Reportable:	YES/NO
Circulate to Judges:	YES/NO
Circulate to Magistrates:	YES/NO
Circulate to Regional Magistrates:	YES/NO

IN THE HIGH COURT OF SPOUTH AFRICA

(NORTHERN CAPE DIVISION, KIMBERLEY)

Case Number: 1502/2016

In the matter between:

WINSTON MOKHUANE Plaintiff

and

MEC: DEPARTMENT OF EDUCATION,
NORTHERN CAPE 1st Defendant

EK MOKOPANENG 2nd Defendant

Coram: Lever J

JUDGMENT

Lever J

1. In this matter, the plaintiff sued on behalf of his minor son Winston Jnr Mokhuane, also known as Thabisho (hereinafter Thabisho or the victim). At the material time, being the 12 October 2015, the victim was 11 years old and a learner at a school under the auspices of the first defendant. On the said date the victim suffered certain chemical burns and it is alleged the first defendant is liable to compensate the victim for the harm suffered.

2. By agreement the question of quantum has been separated from the merits. At this point in time only the merits will be considered.

3. On the relevant school premises and on the date in question, the victim went to a toilet. After using the facility, the victim discovered there was no water to flush the toilet. He came upon a container of liquid, interchangeably described as acid or drain cleaner during the trial. The victim who gave evidence at the trial maintains that when he came across the said container, he did not know it was acid or drain cleaner, but assumed it was water. Up to that time he had no experience of handling an acid. He used this liquid in an attempt to flush the toilet.

4. The victim testified that when he poured this liquid into the toilet, it started ‘boiling’, as he described it. Having discovered that this was not water it seems a process of experimentation followed. This ultimately resulted in the victim or another learner pouring this drain cleaner into

the urinal. Ultimately, this experimentation resulted in the drain cleaner splattering and burning the victim. The victim suffered burns to his head, face and body. The victim was taken to hospital by ambulance and received treatment for his burns in hospital.

5. This formed the basis for the plaintiff's claim, initially against both the first and second defendants. At the hearing of this matter the claim against the second defendant was withdrawn and the plaintiff proceeded only against the first defendant.

6. A number of factual disputes became evident during the course of the trial. These disputes included: where the liquid was found; the colour of the liquid; the size of the container; who poured the acid in the urinal; and how the injuries were caused.

7. In order to determine if any of these disputes are relevant, it is necessary to consider what has been admitted and what has been placed in dispute in the pleadings. To the extent necessary, this will be considered in due course. It would be convenient to first consider the issues raised by Mr Lobi who appeared for the first defendant.

8. Mr Lobi referred to his cross examination of the victim where he put the version of Olebogeng Solomon (Olebogeng) to the victim. Mr Lobi also put the version of Mr Mokopaneng, formerly the second defendant, to the victim. Mr Lobi pointed out that when challenged by a version that

contradicted his evidence, the victim would reply with words to the effect ‘let the other witness come.’ Mr Lobi criticised the victim for this and submitted if evidence contrary to the victim’s version was put to him one would expect the victim to object.

9. In observing Thabisho (the victim) giving his evidence, I formed the view that he was saying nothing more than ‘If that is the evidence of Olebogeng or Mr Mokopaneng, let them come and give their evidence. I have given my evidence.’ In other words, the response of Thabisho is really a challenge to let the defendant’s witnesses come and give their evidence. It must be remembered that Mr Lobi was in control of his own cross examination. Mr Lobi never followed up with ‘What do you mean by that response?’ or ‘Are you admitting the facts as alleged by Mr Mokopaneng or Olebogeng?’

10. In each case Mr Lobi simply left the victim’s response hanging and did not seek to clarify such responses. In my view, in these circumstances, there is no room to draw an adverse inference against the victim or his testimony. Mr Lobi had every opportunity to clarify what Thabisho (the victim) meant by his responses to his cross examination. Mr Lobi did not do so.

11. Furthermore, when one considers the admissions made by the first defendant in his amended plea and the issues as disclosed in the

pleadings, the criticisms and discrepancies relied on in the evidence by Mr Lobi are essentially irrelevant.

12. Mr Lobi, on behalf of the first defendant, raised the issue of whether the victim (Thabisho) was *Culpae Capax* or *Culpae Incapax* at the time of the incident. Mr Lobi submitted that the victim was not *Culpae Incapax* at the material time. As I understood Mr Lobi's argument, this was done for two reasons: Firstly, Mr Lobi raised the issue of contributory negligence. In my view, this is a non-starter because, it was not raised in the pleadings and it was also not properly canvassed in the evidence; Secondly, Mr Lobi submitted that the victim was injured at his own hand. That the victim was the author of his own misfortune, and the first defendant was not responsible for such harm. This second issue requires some consideration.

13. In making this submission, Mr Lobi relies upon the judgment of Weiner J in the Gauteng South Provincial Division, in the matter of [N…] [J…][T…] obo [N…][S…] v ROAD ACCIDENT FUND[1]. Weiner J relied upon the judgment of Williamson JA in the matter of Jones NO v SANTAM BEPERK[2], where Williamson JA held:

> "If it be decided in any particular case that a child under puberty is old enough to have and does have the intelligence to appreciate a particular danger to be avoided, that he has knowledge of how to avoid it or of the precautions to be taken against it, and further that he is sufficiently matured or developed so as to be able to control

[1] An unreported judgment with case number 17439/2013. Mr Lobi provided a copy of the said judgment. There is no SAFLII reference number nor is there a date of judgment.
[2] 1965 (2) SA 542 (AD) at 554A-C.

irrational or impulsive acts, then it would be proper to hold that a failure to control himself or to take the ordinary precautions against the danger in question is negligent conduct on his part; in other words that the child, in relation to the particular acts or omissions complained of in the particular circumstances, was *culpae capax*."

14. The Considerations raised by Williamson JA in the Jones matter[3] are all factual enquiries that need to be supported by evidence. The first defendant has not adduced the required evidence. The victim has not given such evidence. The only evidence adduced on behalf of the first defendant is that of Olebogeng, who after seeing the bubbling in the toilet bowl told the victim that the substance was acid. The evidence of the victim was that he had prior to the incident not come across acid before. In cross examination of the victim, this was never probed. The victim was never asked whether he understood the significance of being told by Olebogeng that the substance was acid.

15. There was no probing in cross examination as to whether the victim understood the dangers of handling acid; the precautions to be observed when dealing with acid; or had the maturity and ability to avoid irrational or impulsive acts in handling the said acid.

16. As the age of the victim at the material time means that the rebuttable presumption that he was *Culpae incapax* at such time, works in favour of the victim, the onus of establishing the abovementioned facts to rebut the presumption would fall on the first

[3] Above.

defendant. The first defendant has failed to rebut such presumption. Therefore, the defence raised by the first defendant that the victim was the author of his own misfortune for which first defendant is not responsible, must fail.

17. The last defence raised by the first defendant, being that the case first defendant was called upon to answer was that another learner had handled the acid in a manner that led to the harm the victim suffered. Mr Lobi submitted on behalf of the first defendant that this was not the case that the plaintiff had established at the trial. On this issue there are two conflicting versions, that of the victim and that of Olebogeng.

18. Mr Botha, on behalf of the plaintiff, submitted that the school had effectively conceded that it was responsible for creating the circumstances where one of its employees acting within the course and scope of his normal duties had allowed the victim to gain possession of the acid. This was the substance of the plaintiff's claim. Mr Botha submitted that it made no difference if the victim poured the acid that caused him harm or that another learner might have done so.

19. Taking all the facts and circumstances into account, I believe Mr Botha is correct on the facts of the present case. In the circumstances of this case the negligent and wrongful omission or act was allowing the relevant children, all approximately eleven years old at the material

time to come into possession of the acid. This aspect will be dealt with in greater detail below.

20. The plaintiff's case is a delictual claim. Accordingly, he must establish: an act or omission by the first defendant or a person for whom the first defendant is vicariously responsible, in circumstances where such vicarious responsibility applies; that arising from such act or omission damages resulted to the plaintiff, in the present case to his minor son; that the act or omission was negligent and wrongful; and that the harm suffered is causally connected to the act or omission.

21. The first defendant is the political head of the department of education in this province. As such is responsible for the wrongful, negligent and/or delictual conduct of the employees of the said department carried out within the course and scope of their employment.

22. It was admitted that the erstwhile second defendant, Mr Mokopaneng, was an employee of the school at the relevant time and that he acted within the course and scope of his employment and that the first respondent was vicariously responsible for his acts and/or omissions carried out within the course and scope of his duties.

23. In any event, the evidence clearly established that Mr Mokopaneng was an employee of the school. It was also never disputed that the first

defendant was responsible for the relevant school. The evidence clearly established that Mr Mokopaneng normally used drain clear at the relevant time to unblock the drains. The evidence clearly establishes that this was the practice at the relevant time. There was a standing instruction to lock the drain cleaner in an office in the administrative section of the school when the drain cleaner was not in use. This establishes that Mr Mokopaneng was acting within the normal scope of his duties when using the said drain cleaner at the time in question.

24. The act or omission that the first defendant is responsible for in this case is the failure of Mr Mokopaneng to secure the drain cleaner as per the ordinary standing instruction to lock it in an office in the administrative section of the school concerned and creating the circumstances where minor children, including the victim (Thabisho), could gain access to such drain cleaner. Whether one accepts the version of Mr Mokopaneng or that of the victim (Thabisho) the act or omission of creating the circumstances where a minor learner could gain access to the drain cleaner has clearly been established on such evidence.

25. The damages suffered by the victim were never seriously disputed. Photographs of the injuries to the minor victim (Thabisho) were discovered and their authenticity and veracity were not disputed by the first defendant. The first defendant cannot, in these circumstances

deny that the minor victim suffered the damages as alleged. This clearly establishes the damages aspect of the plaintiff's claim.

26. The evidence of the minor victim that his injuries in the form of the chemical burns he suffered were caused when the drain cleaner splattered onto the various parts of his body establishes causation. The first defendant never challenged this evidence during the trial.

27. From the admitted facts, it is clear that the first defendant had a legal duty to ensure that the minor learners in the relevant school did not suffer harm by coming into contact with drain cleaner. The standing rule that the drain cleaner was to be locked in an office in the administration block of the school underlines and confirms this aspect. The evidence of Mr Mokopaneng himself establishes the standing rule referred to herein.

28. Clearly, the legal convictions of the community would require that the drain cleaner be locked away out of the reach of the minor learners at the relevant, or any, school to prevent them from inflicting harm on themselves.

29. On the facts of this case Mr Mokopaneng did not live up to this standard. As already established the first defendant is vicariously responsible for the acts and/or omissions of Mr Mokopaneg when he acts within the course and scope of his employment with the relevant

school. Mr Mokopaneng was clearly acting within the course and scope of his employment when he attempted to unblock the drain concerned with drain cleaner. It emerges from the pleadings filed in the matter that at the material time use of drain cleaner was the usual way in which drains were unblocked.

30. In these circumstances the 'wrongfulness' of the conduct complained of is established as it runs counter to the legal convictions of the community to, by act or omission, create circumstances where minor primary school children could and did gain access to drain cleaner.

31. In considering the question of negligence, the following three questions need to be considered: Firstly, would the reasonable person foresee that damage or harm could result in the relevant circumstances?; Secondly, would the reasonable person take steps to prevent such harm?; and Thirdly, did the first defendant on the facts of this case take reasonable steps to prevent the harm from befalling the victim in this case (Thabisho)?[4]

32. In dealing with the first question, clearly the authorities at the said school in fact foresaw that the drain cleaner could cause harm to the learners at their school, because on the evidence of Mr Mokopaneng, the standing instruction was to lock the drain cleaner out of the way of

[4] See: Kruger v Coetzee 1966 (2) SA 428 (A) at 430D-F; and Ngubane v S.A. Transport Services 1991 (1) SA 756 (A) at 776D-F.

learners in an office in the administration block when it was not in use. Clearly, on the basis of this fact and given the nature of drain cleaner, a reasonable person would foresee the danger and harm of allowing minor learners access to drain cleaner.

33. Turning now to the second question, having regard to the nature of drain cleaner and the damage it can cause, as evidenced by the chemical burns the victim (Thabisho) suffered in this case, clearly, a reasonable person would take steps to prevent such harm. At this juncture it is necessary to repeat that the first defendant never disputed that the chemical burns suffered by the victim were caused by the drain cleaner used by Mr Mokopaneng at the school in question.

34. Dealing with the third question set out above, Mr Mokopaneng, on his own evidence, knew that the standing instruction regarding the drain cleaner was that it be locked in an office in the administration block when it was not in use. Mr Mokopaneng, on his own evidence, knew of the risks and harmful properties in handling the drain cleaner. He gave evidence that when he used the drain cleaner, he himself wore a mask and gloves. When asked in cross examination why he did not take the drain cleaner back with him to the administrative block where he ate his lunch, the only answer he could provide was that he had not yet succeeded in unblocking the relevant drain.

35. Clearly, Mr Mokopaneng gave inadequate consideration to the risk he created for the relevant learners. His version of placing the drain cleaner behind an iron gate made up of bars which he barricaded with three wheelbarrows is inherently improbable. It would have been less trouble to simply carry, what on his evidence was a one litre container back to where he was having lunch in any event, than to create the elaborate barricade, he gave evidence of.

36. Furthermore, the first defendant's other witness, Olebogeng, directly contradicted Mr Mokopaneng's evidence in this regard. Olebogeng denied the contention that there were three or any wheelbarrows stacked against the gate inside the relevant toilet. Olebogeng's evidence was that at the time in question the relevant gate was in any event locked making Mr Mokopaneng's version extremely unlikely, if not impossible, if Olebogeng's evidence was correct and having regard to the fact that the victim and other children indeed came to be in possession of the drain cleaner.

37. The evidence of the victim (Thabisho) confirms the evidence of the first defendant's witness Olebogeng insofar as the absence of wheelbarrows in the relevant toilet is concerned.

38. In these circumstances the evidence of Mr Mokopaneng in regard to how he stored the drain cleaner when he went to lunch is so improbable that it stands to be rejected. Even if I am wrong in reaching

this conclusion and Mr Mokopaneng's version on this aspect is accepted, it is still negligent. For the simple reason that the learners concerned still got hold of the drain cleaner. The nature of the drain cleaner itself and its properties require it to be kept out of the reach of learners in a primary school environment. On the evidence, the authorities at the school and Mr Mokopaneng knew this. Yet, Mr Mokopaneng failed to take appropriate steps to place the drain cleaner out of reach of the learners at the said school.

39. The first defendant has admitted that in the school in question the learners were aged between 7 and 14 years old.

40. These factors, in my view, establish the negligence for which the first defendant is vicariously responsible.

41. It is also important to point out that in an alternative basis for the plaintiff's claim the plaintiff pleaded that Mr Mokopaneng was negligent and listed five grounds upon which Mr Mokopaneng was negligent, being: Firstly, in storing the drain cleaner in a place where learners at the school could gain access to the drain cleaner; Secondly, in not locking the said drain cleaner away; Thirdly, by not storing the drain cleaner in an appropriate place where the learners would not have access to it; Fourthly, by not exercising control over the drain cleaner

at all material times and Fifthly, by not making it impossible for children to gain access to the drain cleaner.

42. In response to paragraph twelve of the amended Particulars of Claim and in the first defendant's amended Plea the first defendant merely notes the allegations under reply. He does not admit or deny them. Under the provisions of Rule 22(3) of the Uniform Rules of Court, the first defendant is taken to have admitted the grounds of negligence set out in paragraph 12 of the amended Particulars of Claim.

43. Clearly, the requirement of negligence which the first defendant is vicariously responsible for, have been established.

44. Accordingly, the plaintiff has established all the requirements for his delictual claim against the first defendant and he is entitled to judgment in his favour on the merits of the claim.

In these circumstances, the following Order is made:

1) Judgment is granted in favour of the plaintiff on the merits.

2) The first defendant is ordered to pay all such damages that the plaintiff can prove was suffered by his minor son WINSTON JUNIOR MOKHUANE with identity number 0405065819089 as a result of the incident that occurred at the TSWARELELA PRIMARY SCHOOL in Kimberley on the 12 October 2015.

3) The first defendant is to pay the plaintiff's costs of establishing its claim on the merits on the High Court party and party scale.

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Lawrence Lever
Judge
Northern Cape Division, Kimberley

REPRESENTATION:

Plaintiff: Adv C Botha oio ELLIOTT, MARIS, WILMANS & HAY

Defendant 1st: Mr LL Lobi oio LULAMA LOBI INC.

Date of Hearing: 18 June 2021

Date of Judgment: 07 October 2022