

SOUTH AFRICA / JUDGMENT

Ramesega and Another v MEC for Education Gauteng, Province (14863/2013) [2016] ZAGPJHC 345 (9 December 2016)

[2016] ZAGPJHC 345

COURT

South Gauteng High Court, Johannesburg

BEFORE

M B Mahalelo

CASE / FILE NUMBER

14863/2013

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REPUBLIC

OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION,

JOHANNESBURG

CASE

NO: 14863/2013

Reportable:

No

Of

interest to other judges: No

Revised.

In the matter

between:

DIKELEDI CHRISTINE RAMESEGA

obo

KARABO VICTOR

RAMESEGA Plaintiff

and

THE MEMBER OF THE EXECUTIVE

COUNCIL

FOR EDUCATION GAUTENG

PROVINCE Defendant

JUDGMENT

MAHALELO, AJ:

INTRODUCTION

- [1] The plaintiff, acting in her own capacity and on behalf of her son, Karabo Victor Ramesega (“Karabo”), instituted action against the Provincial Government (“the defendant”) for damages arising from injuries sustained by Karabo, a learner at Crystal Park High School on 30 April 2010.
- [2] The trial was concerned with merits only of the plaintiff’s claim, the issue of quantum of damages is standing over for later determination in terms of Rule 33(4) of the Uniform Rules of Court.
- [3] It appears from the particulars of claim that on the day in question Karabo and other learners climbed on top of the goal post at the soccer field in order to put up a net on the goal post in preparation for the soccer match which was to be played at the school on that day. Karabo lost balance and fell from the top of the goal post causing the whole structure to fall on top of his head. He suffered injuries as a result of the incident.
- [4] The defendant, in its plea, denied that Karabo got injured as pointed out above. Its defence seems to suggest that it did not instruct Karabo or any other learner to put the net over the goal post. Secondly, that when Karabo got injured he was not on top of the goal post but was swinging on the goal post. The defendant’s version therefore being that Karabo got injured when he was swinging on the goal posts.

COMMON CAUSE FACTORS

- [5] Based on the pleadings, pre-trial minutes as well as the evidence led, the following facts can safely be accepted as common cause: Karabo, a 15 year old, and a Grade 9 learner at Crystal Park High School also known as Chief Luthuli Secondary School sustained injuries to his head on 30 April 2010, which necessitated that he be hospitalised. The injuries sustained by Karabo occurred whilst the learners were at the soccer field. It is not in dispute that at that time Karabo was playing for the school soccer team. The coach at the time was Mr Mathabela (“Mathabela”) who has since died.

APPLICATION FOR ADMISSION OF HEARSAY

- [6] At the commencement of the trial the defendant applied for the acceptance of the written statement of Mathabela. The statement was based on the report made to Mathabela by Mbusi Thethwayo and Poni Dube who were said to be amongst the learners who were at the soccer field on the day in question. I must hasten to mention that according to the defendant Mbusi Thethwayo was scheduled to testify in support of the defendant’s case. He disappeared on the morning of the trial. The application was based on the provisions of

section 3(1)(c) of the Law of Evidence Amendment Act 45 of 1998. The application was based on the fact that

Mathabela had since died and was therefore unavailable to testify in these proceedings.

- [7] The application to admit Mathabela's statement was not opposed. In the end, the statement was accepted into evidence and will be considered as such. From the statement of Mathabela it is undisputed that Karabo was injured without Mathabela being aware. It was also not in dispute that in 2010 the goal posts at the soccer field of Crystal Park High School were movable they were not dug down in the ground. It was further not disputed that the nets in question were kept in the storage room of the school and the keys thereto were kept by the caretakers Mr Jabulane Malambe ("Malambe") and Mr Richard Moloi ("Moloi").

THE PLAINTIFF'S CASE

- [8] The plaintiff led the evidence of Karabo's mother, Dikeledi Christine Ramesega ("Ms Ramesega") and Njabulo Shabangu ("Njabulo") who was also a learner and present at the soccer field on that day.
- [9] Ms Ramesega testified that she was at work when she was called by the clerk at Karabo's school and was informed that her son was injured at the school. She informed the clerk that she did not have medical aid and that Karabo may be taken to O R Tambo or Far East Hospital. A short while later the clerk called again and informed her that Karabo was bleeding from his ears, eyes and nose. She immediately left her workplace and headed to Karabo's school.
- [10] Upon arrival at the school she found that the emergency services were already on the scene and Karabo was about to be airlifted to hospital. She enquired from the people who were there including Mathabela what had happened to her son, no one was able to give her any explanation. On the Monday following the incident she went back to the school to collect Karabo's books and clothes. Again she asked Mathabela what had happened to her son. Mathabela shrugged his shoulders and said that he was rushing to another soccer match and was not able to talk. According to her the school has not accounted to her about what happened to her son up till the day of trial.
- [11] Njabulo an eye witnesses, team mate and friend of Karabo also testified. He told the court that on the day in question the soccer team from Crystal Park High School was preparing to host and play against Petit High School. Their coach, Mathabela, instructed them to go and do warm up exercises in the soccer field. Just before the start of the game and upon realising that their opponents had already arrived, they noticed that the nets had not yet been put on the goal posts.

- [12] A number of team mates approached Moloi, the school caretaker and the person responsible for the upkeep of the soccer field, to let him know that the nets were not yet put up on the goal posts. Njabulo testified that the nets were kept in a storage room for which Moloi and Malambe kept the keys.
- [13] Njabulo testified further that, Moloi gave them the nets and instructed them to go and put them up on the goal posts. This was when Karabo and two other learners being Mbusi and Mbuso Thethwayo climbed on top of the goal post to affix the net. According to Njabulo, when they finished affixing the net, the two boys jumped down while Karabo was still on top. This caused the goal post to shake and as Karabo was jumping down his jersey got hooked by the hooks on the goal post at the back of the neck. The goal post collapsed on top of Karabo's head and injured him.
- [14] Njabulo testified furthermore that he was close to the goal post when Karabo fell and that Malambe and Moloi were not at the soccer field. According to him, Malambe arrived after the fact and he assisted him and other boys to shift the goal post off Karabo's head.
- [15] During cross-examination it was put to Njabulo that Moloi could not have given them the nets because he left the school earlier that day. Njabulo was adamant that Moloi was the one who gave them the nets and not only that, but he instructed them to put them up as well. He was confronted about the school's Code of Conduct. He testified that he was aware of what it says. Njabulo testified during cross-examination that putting up the nets on the goal posts according to the school Code of

Conduct was a function dedicated to the school general workers and not the learners although on many occasions the general workers

instructed the learners to put the nets on the goal posts. According to him it was not the first time that the learners had to affix the nets on the goal posts.

THE DEFENDANT'S CASE

- [16] Neo Mashiane ("Neo") testified as follows: He was a pupil at Crystal Park High School in April 2010. He was present when Karabo got injured at the soccer field. Karabo and the other boys had not climbed on the top of the goal posts in order to affix the nets as the soccer match was supposed to be played in the soccer field of Crystal Park Primary School. There were no nets on the goal posts of Crystal Park High School. He saw Karabo in the company of Mbusi and Mbuso Thethwayo swinging in different directions on the goal posts. According to Neo Karabo and the Thethwayo twins were swinging on the goal posts in opposite directions when other team members were doing warm up exercises. He saw that the twins jumped off the post, which was now shaking and Karabo's shirt got hooked on the goal post and the structure collapsed backwards and hit him on the head. He testified that at this time he was standing approximately 15 to 20 metres away from Karabo. When asked about the whereabouts of Malambe at that stage, he testified that Malambe was some 50 metres away in the grandstand.

- [17] Neo testified furthermore that he did not hear Malambe warn the boys to desist from swinging on the goal posts. He confirmed that Moloi was not present on the soccer field when Karabo got injured. He remembered this because, according to him, Moloi was very strict with the learners and Karabo and the other learners would not have been swinging on the goal post if he was there.
- [18] Moloi, the next witness for the defendant testified that he and Malambe are caretakers at Crystal Park High School. Their duties entail general maintenance. They are the ones responsible for the upkeep of the soccer field. They are also custodians of the keys to the storage room where the nets are kept. He denied giving Karabo and the other boys access to the nets and testified that he did not instruct anyone to put up the nets as it was the caretakers' duty to put up the nets whenever a soccer match was to be played and that the learners were not allowed to put up the nets.
- [19] He testified further that he sought the principal's permission to leave early on that day because he was going his home in the Free State. He stated that he was not even aware of the soccer match which was to be played on that day. He only heard about Karabo's injury on the following Monday.
- [20] He confirmed that part of his duties were to monitor the pupils and make sure that they did not behave badly in the school premises. According to him the school rules were adhered to on that day as he was in possession of his key to the storage room.
- [21] The next witness for the defendant was Malambe. He confirmed that he is a caretaker at the school. He further confirmed that his duties entailed general maintenance and upkeep of the soccer field. He testified that on the day in question he was present on the soccer field, he was sitting on the grandstand. He approached Karabo and the other boys and warned them that "now that they were about to play soccer they should not even think of swinging on the goal posts".
- [22] When asked as to why he would think that the boys will swing on the goal posts, he testified that they were naughty and he actually saw them swinging. The boys apologised. He turned his back against them to return to where he had been sitting. When he was 2 metres away from the goal post he noticed that the boys had climbed back onto the goal post. This was when he saw the goal post fall on top of Karabo's head. He assisted the other learners to lift it off Karabo's head.
- [23] According to Malambe, there were no nets affixed to the goal posts because the soccer game was going to be played in the primary school field.
- [24] Malambe testified furthermore that, Karabo and the other boys were naughty children and the incident would have happened in any event, despite anything that he could have done. He conceded that the incident might have been averted if Moloi had been present.

EVALUATION OF THE EVIDENCE

- [25] The plaintiff testified that up to date nobody from Karabo's school accounted to her as to what led to her son being injured. In contrast to what was testified by Malambe, the plaintiff testified that Karabo was never a naughty child. According to her, he behaved well. She testified that had it been that Karabo was naughty and ill-behaved the school ought to have made her aware. According to her she was never called to school in connection with Karabo's behaviour.
- [26] In the main Ms Ramesega's evidence was not contested. I may at this stage hasten to mention that I find that the incident happened in the manner testified to by Njabulo, not in the manner described by Neo and Malambe. The evidence of Njabulo appeared to be much more probable than that of the defendant's witnesses. Njabulo was consistent in his version. He did not evade difficult questions. He came across as an honest and frank witness. He admitted to wrongdoing when he could have lied in order to look smart. An example of this was when he admitted to understanding the school Code of Conduct but still admitted that he also climbed on the goal posts to affix the nets.
- [27] He was persistent that the learners got the nets from Moloi. In this regard it is my view that because the keys to the storage room where the nets were kept were in Moloi and Malambe's possession. It is not probable that the learners could have accessed the nets from anywhere else. In any event nothing of that sort was suggested by the defendant's witnesses.
- [28] I did not form the same impression with the defendant's witnesses for the following reasons: It was my impression that Neo was never meant to be called as a witness. No statement was obtained from him. It is not surprising that Neo's version of events particularly the fact that there were no nets on the goal posts on the day in question was never put to Njabulo. Neo appeared to be keen to relay a particular impression to the court. In his evidence-in-chief he was asked if he knew Karabo. His answer was "Yes he was the one who was swinging on the goal posts". This is in contrast with the testimony of Malambe, who said that Karabo and the other boys warmed up preparing for the soccer match on the goal posts.
- [29] Neo was the first witness to say that there were no nets on the goal posts. This piece of evidence flies in the face of the report purportedly made to Mathabela by Mbusi Thethwayo and Poni Dube.
- [30] With regard to Malambe, he was an unreliable witness. He started by saying that he warned the learners not to even think about swinging on the goal posts. This created an impression that he warned them even before they started swinging on the goal posts. When confronted about this and in hindsight he said that he warned them after they started swinging. Malambe was not consistent with his version that the learners were swinging on the goal post. During cross-examination he stated that the learners were doing warm up exercises because they were preparing for a soccer match. He placed himself close to the incident when Neo's testimony was that he was sitting on the grandstand. The fact that he was sitting on the grandstand is confirmed by the fact that Neo did

not even hear him warn the boys to desist from swinging on the goal posts even though he was 2 metres from the goal post.

[31] Of significance is the fact that Malambe conceded that the incident might have been averted had Moloi been present. This accord with the evidence of Njabulo that Moloi was not present when Karabo fell from the goal posts.

ONUS OF PROOF

[32] It is trite law that in matters of this nature the plaintiff bears the onus of proving its case on a balance of probabilities. On the other hand the defendant bears the evidentiary burden to rebut the plaintiff's case.

[33] In assessing whether the plaintiff has discharged the onus resting upon it, it must be shown that the plaintiff succeeded in establishing that a reasonable person in the position of the staff members of the defendant, who supervised the learners including Karabo at the school ought to have foreseen the possibility that Karabo would fall and injure himself if he was allowed to climb on top of the goal post to put up the net , that the school should have taken steps to guard against such occurrence and that the school failed to take such reasonable steps.

[34] On the above evidence with all its imperfections on both sides, the crucial question is the following: Whether any negligence can be ascribed to the school during the incident, and whether the school breached any duty of care towards Karabo and the plaintiff in the circumstances.

[35] The requirements for liability in our law are set out in *Kruger v Coetzee* 1966 (2) SA 428 (A). Holmes JA held at 430E:

“For the purposes of liability culpa arises if –

(a) A diligens 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.

This has been constantly stated by this Court for some 50 years. Requirement (a)(ii) is sometimes overlooked. Whether a diligens paterfamilias in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend upon the particular circumstances of each case. No hard and fast basis can be laid down. Hence the futility, in general, of seeking guidance from the facts and result of other cases.”

- [36] This exposition of the requirements of liability was accepted in *Minister of Education and Another v Wynkwardt* NO 2004 (3) SA 577 (C) in which a grade 3 learner at a school with 900 learners and 32 educators was injured. At the time the learner was 9 years and 7 months old. He had climbed over a locked gate and had fallen and injured himself. The learners were warned not to use the gate which was locked. The Court at 580A to D stated as follows:

“It was not in dispute that R was injured at school while under the control and care of the Appellants’ employees and it was fairly and properly conceded that teachers owe young children in their care a legal duty to act positively to prevent physical harm being sustained by them through misadventure. It was submitted that in this instance as in many other delict cases, the real issue is ‘negligence and causation and not wrongfulness’ (See: BOE Bank Limited v Ries 2002 (2) SA 39 (SCA). The conclusion of the Court a quo is premised upon the core finding that the Appellants failed to take ‘reasonable steps to ensure that R, like all his peers, left the school through the correct exit gate’. Mr Gauntlett in my view rightly, points out that the true enquiry is not as to foreseeability but as to what constituted reasonable steps for the Appellants to take the circumstances, and whether these, if taken, would probably have averted the harm.”

- [37] In *Minister of Safety and Security v Van Duivenboden* 2002 (6) 431 (SCA), applying *Kruger v Coetzee* (supra), held (at 448F-G) that the answer to element (a)(ii) of the said case:

“Will depend upon what can reasonably be expected in the circumstances of the particular case. That enquiry offers considerable scope of ensuring that undue demands are not placed upon public authorities and functionaries for the extent of their resources and the manner in which they have ordered their priorities will necessarily be taken into account in determining whether they acted reasonably.”

- [38] The duty of care depends on the risks that school children are subjected to. In *Rusere v The Jesuit Fathers* 1970 (4) SA 537 (R) a group of children between the ages of seven and ten were left unattended in the school grounds and engaged in a game using

bows and arrows during which an eight-year-old child sustained a serious injury to his eye. It was held at 539F-H that:

“In my opinion, however, the duty to keep children of this age under constant supervision depends essentially upon the risks to which they are exposed in their particular surroundings ... To contend, however, that children of this age should never be more than momentarily out of sight of a responsible person even when they are in normal and familiar surroundings which are devoid of features that could sensibly be regarded as hazardous, is, I think, to exact too high a duty of care from the bonus paterfamilias.”

- [39] It is apparent from the authorities referred to above that where learners are not kept under the constant supervision of educators

this is not in itself a breach of the duty of care owed to such learners. It would depend on the circumstances of each case and to the risk that the learners were exposed to. One should be careful not to place undue demands on public authorities and functionaries of their resources and the manner in which they have ordered their priorities will necessarily be taken into account in determining

whether they acted reasonably.

- [40] The evidence of Malambe and Moloi that they were inter alia tasked with monitoring the learners in the soccer field and ensuring that they did not misbehave in my view shows that the defendant foresaw the possibility of danger in the sports grounds and saw the need to post adults to monitor the children.
- [41] The question under the circumstances is: did the school do enough to ensure the safe environment for the learners on the day in question. This question must unfortunately be answered in the negative. This is so because of the following reasons: Mathabela as the coach was not at all times with the learners at the soccer field. He was not aware how Karabo was injured. On the version of the defendant the learners including Karabo were known to be naughty and troublesome. Malambe was the only one left to supervise the learners on the soccer field. It was clearly not reasonably possible for Malambe to keep proper supervision and control (not continuously) over all the learners under his supervision all the time. Malambe conceded this much and said that if Moloi was present perhaps the incident could not have happened. Neo also stated that as Moloi was the one who was a bit stricter with the learners, if he was present the incident would not have occurred.
- [42] I have found that the incident happened as testified by the plaintiff's witness. It is common cause that the goal posts were not dug down. They were movable. On either version whether Karabo was swinging, putting up the net or warming up, fact of the matter is, he was on top of the goal post and his injuries are casually connected to that event. The fact that the goal posts were not dug down in the ground clearly created a danger to the learners which the defendant should have reasonably foreseen and taken preventative measures by ensuring that the learners are not given the nets to affix on the goal posts without supervision. Furthermore the defendant should have ensured that the goal posts were tightly secured by digging them into the ground. The preventative measures are in my view not unreasonable.
- [43] Surely in the present case the presence of the goal posts not dug down in the ground on its own created a danger to the learners in the soccer field. It is even worse if the learners are given nets to mount on the goal posts without proper supervision.

[44] In *LUR vir Onderwys en Kultuur, Vrystaat v Louw en 'n Ander* 2006 (1) SA 192 (HHA), it was held that in terms of section 60(1) of the South African Schools Act 84 of 1996, the State is liable “for any damage or loss caused as a result of any act or omission in connection with any educational activity conducted by a public school and for which such public school would have been liable but for the provisions of this”.

[45] Based on all the above and the legal principles referred to, I conclude that the plaintiff has succeeded on a balance of probabilities to show that the harm which befell Karabo on the day in question was reasonably foreseeable and the defendant has not shown that, based on its statutory duty, it has taken all proper and reasonable measures in order to ensure the safety of Karabo. The occurrence of the incident under the circumstances cannot be said to have been too remote for the defendant’s staff to have foreseen.

[46] In the result, the following order is made:

46.1 The defendant shall be liable to the plaintiff for all proven damages as a consequence of the injuries sustained by Karabo at Crystal Park High School on 30 April 2010.

46.2 The defendant shall pay the costs of the action.

M B MAHALELO

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

APPEARANCES

Counsel for Plaintiff

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Instructed by

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Date of Hearing

17, 19 and 24 August 2016

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