefore insisted that the names of the educators that they wrote down have attended the trip as the learners will not depart on their own, but she will not guarantee whether they all have attended as she was not present. She stated that she was told that the soccer field was outside the school premises, but next to the school. She also stated that it was the responsibility of the respondent to protect the learners who were inside and outside the school premises.
- [21] She conceded that it was her responsibility to ensure that learners who undertake a school trip were under supervision by educators or act together with the SGB, or even ask parents to assist in supervising the learners. She stated that they did not ask the parents to accompany the learners as the SGB had promised to accompany them, but did not go due to other commitments. She conceded
- that with the number of 130 learners who had undertaken the school trip, the ratio should have been 2 teachers in each bus. She conceded that if the appellant was drunk during the school trip, that amounted to a misconduct, but that the appellant was never disciplined for that.
- [22] Frans Cheune was the respondent's second witness to testify. He testified that he is an educator at Kgokolo high school. On 14th May 2016 he did not leave with the learners from the school when they undertook a trip to Zebediela, but they picked him on the way. The educators who accompanied the learners were six in number, and that is himself, Mr Thobejane, madam Madileng, Mr Megwa, Mr Motswane and madam Teffo. In the buses it was himself, Mr Megwa, Mr Thobejane and madam Madileng, whilst Mr Motswane was in the company of madam Teffo in his car which was escorting the buses.
- [23] They arrived at the school of their destination in Zebediela between 10h00 and 11h00. On their arrival they were welcomed by one educator Kekana who told them that inside the school premises it was only the netball field whilst other playing fields were outside the school premises. Mr Kekana told the learners to confine themselves to be next to the school and not go to the nearby village. The learners from Kgokolo high school were given a classroom where they could be able to set the football scheme. After setting the football scheme they proceeded to the soccer field that was outside the school premises. At the soccer field he was in the company of Mr Motswane and Mr Megwa.

- [24] After the soccer had commenced playing, he was standing on the touchline with Mr Mekgwa, whilst Mr Motswane and Mr Kekana were on the other side of the soccer field in order to make sure that things were running smoothly. The number of people who were at the soccer field might have been between 190 and 200. It seems when the soccer started playing, the appellant was at a distance from the soccer field and was where the other people were gambling with dice. Out of the blue, there was commotion in the soccer field with some players complaining with the way the referee was handling the soccer match. Where the appellant was, there was also some commotion with people chasing each other which was like they were fighting.
- [25] The commotion in the soccer field lasted for about 5 to 10 minutes whilst the one where they were gambling with dice continued. The commotion at the place where they were gambling with dice was about 100 to 200 metres away from the soccer field. The appellant was part of the people who were involved in the commotion at the place where they were gambling with dice. The learners of Kgokolo high school came carrying the appellant who was injured and brought him to Mr Motswane and reported that the appellant had been injured. These learners have taken the appellant from where they were gambling with dice. The appellant was brought to Mr Motswane between 17h00 and 18h00. As the appellant was injured in the village, the police forum came and told them that the appellant should be taken to hospital. Mr Motswane agreed with the police forum that the appellant be taken to hospital, and thereafter Mr Motswane in the company of other learners followed them to hospital.
- [26] When the appellant was taken to hospital, they were busy assisting the learners to board the buses so that they can leave as it was already late. He thought the police forum was within the crowd that was at the soccer field to watch soccer. He was told by Mr Kekana that those people were the members of the police forum. When the learners brought the appellant to Mr Motswane the witness was still on the other side of the soccer field which was a bit far. He denied that Mr Motswane went to visit the appellant at the hospital the following day, but that he was following the people who were taking the appellant to hospital in the company of other learners. The learners at the soccer field were being supervised by himself, Mr Kekana, Mr Megwa and Mr Motswane. The appellant was not amongst the spectators who were watching soccer at the soccer field, but that he was with the group that was far away from the soccer field.
- [26] The witness was cross-examined and he conceded that he did not see the appellant gambling with dice but that he heard from other people that the appellant was part of the people who were gambling with dice, but where he was, he was able to see that people were gambling and heard that they were gambling with dice. The fight that ensued afterwards made him to conclude that they were gambling with dice as a fight cannot just come out of nothing. They did not go to where the people were gambling with dice as it was far from the soccer field. The witness stated that at the soccer field the spectators were learners and members of the community. The witness stated that at the time the appellant got injured, he was no longer wearing school uniform, but had taken it off and was wearing his private

clothes. The witness stated that when they arranged the trip, they were not told that the soccer field was outside the school premises, and that they thought that everything was within the school premises.

[27] The witness stated that for 130 learners it was sufficient to be accompanied by six teachers, and maybe 2 to 4 SGB members might have been added according to his own observation. That the ratio was 1 educator for 30 learners and therefore the six educators were sufficient even though they were disappointed by the SGB members who failed to accompany them. The witness conceded that he did not accompany the appellant when he was taken to hospital, and that even after some days he did not go to hospital to visit him. However, he stated that he can tell that Mr Motswane ended up being at hospital as Mr Motswane had phoned giving him an update. That concluded the evidence of the respondent and it closed its case.

[28] The court a quo found that the appellant had failed to prove negligence on the part of the defendant and dismissed the appellant's

action. The appellant is appealing against the whole of the judgment and order of the court a quo in dismissing his action. The appeal is with the leave of the court a quo.

[29] This court is called upon to determine whether the court a quo had erred in dismissing the appellant's action. It is not in dispute that on 14th May 2016 the appellant was a learner at Kgokolo high school and had sustained injuries when he was on an official school trip. Regulation BA(2) of the Regulations for Safety Measures at Public Schools read as follows:

- (2) A public school must take measures to ensure the safety of school learners during school activity, including -
 - (a) insuring against accidents, injuries, general medical expenses, hospitalisation and theft that may occur, depending on the availability of funds;
 - (b) ensuring, where reasonably practicable, that learners are under the supervision of an accompanying educator at all times;
 - (c) requesting parents or other adults to assist in the supervision of learners;
 - (d) ensuring that the educator-learner ratio is at least -
 - (i) one educator, parent or other adult for every 20 learners in primary schools; or
 - (ii) one educator, parent or other adult for every 30 learners in secondary schools, and
 - (e) ensuring that, in respect of adult-learner ratio, gender is taken into consideration".

[30] Kgokolo high school is a public school and Regulation 8A(2) places a legal duty on the school to ensure the safety of learners who undertake a school activity. That entails where reasonably practicable that learners are under supervision of an accompanying

educator, parent or other adult at all times. As a secondary school, its ratio is one educator, parent or other adult for every 30 learners. 130 learners from Kgokolo high school have undertaken the school trip to Zebediela. For the 130 learners, 5 educators would have been sufficient to accompany the learners during the school trip. According to the evidence of the respondent 6 educators have accompanied the learners during the school trip, in which case they have exceeded the minimum requirements of the regulations even though there were no parent or other adult accompanying them.

[31] What must be determined is whether the circumstances under which the appellant had sustained injuries, can it be said that the respondent had failed in their legal duty which they owe to the appellant and other learners which render them to have been negligent. In *Minister of Safety and Security v Van Duivenboden*[1] Nugent JA said:

(12) Negligence, as it is understood in our law, is not inherently unlawful - it is unlawful, and thus actionable, only if it occurs in circumstances that the law recognises as making it unlawful. Where the negligence manifests itself in a positive act that causes physical harm it is presumed to be unlawful, but that is not so in case of a negligent omission. A negligent omission is unlawful only if it occurs in circumstances that the law regards as sufficient to give rise to a legal duty to avoid negligently causing harm. It is important to keep that concept quite separate from the concept of fault. Where the law recognises the existence of a legal duty it does not follow that an omission will necessarily attract liability - it will attract liability only if the omission was also culpable as determined by the application of the separate test that has consistently been applied by this court in *Kruger v Coetzee*, namely whether a reasonable person in the position of the defendant would not only have foreseen the harm but would also have acted to avert it. While the enquiry as to the existence or otherwise of a legal duty might be conceptually anterior to the question of fault (for the very enquiry is whether fault is capable of being legally recognised), nevertheless, in order

to avoid conflating these two separate elements of liability, it might often be helpful to assume that the omission was negligent when asking whether, as a matter of legal policy, the omission ought to be actionable.

(13) In *Minister van Polisie v Ewels* it was held by this court that a negligent omission will be regarded as unlawful conduct when the circumstances of the case are of such a nature that the omission not only evokes moral indignation but the 'legal convictions of the community' require that it should be regarded as unlawful. Subsequent decisions have reiterated that the enquiry in that regard is a broad one in which all the relevant circumstances must be brought to account. In *Knop v Johannesburg City Council* Botha JA said that the following well-known passage from Fleming *The Law of Torts* 4th ed at 136 correctly sets out the general nature of the enquiry:

'In short, recognition of a duty of care is the outcome of a value judgment, that the plaintiff's invaded interest is deemed worthy of legal protection against negligent interference by conduct of the kind alleged against the defendant. In the decision whether or not there is duty, many

factors interplay; the hand of history, our ideas of morals and justice, the convenience of administering the rule and our social ideas as to where the loss should fall. Hence, the incidence and extent of duties are liable to adjustment in the light of the constant shifts and changes in the community".

[32] There is a dispute as to the exact place where the appellant sustained the injuries and how he had sustained them. According to the appellant he was injured next to the soccer field whilst he was trying to assist a fellow learner who had been attacked. The version of the respondent is that the appellant was attacked far away from the soccer field where a certain game not related to school activities was being played, and that seems like they were gambling with dice. Further that at the time the appellant was injured, he was no longer wearing school uniform of Kgokolo high school, but had changed into his private clothes. The appellant's only witness is his brother who did not see how the appellant got injured. The appellant's witness was called to the scene after the appellant was injured, and when he arrived at the scene, he found the appellant lying on the ground. As to how the appellant got injured, the appellant's evidence is that of a single witness, and that of his brother is not helpful as he did not witness how the appellant got injured.

[33] It is trite law that the onus was on the appellant to prove negligence on the part of the respondent on a balance of probabilities and also to prove that the incident of the 14th May 2016 is causally connected to the injuries that he had sustained. In *Long and Another v Jacobs*[2] Petse AJA said:

"In determining the question of negligence one must of course pay due heed to the warning of Nicholas AJA in *S v Bochrus Investment (Pty) Ltd & another* 1988 (1) SA 861 (A) at 866J-867B that:

'In considering the question [reasonable foreseeability], one must guard against what Williamson JA called "the insidious subconscious influence of ex post facto knowledge" (in *S v Mini* 1963 (3) SA 188 (A) at 196 E-F). Negligence is not established by showing merely that the occurrence happened (unless the case is one where *res ipsa loquitur*), or by showing after it happened how it could have been prevented. The diligens paterfamilias does not have "prophetic foresight". (See *S v Burger* [1975] (4) SA 877 (A) at 8790). In *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound)* [1961] UKPC 1; 1961 AC 388 (PC) ((1961) All ER 104) Viscount Simmonds said at 424 (AC) and at 414G-H (in All ER):

'After the event, even a fool is wise. But it is not the hindsight of a fool; it is the foresight of the reasonable man which alone can determine liability'".

[34] The circumstances surrounding the manner in which the appellant was injured on 14th May 2016 as per his version of events is

questionable. That can be summarized as follows. He heard a noise and saw some commotion whilst watching soccer at the soccer field that is outside the school premises. He went to investigate as to what was happening. On arrival at the scene he found that one of their fellow learners from Kgokolo high school was injured. He alerted that to Mr Motswane who was about

25 metres from the scene, but is not sure whether Mr Motswane heard him. The appellant asked the fellow learner as what had happened, was told by the fellow learner that he had been pepper sprayed. Other people were screaming that they find water to assist the fellow learner. As the appellant was looking for water to assist the fellow learner, he too was pepper sprayed in the eyes and hit with an unknown object. The appellant fell down to the ground, and as he was lying on the ground, he felt people kicking him on the face and he lost his consciousness.

[35] As per the appellant's version, his involvement at the scene was to ask the fellow learner what happened, started looking for water to assist the fellow learner and suddenly out of nowhere he was attacked for no apparent reason. When the commotion started he was not there. It seems it was only the appellant and the fellow learner who were attacked. On arrival at the scene it does not come out clear as what he did to provoke the attackers to attack him when he was not there when the commotion started, and why specifically him. The fellow learner was known to the appellant, but he/she has not been mentioned by name. From the version of the appellant, the fellow learner was also injured, but it does not appear from the record as what had happened to the fellow learner who was injured, and what sought of assistance was given to him. The attention was now given only to the appellant. Even the appellant's witness, testified that he alerted Mr Motswane about the appellant, he said nothing about the fellow learner who was also injured, despite the fact that they were all from the same school and Mr Motswane was responsible for all of them. Except for the appellant, it is doubtful whether there was any other learner who was injured and was assisted by the appellant.

[36] The appellant in his original particulars of claim has stated that he was attacked by a co-learner using a pepper spray in front of the teachers. The appellant sought to amend this paragraph by alleging that the appellant was attacked by another learner and other unknown people in front of the teachers. However, the amendment was defective in that Rule 28(1) was not complied with as there was no provision made for the respondent to object to the intended amendment. Therefore, there was no amendment effected as the notice was void, and the original particulars of claim will stand. If the appellant was injured by a co- learner, the name of the learner was not disclosed. The conduct of the co- learner amounts to a serious misconduct, but it was not disclosed as to how the school dealt with the conduct of the learner in question.

[37] Even if it was accepted that the appellant's particulars of claim have been properly amended, that does not solve the appellant's

problems. It has not been disclosed as to what had happened to the learner whom the appellant was assisting when he was attacked. It has not been disclosed how the appellant came to the conclusion that the attacker was a learner. The appellant's evidence does not even mention that he was attacked by a learner. The evidence of the appellant therefore does not support what has been stated in his particulars of claim.

[38] The respondent in its plea has disputed that the appellant was attacked in their presence, and had put the appellant to proof that. The respondent had further pleaded that the appellant and other learners left whilst the competition was on and went to the tavern and thereafter started gambling with dice. It was therefore clear to the appellant that the scene where he was attacked was in dispute. The crucial witness to have assisted the court a quo in that regard was the learner whom the appellant wanted to assist when he was allegedly attacked. This learner was known to the appellant, and they were also from the same school, but was not called as witness to corroborate his version or any other witness who was present when the appellant was attacked. The respondent's version of events is that the appellant was injured where they were gambling with dice and at that time the appellant had changed the school uniform into his private clothes. Further that the incident happened far from the soccer field. The learner whom the appellant allegedly went to assist when the incident occurred, would have cleared all these uncertainties. It has not been explained why this learner or any other witness who was present were not called as witnesses.

[39] It is trite that if a witness is available to confirm a party's allegations and he was not called to give evidence, the inference

would be overwhelming that his evidence would have been unfavourable to the party not calling him. (See *Munster Estates (Pty) Ltd v Killamey Hills (Pty) Ltd*[3]). All these uncertainties give credence to the respondent's version that when the appellant was injured, he was not near to the soccer field. On arrival at the visiting school, the visitors were warned not to go far away from the school premises. The ratio of the educators from Kgokolo high school were more than sufficient to have supervised their learners. The appellant had decided to sneak away and changed into civilian clothes. This would have made it difficult for his own educators to have monitored his movements as he had now mixed with the ordinary members of the nearby community and looked like one of them. Therefore, it was not reasonably practicable for the educators at the soccer field to have supervised the appellant who was no longer nearer the soccer field and had also changed into civilian clothes.

[40] Even from the appellant's own version of events, he was attacked without any sign that an attack was eminent whilst looking for water to assist the fellow learner who was injured. This seems to be an attack in a spur of moment as the appellant was not involved in the commotion, and was caught unaware. The person that needed attention was the injured learner, and that is what made the appellant to get involved. There were no other safety measures or precautions the educators who were at the soccer field could have taken to prevent the appellant from being pepper sprayed as from the appellant's own version, he was not involved in the commotion. Everyone including the appellant's attention were directed to assist the injured learner. There was no sign that the commotion could have extended to those who have come to assist the injured. The appellant himself when he went to assist the injured learner had acted spontaneously without first seeking the assistance of the educators. Even if the educators were nearer to the appellant, they would not have foreseen that the appellant will be attacked for looking for water whilst not been involved in

the commotion. What the appellant is seeking is what Nicholas AJA has warned against by trying to show how the incident could have been prevented and not taking into consideration the circumstances under which the incident had happened.

[41] From the evidence presented, I agree with the court a quo that it cannot be correct that it was only two educators that had accompanied the learners of Kgokolo high school to Zebediela. The respondent had adduced evidence sufficient to dispel the prima facie proof of negligent, whilst the appellant had failed to discharge his onus of prove. The court a quo had correctly granted the orders, even though the judgment does not engage the issues dealt above. It follows that the appeal stands to be dismissed.

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

42.1 The appeal is dismissed with costs.

JUDGE OF THE HIGH COURT OF SOUTH

AFRICA, LIMPOPO DIVISION,

POLOKWANE

I AGREE

MULLER J

MANZINI AJ

ACTING JUDGE OF THE HIGH COURT OF

SOUTH AFRICA, LIMPOPO DIVISION,

APPEARANCES:

Counsel for the appellant: Adv Makuya UB

Adv Magau LM

Instructed by: Raphesu

JL Attorneys

Counsel for the respondent: Masoga KE

Instructed by: Office

of State Attorney Polokwane

Date heard: 6th

October 2023

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[1] 2002 (6) SA 431 (SCA) at paras 23 and 13

[2]

[2012] ZASCA 58 (2 April 2012) at para 16

[3] 1979 (1) SA 621 (A)

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