

SOUTH AFRICA / JUDGMENT

R and Another v Member of the Executive of Education, Gauteng Province and Others (24232/2002) [2009] ZAGPPHC 394 (9 October 2009)

[2009] ZAGPPHC 394**COURT**

North Gauteng High Court, Pretoria

BEFORE

Dolamo

CASE / FILE NUMBER

24232/2002

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IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: 24232/2002

DATE: 9 OCTOBER 2009

In the matter between

C[...] B[...] R[...] - C[...] 1st PLAINTIFF

C[...] J[...] R[...] 2nd PLAINTIFF

AND

MEMBER OF THE EXECUTIVE OF EDUCATION,

GAUTENG PROVINCE 1st DEFENDANT

FREDERICK JACOBUS VENTER 2nd DEFENDANT

BAYETE RESORT PTY (LTD) 3rd DEFENDANT

JUDGMENT

DOLAMO. AJ

- [1] The Plaintiffs sued the Defendants for damages as a result of injuries sustained by the Second Plaintiff when he fell from a

contraption known as a "foefie slide". This incident occurred on the 23rd September 2001 when the Grade 10 learners at Hendrik Verwoerd School went on a field trip, organized by the school, and held on a farm known as Bayete which was owned by the Third Defendant. The First Defendant is the Member of Executive Committee for Education in the Gauteng Provincial Government and the Second Defendant is the director of the company which owned Bayete. The Defendants are sued vicariously for the actions of their employees who, at all material times, were acting within the course and scope of their employment.

- [2] The particulars of claim alleges that at all material times the employees of the First and Third Defendants owed a duty of care to all the learners who went on this camp. In addition it was alleged that the employees of the First Defendant gave a written undertaking to the parents of the learners who went on this camp that, for the entire duration of the camp, all the activities by the learners would be under the direct supervision of the employees of the First Defendant as well as properly trained staff of the Third Defendant. That at the time when the Second Plaintiff was injured the staff of the First and Third Defendants were not in attendance. It was further alleged that it was foreseen by the employees of the First and Third Defendants that the presence of the "foefie slide" and its use by the learners, in the absence of supervision, created a potentially dangerous situation which could lead to injuries. That the failure of the Defendant's employees to supervise the learners was a breach of their duty of care owed to the learners and this negligence was casually connected to the injuries sustained by one Second Plaintiff. This made them liable for the damages occasioned to the Plaintiff as a result of such injuries. The Defendants denied any liability. In particular the Defendants denied that they were negligent. The First Defendant raised a special plea, which was not pursued during trial that the Plaintiffs had failed to comply with the provisions of section 3 (2) of Act 40 of 2002 in that they did not serve the required notice of intension to institute the action within the prescribed period. On the merits First Defendant denied that employees were negligent as alleged and, in the alternative, and only in the event of it being found that his employees were negligent, that Second Plaintiff was also negligent and that his negligence, in using the "foefie slide" in an inherently dangerous manner, contributed to the injuries sustained. Second and Third Defendants also denied that their employees were negligent. While they admitted that there was a "foefie slide" on the farm and that one of the learners fell therefrom they pleaded that the learners, prior to the incident were using the "foefie slide" under the supervision of the Third Defendant's instructor and who at one point, gave an instruction to the learners to stop using the slide and ordered them to return to camp. That the said learner was injured at the time when he was using the "foefie slide" without the permission or knowledge of the instructor. Secondly that if it was found that the injured learner was the Second Plaintiff he was injured as a result of his sole negligence when he misused the "foefie slide" by glidding simultaneously with another learner. And in what, in my view is an alternative plea pleaded that the Second Plaintiff used the "foefie slide" at his own risk since there were warning

signs prominently displayed on the premises, that the facilities were used at own risk, and that Second Plaintiff did see these signs or ought to have seen them.

[3] At the commencement of the hearing I was advised that the Plaintiffs were no longer proceeding with their claim against the Second Defendant. An Application was also made, and I ordered accordingly in terms of Rule 33 (4), that the trial proceed only on the merits.

[4] The evidence of all the witnesses who testified in the trial is on record and I shall not repeat it in details. It is a matter of common cause between the parties that during 2001 the Second Plaintiff, who was 17 years and 8 months old, was a grade 10 learner at Hendrik Verwoerd School. That during the 21st to 28th September 2001 the Grade 10 learners. Including the Second Plaintiff, went on the adventure camp offered and conducted by personnel of the Third Defendant. They arrived at Bayete resort on the 21st September 2001. accompanied by two teachers, Mr Pienaar and a Mrs Du Toit. The number of learners who made the camp was approximately 50. On arrival the party was met by Messrs Oberholze and Grobler, personnel of the Third Defendant. It is not clear from the evidence

of the learners whether any rules governing their conduct were pronounced on their arrival. What is clear from their evidence,

however, is that the programme of activities which would have been undertaken during the camp was announced. After checking in they immediately started with the programme of activities. As it is customary on such adventure excursions they started with ice-breaking

games and progressed to substantial activities, such as rock climbing, “lantern bekruip”. trekking, obstacle courses,

etc. Mr Oberholzer who was then 19 years old, was the main instructor and facilitator of these activities, with the two teachers in a supporting role of ensuring discipline amongst the learners. It appears from the evidence that there were no serious problems of ill discipline and the authority of Oberholzer was generally respected, his attitude described as more accommodative than militaristic. On Sunday the 23rd day of September 2001 the learners were given an afternoon off; i.e there was no formal programme of activities, with the learners allowed to engage in leisure activities of their own choice .Most of these leisure activities centred around the ‘swemgat’ over which the “foefie slide’ stretched. I interpose here to describe the waterhole as well as the “foefie slide". From the photos which were handed into evidence the “swemgat" appears to be a naturally formed dam of water. The “foefie slide" consisted of a wooden ladder like pylon about 12 metres in height with two steel cables tied to the top thereof. These two cables, which stretched across the length of the dam were anchored into the ground at the opposite end of the pylon. A pulley with two handles, one on opposite sides was attached to each cable. The person who intends to use the slide will stand on a platform which is up the step ladder like pylon. By standing on the platform and holding on to the handles a person could slide down from the top of the pylon and end in the deep end of the water on the opposite side of the dam. The next person to use the slide will then pull the handles back with a rope which was attached to the pulley.

[5] On the day in question the learners were accompanied to the waterhole by Mr Oberholzer. The teachers, however, were not present, having gone on a game drive within the resort. The purpose of Mr Oberholzer's presence and the reason why he accompanied

the learners in his own words, was to supervise them. In the course of their frolicking around the waterhole the learners approached him and requested to use the "foefie slide" and he duly agreed. The "foefie slide" proved to be popular especially

amongst the boys. Soon a silent competition, in which the competitors tried to outdo each other in performing tricks on the 'foefie

slide", ensued. Second Plaintiff was one such competitor. His trick consisted of sliding down with his friend L[...] B[...],

clinging to his waist. This manoeuvre ended when he lost his grip on the handles of the slide, and both he and his partner fell into the shallow end of the water, where he was severely injured.

[6] While it is a matter of common cause that one Oberholzer went with the learners to the waterhole, how long he had stayed and what he did consequent upon granting the learners permission to use the 'foefie slide' is in dispute. So too is what had caused the Second Plaintiff to lose his grip and fall into the water. These two aspects and the other ancillary issues thereto, are in my view, crucial to the determination of the question whether the Defendants were negligent, a negligence which was causally connected to the injuries sustained by the Second Plaintiff.

[7] Mr Oosthuizen argued that it was not the Plaintiffs' case that where learners are not kept under constant supervision that it automatically amounts to a breach of the duty of care owed to such learners, but rather that in the circumstances the degree of supervision which was required was dependent on the risks to which the learners were exposed. He submitted that the erection of the 'foefie slide' over the waterhole was tantamount to the introduction of a hazard that required, not only an effective supervision, but conduct which would prevent any harm flowing from such hazard. According to Mr Oosthuizen even if the evidence of Mr Oberholzer is accepted, that he instructed the learners to stop the use of the slide, he still failed in his duty of care by leaving the learners unsupervised to continue with the use of the "foefie slide. This according to Mr Oosthuizen constituted the negligence which was causally connected to the injuries sustained by the Second Plaintiff.

Furthermore, he argued that there was no evidence on record that the Second Plaintiff was amongst the learners who were instructed to cease the activities on the "foefie slide". In his view it is also irrelevant what had caused the Second Plaintiff to fall off the "foefie

slide". Mr Oosthuizen, referred to the decisions of Minister of Education and Another v Wyakwart NO 2004 (3) 5 A 577 (c) at 532 paragraph E583 H; Faiga v Body Corporate of Durbanton Oaks and Another 1997 (2) SA 651 (WLD) p 664 paragraph G to 666 paragraph J. the as then unreported judgement of Combrik J in CR Rabie v Lid Van die Uitvoerrendo Komitee van Gauteng verantwoordelike In Onderwys p 9 to 13; Administrator. Transvaal v Van der Merwe 1994 (4) 347

(A) at page 360 A-1; Langley Fox Building Partnership (PTY) Ltd v Valence 1999 (1) S A (1) (AD) at p 8 par A to page 13 par B and finally to Weber v Santam Veskering maatskappy Bpk 1983 (1) 381 (AD).

[8] The Defendants argued a contrary view to that of Mr Oosthuizen. Mr Mohlamonyane, on behalf of the First Defendant, argued that it was not in dispute that the teachers, and by extension Mr Oberholzer to whom the teachers delegated their responsibilities, owed a duty of care to the learners out that their absence at the waterhole did not constitute negligence per se. He submitted that since it was the learners day off the teachers did not expect that there would be an activity that would require supervision and, even if such activity would have arisen in their absence, Mr Oberholzer would have supervised the learners. There was no reason to foresee the possibility that the learners would continue to use the "foefie slide" even after Mr Oberholzer had ordered them to stop the activity or to misuse it as the Second Plaintiff did. According to him the Plaintiffs have failed to prove that the First Defendant's employee had failed to take reasonable steps to prevent the injuries to Second Plaintiff. He conceded that the First Defendant would be bound by acts or omissions of Oberholzer to whom his employees delegated their responsibilities of supervising the learners in their absence. Mr Erasmus, on behalf of Third Defendant, argued that this Court must make a credibility finding against Second Plaintiff, on now he fell from the slide, and Ms Sloane, on her observation of Second Plaintiffs activities on the slide. He also drew a distinction between the facts in the Rabies Case supra, and the present case According to Mr Erasmus The distinction a distinction with which I agree between the facts of the Rabie's case supra and the present case lies in the different ages of the Plaintiffs (Second Plaintiff in the present case is 17 years and 8 months while in the Rabie's case he was only 13 years and 11 months) as well as the fact that in the Rabie's case the Plaintiff did not participate in the activity out of his own volition whereas it is the case in the present matter. He went on to state that in the present matter the Second Plaintiff not only did he participate in the activity voluntarily but used the slide for the purposes for which it was not designed and this could not have been foreseen by any of the Defendants, contrary to what the Plaintiffs and argued i.e that the Defendants should have taken steps to guard against this abuse by Second Plaintiff. Lastly it was argued on behalf of the Defendant that it had posted disclaimers around the resort and that Second Plaintiff used the facilities at own risk.

[9] The requirements for negligent liability were set out by Holmes JA in Kruger v Cotetsee 1966 (2) S.A 426 (A) On page 430 E the Court held that:

"For the purposes of liability culpa arise if-

(a) a diligence paterfamilias in the position of the defendant -

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

[10] The question in the present case, in my view, is not whether Oberholzer, by leaving the waterhole before ensuring that all the learners had stuck the use of the foefie slide as he had instructed, was negligent but whether, a reasonable man in his position would have foreseen the reasonable possibility that, in his absence any of the learners would abuse the slide in the manner in which Second Plaintiff did that such abuse will lead to injuries leading to patrimonial loss and would have taken reasonable steps to guard against such occurrence. Combrik J's dictum in *Rabie v Luk van Gauteng Verantwoordelik vir Ondewys* [2006] JOL 17470 (T) stated the following regarding the duty of care:

'die vraag of Christian nalatig behels twee vrae naamlik; (a) gemeet aan die standaard van die redelik man, het hy nalatig opgetree; en (b) indien wel was hy toerekeningsvatbaar (culpa capax) sien *Jones No v Santam Bpk* 1965 (2) SA 542 (A) en *Weber v Santam Versekeringsmaatskappy Bpk* 1983 (1) SA 381 (A) (sien in hierdie opsig die weldeurdatge bespreking van die toets an gelmede sake deur Prof Van der Vyfer in 1983 SALJ - 52)

ten einde te bepaal of 'n kind nalatig was in bepaalde omstandighede vereis ons rag steeds dat sy gedrag gemeet moet word aan die van 'n redeliks volwassene in Christian se posisie sou voorsien het dat beseer kon word as hy ann die speltjie deelneem en daarteen sou gewaak het deur nie deel te neem nie. Gemeet aan die standard was Christian nalatig deur aan die speletjie deel te neem. Ek glo nie dit kan gesé word dat, hy ook nalatig was deur aan die net vas te hou nie. Die waarskynlikhede is dat dit 'n refleks handeling was.

Die vraag is dan of hy bevind moet word toerekeningsvatbaar te gewees het. Die toets deur die Appélhof in *Weber* sa saak gestel is die volgende:

"As die kind so doen en late gemeet word aan maatstaf van die volwassene, dan moet daar gevra word of hy ryp genoeg was om tov die betrokke situasie aar daardie maatstaf te voldoen (vgl Gouws NO v Minister van Gemeenskapbou 1976 (1) PH J33 (N)). As hierdie benadering met insig toegepas word, dan behoort baie van die besware deur ons kontemporêre skrywers teen die beginsels van die Jones-saak te verval en behoort dit ook nie nodig te wees om bepliet dat, ten einde n blikke resultaat te bereik. 'n redelik kind van toepaslike ouderdom,soos in die Anglo-Amerikaanse regstelsel, as maatstaf om nalatigheid te bepaal aangewend moet word in plek van die maatstaf van die bonus paterfamilias nie"

Ek beklemtoon die woorde 'tov die oelrokkft situasie'."

[11] the above except, in my view, outlined the approach to be adopted when dealing with question of negligence where children are involved. I shall also adopt the same approach in this case. There is one submission made on behalf of the First Defendant which calls for immediate attention and the disposal thereof before dealing with the rest of the arguments of the respective parties. This aspect relates to the display of the notices of disclaimer, which were allegedly posted in prominent places around the resort, warning the guest that facilities at Bayete Resort were used at own risk. Third Defendant's evidence as to when these warning signs were posted on side raised questions. An impressions, albeit tacit, was

created that all the signs advising that the facilities were used at own risk were posted throughout the resort prior to the incident and on the legal advice to Second Defendant by his friend Mr Vos. This version, in my view, was adjusted to fall in line with the uncontroverted evidence, as gleaned from a photo taken on the day of the incident by R[...], one of the learners who were in the vicinity of the dam, which clearly showed that there was no such sign near the "foefie slide" to say that other signs were erected piece-meal. No satisfactory explanation was given for the hasty erection of the one sign while waiting for the manufacture of the frames for the other signs. One can safely accept the version of the Plaintiffs witnesses that there were no signs at the time when the learners were at Bayete. The

conclusion

therefore is that these signs were erected after the incident and as a desperate means to ward off culpable liability. The defence, such as raised in the decision of *Diurban's Water Wonderland (PTY) Ltd v Botha and Another supra*, to which I was referred will therefore not be available to Third Defendant in the present matter. The rejection of this defence,

however does not translate into liability on the part of the Defendants. The Plaintiff still has to show that the Defendants were

negligent and that their negligence was casually connected to the patrimonial damages they had suffered.

[12] The Second Plaintiff was 17 years and 8 months old at the time of the accident. He was a well build and athletic enough to play in the front row of the first rugby team of his school. Although he was a standard below that of his age group he had displayed a level of maturity that he was considered for a leadership role. There is no doubt therefore that when measured against the standard of the reasonable man in respect of this particular situation, he is found to be wanting. He was not injured while he was using the "foefie slide" for the purpose for which it was created. On the contrary he was injured while he was abusing this contraption. A reasonable 17 year 8 months old young man in the position of the Second Plaintiff would have foreseen that abusing the "foefie slide" in the manner in which he did may lead to injuries. Confirmation that Second Plaintiff acted contrary to the conduct expected of a young man of his age group and intellectual capacity is found in the evidence of S[...] and J[...], learners in the group who were about 16 years old at the time, that it was plain stupid and dangerous to use the slide in the manner in which the Plaintiff did.

[13] It is inconceivable that a reasonable man in the position of Oberholzer would have foreseen that a young man of Second Plaintiff maturity would glide from the top of the "foefie slide" with a weight of approximately 50 kg hanging around his waist and weighing him down and would have taken steps to guard against such occurrence. What had caused Second Plaintiff to lose his grip on the handles of the slide in these circumstances, becomes relevant. I agree with Erasmus that the evidence of Second Plaintiff on what caused him to lose his grip was

unsatisfactory nor was it assisted by the evidence of any of his witnesses. He was ambivalent as to what caused him to fall. Initially he testified that he fell because he lost his grip. In cross-examination he changed his version and alleged that he fell because the mechanism of the slide 'stalled'. His cause was not assisted by the evidence of his Sloane either who, even after the passage of time which would have affected his recollection, insisted that Second Plaintiff and L[...] were hanging on each of the handles of the slide. The version of the Second Plaintiff can be safely rejected as untrustworthy. In the same swoop I can reject safely rejected the evidence of Ms Sloane which came as bold out of the blue. The conclusion I have arrived at is that the Second Plaintiff lost his hold and fell because of the extra weight. A reasonable person in my view, would not have foreseen that Second Plaintiff would be so daring as to try and slide down with a weight almost equal to his own. while hanging by his own hands to the handles of the slide.

[14] I therefore find that the Plaintiff's have failed to prove that the Defendants were negligent and that such negligence was casually connected to the injuries sustained.

[15] The Defendant have asked for a costs order against the Plaintiffs. While it is a general rule that the costs will foliow the successful party I am aware of the onerous burden this litigation must have placed on the Plaintiffs. I accordingly do not make any costs order.

[15] The order I make is therefore the following:

- 1) That Plaintiffs action is dismissed: and
- 2) That no order as to costs is made

DOLAMO

ACTING JUDGE OF THE HIGH COURT

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