20/12/2017

IN THE HIGH COURT OF SOUTH AFRICA, GAUTENG DIVISION, PRETORIA

[FUNCTIONING AS MPUMALANGA CIRCUIT COURT, MBOMBELA]

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED.

20 / 12 / 2017
DATE

SIGNATURE

CASE NUMBER 885/2016

THOKO DLAMINI OBO MINOR — PLAINTIFF

And

MEMBER OF THE EXECUTIVE FOR THE DEPARTMENT OF EDUCATION MPUMALANGA PROVINCIAL GOVERNMENNT — DEFENDANT

JUDGMENT

LEGODI J,

[1] An incident at Majembeni Primary School, Hoyi Trust under Kgosi Ngomane in the Tonga area Mpumalanga Province, during which three leaners were injured by a stand on which water tank was positioned, became the subject of a dispute before me.

[2] The mother of one of learners has instituted an action against the Department of Basic Education Mpumalanga claiming general damages and loss of earning capacity sustained by the learner who at the time of the incident was about nine years old.

[3] At the heart of the dispute the question is whether the defendant failed in their legal duty of care by not providing safe educational environment, a dangerous object free zone and not adhering to professional standards administered with due professional skill and expertise reasonably expected from a public school as regulated. And that in breach of duty of care or implied agreement between the learners and the school, the school and or educators failed to exercise due proper safety measures and expertise reasonably expected in providing the safe environment that has been promised by the school to the plaintiff. It is further pleaded that the school was negligent and breached its legal duty to exercise due professional skill as was reasonably expected.

[4] The educators are said to have failed to properly monitor the learners to ensure that the learners do not sit adjacent to the water tank which was mounted on the dilapidated and old irons struts which needed to be replaced.

[5] The department in its plea raised no other defence than a base denial. For example in paragraph 9 of the particulars of claim the plaintiff pleaded:

"On/or about 20th August 2013 and at/or near Majembeni Primary School the child attended school and was seated adjacent to the water tank under the supervision of the educators of Majembeni Primary school kaHoyi Trust in the District of Nkomaxi in the Mpumalanga Province.

[6] The plea thereto is that: "Defendant has no knowledge of the allegations contained herein, does not admit same and put to the plaintiff to the proof thereof". Similarly, in paragraph 10 of the particulars of claim, the plaintiff pleaded:
"On the same date, the 20th of August 2013 and in the school premises during regular school hours, and within the presence of educators, the child was injured when a water tank fell and the supporting iron struts of the water tank struck his legs and thereby got injured"

[7] The plea thereto is as quoted in paragraph 6 above. On 28 November 2017 after oral argument and after parties were directed to file written heads of argument by not later than 1 December 2017, parties were informed by way of an email as follows:

*"**RE: MRS DLAMINI VS DEPARTMENT OF EDUCATION***

I have been directed to address this letter to you as follows:

1 In your written heads of argument you are further directed to deal with the following:

1.1 Whether the special plea is still being pursued and if so written heads of arguments in regard hereto must be filed.

1.2 Whether a bare-denial plea constitute any other defence, and if so, whether any defence of non-foreseeability is covered by the pleas of denial and if not whether evidence adduced seeking to raise unforeseeability of the incident is admissible in law even if not properly pleaded.

2 Let us have your written heads as directed by the court. That is, by not later than Friday 1 December 2017."

[8] Litigation is not a game where a party may seek tactical advantages by concealing facts from his or her opponents and thereby occasioning unnecessary costs. Nor is a party entitled to plead in such a manner as to place the onus on his or her opponent if the facts as known to the pleader place the onus on him or her[1]. The function of pleading is three fold: (a) they must ensure that both parties know the points in issue between them, so that each party knows what he has to meet. He or she can

[1] Niewoudt v Joubert 1988(3)SA 84 (SE)

thus prepare for trial knowing what evidence he or she requires to support his own case and to meet that of his opponent. 'The object of pleadings is to clarify the issues between the parties and a pleader cannot be allowed to direct the attention of the other party to one issue, and then at the trial attempt to canvass another[2].

[9] Every pleadings must contain a clear and concise statement of the material facts upon which the pleader relies for his or her claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto[3]. The plaintiff is entitled to know the limits of the defence in a clear and concise manner. When a plea is vague as to what a defence is, or as to whether there are one or two defences, such a plea ought not to be allowed to stand even through some good defence may be wrapped in it[4].

[10] Once pleadings are filed, the parties are bound by them. If the pleadings raise certain issues and the evidence adduced at the trial does not substantiate them, the action or defence as the case might be would fail unless amendments are granted[5].

[11] The Department denied almost everything which the plaintiff pleaded. To raise un-foreseeability as a defence during trial without even seeking to amend the original plea and by so doing failed to disclose facts which were at its disposal cannot be allowed. The injured, Sakhi Christian Dlamini was a learner at the school aforesaid. He was injured at the school by water tank stand which fell on him and it was during break when it so happened. These are facts clearly known to the defendant and should never have been denied.

[12] Failure to plead these known facts coupled with failure to plead un-foreseeability of the incident, in my view, gives the impression that the Department took no consideration on properly pleading. Or it deliberately wanted to put the plaintiff in an unfavourable position where she has to prove everything. This is a tactical approach in pleading which must be discouraged. Just on this point alone, the defence

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[2] Imprefect (Pty) v National transport Commission 1993 (3) SA 94 (A)
[3] SA Onderlinge Brand Versekering Maatskappy v Van den Bert 1976(1) SA 602 A
[4] AA Mutual Insurance Association Ltd v Biddulph and Another 1976 (1) SA 725 (A)
[5] Ferguson & Timpson Ltd v African Industrial & Technical Services Pty Ltd 1949 (4) SA 340 (W)

of un-foreseeability which is not pleaded, can easily be ignored. This brings me to consider other factors in the event I was to be wrong regarding un-foreseeability.

Legal duty

[13] If a child has an accident in the school, in the school yard, on the way to school, on school bus or while on a school trip, the question of whether or not the school or the teachers were negligent, may arise as it has arisen in the present case. There is no simple answer to the question when the school may be liable. Everything depends on the facts of the individual case. Teachers or educators have a duty of care towards the learners, students and or pupils. The general law of negligence provides that a person may be negligent if he or she owes a duty of care to the person injured and he or she did not carry out that duty to the legal standard required and the person (in this case, the learner), suffered injuries as a result of the failure to adhere to the duty of care.

[14] In any given case, the actual facts must be examined closely to see if all these elements set out above are present. When the duty of care of teachers towards their learners starts, where it ends and precisely what constitutes a breach of duty, are not nearly so clear-cut.

[15] The following general principles apply: (a) Teachers must take responsible care to ensure that their learners do not meet with foreseeable injury. They have a duty to protect the children against foreseeable risks of personal injury or harm. (b) The standard of care is that of a reasonable prudent parent or person. The degree of care depends on such factors as the age of the learners. (c) There must be an effective system of supervision in operation in the school.

[16] The duty of care by teachers towards their learners applies mostly on the school premises during school opening hours. Teachers are required to follow good standards and approved practice. Schools are obliged to abide by the usual safety rules that apply to public buildings and normal rules that apply to employee safety at work. Where one party acts in a reasonable reliance on the impression created by another party that the latter will protect that person or property of former, a legal duty

rests upon the party creating the impression to prevent prejudice to the party acting in reliance on that impression.[6]

[17] In the particulars of claim and at the risk of repetition, failure of duty of care by the school is pleaded as follows:

"14. This duty encompasses the provisions of a safe educational environment.

15. In the alternative, by accepting the child as a learner in the school, the Department and the Educators, acting within the cause and scope of their employment and for whose actions and omissions the Government is liable, accepted a legal duty to provide a dangerous object free zone to the minor child while adhering to professional standards and that this duty would be administered with the due professional skill and expertise reasonably expected from a public school as regulated by the Department of Education.

16. In breach of the said agreement between the learner and the school contract, the school and/or the Educators did not exercise due proper safety measures and expertise reasonably expected in providing the safe environment that has been promised by the school to the plaintiff.

17.1 The school was negligent and breached the legal duty to exercise due professional skills as was reasonably expected of it.

17.2 This was done with reference to the following:

17.2.1 The Educators failed to properly monitor the learners to ensure that the learners do not sit adjacent to the water tank which was mounted on the dilapidated and old iron struts which needed to be replaced.

17.2.2 The Department was further negligent in that it has failed to provide the safe and harm free environment that was promised to the plaintiff.

[18] These averments were met with a plea drafted as follows:

"AD PARAGRAPHS 12, 13 AND 14; Thereof;

Allegations herein are admitted.

AD PARAGRAPH 15, Thereof

[6] Neethling and Potgieter 1990 TSA R 766

Save to deny that the defendant accepted a legal duty to provide a dangerous object free zone, further allegations contained herein are admitted.

AD PARAGRAPH 16; Thereof

Allegations contained herein are denied and Plaintiff is put to the proof thereof.

AD PARAGRAPH 17 AND 18; Thereof

Allegations contained herein are denied and plaintiff is put to the proof thereof.

[19] A denial of a legal duty to provide a dangerous object free zone to the minor or school children, in my view, displays clear tactical manoeuvre with which the Department sought to litigate in the present case and more in particular to prejudice the plaintiff. In paragraphs [13] to [16] of this judgment, I dealt with the duty of care and legal duty owned to the learners by schools. To deny that the school and its teachers were obliged to ensure the school is "a dangerous object free zone" in my view, is tantamount to say, it does not matter whether or not the school places dangerous objects at the school and does not matter whether or not the learners are harmed by such objects. In fact, such a denial without an alternative pleaded defence, disposes of any defence suggesting un-foreseeability of the accident

[20] The facts are these: There are three water tanks at the school. The accident happened during school break. That is when the learners were out of class to eat, wash dishes and drink water from the water tank in question. At the time of the accident there was no teacher or educator near-by to take care of or supervise the learners, neither was there any evidence to suggest otherwise.

[21] In fact the mother of the learner in question testified that she was called at the school after the accident and was told that the accident happened during break when teachers were in their respective classes apparently eating as well. So, the school allowed primary school learners, for example, under the age of ten like the learner in question to be on their own outside class rooms and during break where it must be reasonably expected that the learners would be engaged in lot of activities, e.g, playing, rushing to the water tank in question to wash their dishes, hands and drink water. I deal later in this judgment with the collapse of the water tank and the stand in

question and alleged un-foreseeability thereof insofar as it might be necessary despite the fact that it has not been pleaded as a defence.

[22] Despite the denial of legal duty or duty of care towards the learners by the school in question, I hereby find that, that duty existed or is inferred by the nature of the relationship between the school, parents and learners. This then brings me to deal with the question whether the school and or teachers were negligent.

Negligence

[23] Negligence in the particulars of claim is pleaded as in paragraph 17 of the quotation in paragraph [17] of this judgment and paragraph 18 of the particulars quoted hereunder:

> *18. In the alternative the Educators and/or the Department were negligent in not providing a safe educational environment where it was reasonably foreseeable that learners attending the school and being under the supervision of the educators may be injured."*

[24] The test for negligence is whether the reasonable person, in the same position as the wrongdoer, would have foreseen and prevented either injury to another in general (abstract approach) or the consequence concerned (concrete approach).[7]

[25] I find it necessary under this heading to deal first with the principle of *res ipso loquitur*. The maxim *res ipso loquitur* is often resorted to by a party seeking to establish negligence on the part of another. It is sometimes referred to as facts speak for themselves. The impact and application of the maxim may dispose of the question of negligence and the related issue of onus. If a defendant seeks to rebut a *prima facie* case, not by contradicting the facts relied upon by the plaintiff to establish that *prima facie* case, but by way of explaining those facts, there is still only one enquiry: Has the plaintiff, having regard to all the evidence in the case, discharged the onus of proving, on the balance of probabilities, the negligence he has averred against the defendant?

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[7] Van der Walt and Midgley Delict 206-207 Bogery Delict 440-442

[26] However, the maxim *res ipso loquitur*, where applicable, gives rise to an inference rather than to a presumption nor is the court necessarily compelled to draw the inference. Once the plaintiff proves the occurance giving rise to the inference of negligence on the part of the defendant, the latter must adduce evidence to the contrary. He or she must tell the reminder of the story, or take the risk of judgment being given against him or her. How far the defendant's evidence need go to displace the inference of negligence arising from point of the occurrence complained of by the plaintiff, depends on the facts of the particular case[8]. (My emphasis).

[27] The use of the expression *res ipsa loquitur*, strictly speaking, is only applied when it is necessary to look solely at the incident concerned without the help of any other explanatory evidence. Only if the incident is viewed by itself and in its own light, ought the expression to be used as otherwise restricted, meaning thereof might become confused.[9] (My emphasis)

[28] Looking solely at the accident in the present case, and without the help of any other explanatory evidence, the facts are this: The water tank at school collapsed from its holding position. It was placed on a steel plate or stand which was supported by four steel pillars mounted on a cement ground. The stand fell onto the three learners, one of them being the victim in the present proceedings. As a result, the learner in question sustained serious bodily injuries. The tank in question was filled with water the previous day.

[29] On these facts, it can reasonably be inferred that the pillars were old, rusted and could no longer sustain the weight of the tank full of water. Again, in the particulars of claim an allegation is made: "Educators failed to properly monitor the learners to ensure that the learners do not sit adjacent to the water tank which was mounted on dilapidated and old iron struts which need to be replaced. So, because the facts speak for themselves, and the plaintiff has proved the occurrence by inference of negligence, that is, the tank will not have collapsed if the pillars upon which the stand was mounted,

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[8] Beek's Theory & Principles of Pleadings in Civil Actions 6th Edition at 380 para 13. 76
[9] Groenewald en Ander v Auto Protection Insurance Co Ltd 1965 (1) SA 184 A

were not old and dilapidated, the defendant was required to allude evidence to the contrary. One way of doing it, was for the defendant to show that the pillars were not old, something which the defendant dismally failed to establish. I deal more in detail with this aspect later in this judgment when dealing with un-foreseeability.

[30] An attempt during oral argument to postulate another inference is in my view, complicated by the manner in which the defendant has elected to plead. I had difficulties in appreciating the postulation. That is, the water tank must have fallen due to the learners playing on the pillars, stand and or the tank aforesaid. Firstly, this is not what the defendant pleaded when it had the opportunity to do including when engaged on the issue during oral argument. That is, counsel for the defendant argued the postulation without reminding himself of the fact that it has to be pleaded first.

[31] In any event, the postulation does not make the defendant's case any better. Instead, it makes it worse because if the children were to be the cause of the collapse of the tank, then, the defendant must be hit by the averment in paragraph 17.2.1 of the particulars of claim. That is, '*the educators failed to properly monitor the learners to ensure that the learners do not sit adjacent to the water tank*' and '*failed to provide the safe and harm free environment and in not providing save educational environment under the supervision of the educators*' as pleaded in paragraphs 17.2.2 and 18 of the particulars of claim quoted in paragraphs [17] and [23] of this judgment. Whichever way one looks at it, the defendant has no defence and or failed to provide evidence sufficient to rebut the inference alluded to earlier and evidence adduced by the learner's parent. I now turn to the other issue.

Un-foreseeability

[32] Reasonable foreseeability has been used in a number of decisions as a creation for legal causation. But in terms of the prevailing flexible approach, it plays a subsidiary role just like all the other traditional test for legal causation. The reasonable foreseeability should not be seen as the simple decision criterion for establishing liability. Reasonable foreseeability is not the sole decisive interim for legal causation[10].

[10] Smit v Abrahams 1994 (4) SA 1 (A) at para 17

Therefore, it would be possible in a given matter, merely on the basis of legal policy, to impute liability in terms of the flexibility approach even where the damages was so exceptional that it could not be described as reasonably foreseeable[11]. Based on this, it is clear that reliance on un-foreseeability if it was pleaded, the defendant would still have walked on thin line. It is a very limited defence and reliance on it alone may not be of great assistance to the pleader. For example, just on legal policy issue, you expect every learner to be safe at school and every teacher to ensure that safety environment is adhered to.

[33] The fact remains that the question whether a wrongdoer should be held liable for a "remote consequence", is completely different from the question whether the wrongdoer's conduct was unreasonable according to the legal convictions of the community (the question of wrongfulness), and from the question whether the wrongdoer should be legally blamed because he foresaw and reconsidered himself with the consequence and possible wrongfulness thereof (the question of intent); and from the question whether injury was foreseeable with such a degree of probability that the reasonable man would have taken steps to avoid injury (the question of negligence).[12]

[34] It is not necessary that all consequences of the defendant's conduct should have foreseen, only the nature or the kind of harm which actually occurred must have been reasonably foreseeable. The exact extent or precise manner of occurrence need not have been reasonably foreseeable. However, the risk of harm must have been a real risk, which a reasonable person would not have brushed aside as being farfetched[13].

[35] The plaintiff, that is parent of the learner so injured in the instant case, was taken to the scene of the accident at the school. The pillars were not only bent, but were also rusted. This appears to support the conclusion that the pillars would not have bent had they have been in good conditions. Of concerning is the evidence by both the principal and her deputy seeking to suggest that they do not know for how

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[11] See Smit *supra* at para 19, also Neethling and Potgieter 1995 THRHR 345
[12] Law of Delicit 5th edition Neethling, Potgieter & ----------
[13] Bogery Delicit 443

long or when were the pillars, stand and water tank so erected. If they do not know even after the incident, then it must have been long time ago to have the pillars rusted. Their evidence in this regard for one reason or the other so tallied that collusion cannot be excluded.

[36] I find it hard to believe that they do not know. Firstly, they were already at the school when the pillars, stand and tank were erected. Secondly, according to the principal everything which is done at the school is recorded. Thirdly, because of the seriousness nature of the accident, the Department investigated or would have investigated the cause of the accident and a report would have been prepared. This would not have been done without trying to establish the cause of the accident and the condition of the pillars in particular, and when they were so erected. Lastly, there is also context: After the accident, the other two tanks had to be redone. The pillars were remounted and modified to ensure that similar accident with regard to the other two water tanks did not happen.

[37] Both the principal and her deputy claimed to have been observing the water tank in question. They were seeing it every school day, so they said. That cannot be equated to observing and inspecting the conditions of the pillars. It is reasonably expected that in the course of time, the pillars would have become rusted and at the same time not suitable to sustain the weight of a tank full of water placed on a stand supported by old pillars. For this, one would have expected serious attention to be paid to, by either replacing or renovating the pillars in one way or the other to ensure that the water tank did not pose danger to the learners including the teachers.

[38] The principal sought to suggest that during every school re-opening, everything is checked and fixed whenever an attention is needed. It did not become clear as to how she was checking and whether it ever crossed her mind to check the conditions of the pillars. She was the only one who suggested that the pillars were not rusted. I say so because her deputy indicated that he could not deny that they were rusted. I therefore come to the conclusion that the pillars were old and not fit to carry the weight of a tank full of water and it was expected of the school to have foreseen that failure to maintain the pillars in proper condition would cause the tank to collapse and thus posing a danger to the learners.

[39] Consequently I hereby make an order as follows:

39.1 The defendant is hereby found liable to compensate the plaintiff's proven damages arising from the injuries sustained by the learner, Sakhi Christian Dhlamini when the stand on which a water tank was placed, fell on him.

39.2 The defendant to pay the costs of the action to date insofar as they relate to merits of the case.

39.3 The issue of quantum is postponed sine die.

M F LEGODI
JUDGE OF THE HIGH COURT

DATE OF HEARING:	27 NOVEMBER 2017
DATE OF JUDGMENT:	20 DECEMBER 2017
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