

Reportable:	YES <u>NO</u>
Circulate to Judges:	YES <u>NO</u>
Circulate to Magistrates:	<u>YES/NO</u>
Circulate to Regional Magistrates:	<u>YES/NO</u>



**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG**

CASE NO: 1791/2018

In the matter between:

QMR

First Plaintiff

SMN

Second Plaintiff

FMN

Third Plaintiff

and

MEMBER OF THE EXECUTIVE COUNCIL

FOR EDUCATION: NORTH WEST PROVINCE

Defendant

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via e-mail. A hard copy has been placed in the pigeonholes of the instructing attorneys at the Office of the Registrar. The date and time of the handing down of judgment is deemed to be 14h00pm. on 27 September 2022.

ORDER

- (1) The claims of the first, second and third plaintiffs' succeeds.
- (2) The defendant is ordered to pay each of the first, second and third plaintiffs' an amount of R375 000.00 (three hundred and seventy-five hundred thousand rand).
- (3) The defendant is ordered to pay the costs of action.

JUDGMENT

PETERSEN J:

Introduction

- [1] The plaintiffs' initially instituted separate actions for general damages, which were later consolidated, against the defendant. The claims arise from the death of their wards identified as L..... R....., R..... R..... N..... and N...-N..... N..... ("the learners") due to drowning on 19 March 2016, whilst on an official school excursion organised by the Rustenburg Technical High School. The claim is defended by the defendant.
- [2] The trial commenced on merits and quantum.

Issues of common cause

- [3] It is common cause from the pleadings that the learners drowned on 19 March 2016 during an official school excursion on a visit to a farm known as Farm Modderfontein ("the farm") whilst under the supervision of Mrs [REDACTED] [REDACTED] [REDACTED] [REDACTED], an educator employed by the Department of Education, North West Province during the course and scope of her employment.
- [4] Two of the learners (N.... and R.....) drowned when Mrs C [REDACTED] allowed them to use a canoe on a dam on the farm, which capsized, leaving them in the water unable to swim to safety and ultimately resulting in their drowning and death. The circumstances surrounding the death of the third learner (L.....) remains shrouded in uncertainty.
- [5] The defendant admits responsibility towards the learners in accordance with the applicable law in terms of the South African Schools Act, 84 of 1996 and in particular section 60(1) and Regulation 8(2) promulgated in terms of the South African Schools Act.

Issues in dispute

- [6] The defendant specifically disputes any negligence on the part of Mrs C [REDACTED] or any causal connection between the death of the learners and the steps taken by Mrs C [REDACTED] to ensure the safety of the learners.

The evidence for the plaintiffs'

- [7] The only witness called on liability/merits, Mrs C [REDACTED], is a mutual witness relevant to the case for the plaintiff and the defendant. Ms F [REDACTED], the

granddaughter of the first plaintiff, Mrs R [REDACTED] and Ms F N [REDACTED], the third plaintiff, testified in the main on issues relevant to liability, whilst touching briefly on the issue of quantum. Dr Dlukulu, a Clinical Psychologist was called by the plaintiffs' on the issue of quantum.

- [8] On 23 August 2022 upon completion of the evidence of Ms P [REDACTED] an agreement was reached by the parties that subject to the determination of liability (negligence), the plaintiffs are entitled to claim the type of damages pleaded in the particulars of claim, which damages should be quantified through the evidence of the plaintiffs expert witness, Dr Dlukulu.

- [9] On 19 March 2016, Mrs Conradie who had accompanied the learners on the official school trip took the learners on a walkabout on the farm owned by her husband. As they passed a dam on the farm estimated to be around 100 square metres, which had filled around 50% as a result of rain the previous evening, the learners unrelentingly begged Mrs C [REDACTED] to allow them to swim in and use canoes on the dam. No water activities were anticipated as part of the official trip. Mrs C [REDACTED], who did not know many of the learners, enquired from them about their ability to swim, with only 5 or 6 of the learners confirming that they could swim. The learners who could not swim were instructed to remain close to her. Mrs C [REDACTED], who believed herself to be a good swimmer and life guard and being familiar with the dam on the farm, having allowed her own children to swim in the dam, acceded to the learners' request. She further testified to tubes next to the dam which could be used as safety devices and as a precautionary measure. However, the tubes had already been removed from the water at the time of the incident.

[10] Mrs C [REDACTED] maintained that she monitored the learners who were within her sight during the water activities. The water activities proceeded uneventful until Mrs C [REDACTED] called it a day and three of the learners, N...., R..... and Michael requested to proceed with one last round in a canoe. During this last round, the canoe capsized. When the three learners surfaced, Mrs C [REDACTED] immediately observed that R..... appeared anxious and scared; N.... was clutching onto the canoe and M [REDACTED] was swimming out of the dam. Realising that R..... and N.... needed assistance, Mrs C [REDACTED] swam to the two boys. Whilst Mrs Conradie's evidence about doing so within a two-minute period or immediately is debatable, it is accepted that she swam to the assistance of the two distressed learners. As Mrs C [REDACTED] stood next to the capsized canoe, the water level was such that she was immersed right up to her nose.

[11] With R..... and N.... now in a distressed state, she took hold of N....'s hand whilst R..... embraced her around her neck and shoulders with his arms. R.....'s actions caused Mrs Conradie to sink with her head going below the water surface. As Mrs C [REDACTED] swam out of the water she intermittently sank below water, whilst at times feeling her feet touching the floor of the dam. When it dawned upon Mrs C [REDACTED] that she was at risk of drowning with R..... and N...., she called out to the learners who were standing on the dam wall, to find a stick and form a human chain to assist her in getting out of the dam with the two boys. By then some of the learners had run off to call for assistance from Mrs C [REDACTED]'s husband and son who were working in the vicinity of the dam wall.

[12] When Mrs C [REDACTED] and the boys were eventually extracted from the dam, N.... was unconscious. R..... and N.... succumbed to drowning. Mrs Conradie could not explain how L..... drowned, save for flashbacks

where she appears to see him at the front of the human chain she had called for. L.....'s body was only retrieved from the dam some time following the incident.

Ms Plaatjie

[13] Ms P [REDACTED] is the granddaughter of the first plaintiff and cousin of the deceased L..... Save for the evidence of Ms P [REDACTED] regarding her attendance at her grandmother's home after receiving a phone call about L..... being missing and later being visited on the day of the incident by the police and a teacher, who informed then that he had drowned and been found by police dogs, she testified about a visit arranged by the school to the scene of the incident.

[14] Ms P [REDACTED] described the mass of water they encountered on the farm as being a dam with black coloured water surrounded by grass and reeds which appeared not to be fit for swimming. The dam was estimated to be one and a half lengths of the size of the court room. The family members who attended the scene were shown a point towards the centre of the dam where two of the learners drowned and a rocky shore where L..... was eventually found. According to Ms Plaatjie a contribution of R50 000,00 came from either the school or Department of Education towards assisting with funeral costs.

Mrs [REDACTED]

[15] Mrs N [REDACTED] evidence in the main confirmed having been informed of the drowning of her grandson N... and the trauma brought about in the initial attempts at seeing the body of N... and identifying same. Mrs N [REDACTED] likewise confirmed a contribution of R50 000,00 towards funeral costs.

Dr Dlukulu

[16] *Adv Uys* for the plaintiffs' in addressing the Court on the question of quantum did not seek to have this Court place any reliance on the evidence of Dr Dlukulu. The submission in my view was correctly made as Dr Dlukulu's evidence sadly was of no assistance to the Court on the question of quantum. I accordingly do not propose to traverse any of the evidence of Dr Dlukulu in this judgment.

The evidence for the defendant

[17] The defendant closed its case, without leading any evidence, predicated on the fact that Mrs O [REDACTED] who testified in the case for the plaintiff was a mutual witness.

Negligence/Reasonable foreseeability

[18] The principles enunciated in *Kruger v Coetzee*¹ is the trite position in considering the question whether the plaintiffs' have discharged the onus of proving negligence predicated on the defendant's breach of its legal duty of supervision through Mrs Conradie:

"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.'

¹ 1966 (2) SA 428 (A) at 430E.

[19] The defendant had a general duty to the learners to create a safe, healthy and secure environment for education and related activities, which included reasonable adult supervision over any related activities. In *Rusere v The Jesuit Fathers*² Beck J made the point that:

"The duty of care owed to children by school authorities has been said to take such care of them as a careful father would take of his children."

[20] In *Herschel v Mrupe*³, Schreiner JA stated as follows in respect of foreseeability:

"But the circumstances may be such that a reasonable man would foresee the possibility of harm but would nevertheless consider that the slightness of the chance that the risk would turn into actual harm correlated with the probable lack of seriousness if it did, would require no precautionary action on his part. Apart from the cost or difficulty of taking precautions, which may be a factor to be considered by the reasonable man, there are two variables. the seriousness of the harm and the chances of its happening. If the harm would probably be serious if it happened the reasonable man would guard against it unless the chances of its happening were very slight. If, on the other hand, the harm, if it happened, would probably be trivial the reasonable man might not guard against it even if the chances of its happening were fair or substantial.

(my emphasis)

[21] It is clear from the aforesaid that the duty of care is linked to reasonable foreseeability of harm to another. In *Peri Urban Areas Health Board v Munarin*⁴, the Appellate Division stated as follows in this regard:

"Foreseeability of harm to a person, whether he be a specific individual or one of a category, is usually not a difficult question, but when ought I to guard against it? It depends upon the circumstances in each particular case, and it is neither necessary

² 1970 (4) SA 537 (R) at 539 C-E.

³ 1954 (3) SA 464 (A) at 477A-C.

⁴ 1965 (3) SA 367 (A) at 373E-H.

nor desirable to attempt a formulation which would cover all cases. For purposes of the present case it is sufficient to say, by way of general approach, that if I launch a potentially dangerous undertaking involving the foreseeable possibility of harm to another, the circumstances may be such that I cannot shrug my shoulders in unconcern but have certain responsibilities in the matter - the duty of care."

Discussion

[22] The peculiar or unique facts of this matter must be considered against the authorities cited above. A fact which stands out at the outset is that the school trip had not envisaged any water related activities and neither was parental consent given for any such activities. Mrs O [REDACTED] should have been acutely aware of the absence of parental consent and this is a fact which she could not shy away from, despite the unrelenting begging by the learners to engage in such activities. The fact that Mrs O [REDACTED] allowed her own children to swim in the mass of water (dam) does not avail the defendant's case. Mrs O [REDACTED] in the position of a careful mother (*diligens paterfamilias*) should have refused any engagement in such activities.

[23] On the evidence of Mrs O [REDACTED], the steps taken herself to establish which of the learners could swim, did not suffice in the circumstances which prevailed at the spur of the moment, at the dam. On Mrs O [REDACTED]'s own version the dam had filled with rain water, with the last rain showers being the previous evening. The depth of the dam was unknown, flotation devices in the form of tubes were kept on the dam wall and no life jackets were available for use by the learners. With the number of learners in the dam and around the dam who could not swim, Mrs O [REDACTED] as the only teacher or adult providing supervision undoubtedly fell shy of ensuring reasonable supervision to prevent any harm, which should have been foreseen or anticipated.

[24] Mrs C [REDACTED] is unable to say what happened to L..... who was not in the canoe at the time of the incident. This on its own is a glaring indication that insufficient steps were taken to safeguard the learners, whether in or around the dam. An inescapable fact is that L..... drowned in inexplicable circumstances, in circumstances where the drowning could have been prevented.

[25] Ms Plaatjie's evidence does not advance the case for the plaintiffs' on the issue of liability particularly in as far as her evidence suggests that Mrs C [REDACTED] was not present at the time of the drowning. Ms Plaatjie was not present at the time of the incident and any evidence in that regard constitutes inadmissible hearsay.

[26] The evidence on Mrs C [REDACTED] own version, overwhelmingly proves negligence on her part, which negligence is causally linked to the drowning of the three learners. If it were not for Mrs C [REDACTED] allowing the water related activities in the absence of parental consent in the first place and without proper adult supervision, in the second place, the harm which resulted in the death of the learners could have been averted.

[27] The claim of the plaintiffs' on the evidence of Mrs C [REDACTED] should accordingly succeed.

Quantum

[28] As indicated *supra* the parties agreed on 23 August 2022, subject to the issue of liability, that the plaintiffs' are entitled to claim the type of damages pleaded in the particulars of claim (emotional shock). As further stated *supra* the evidence of the plaintiffs expert witness, Dr Dlukulu did not assist the

Court in this regard. That the plaintiffs' are entitled to general damages for emotional shock was recognised by the Appellate Division in *Bester v Commercial Union*⁵ where the following was said:

"Appellant se aksie is 'n aksie ex delicto om genoegdoening en skadevergoeding weens skok, pyn, teed en ongeskiktheid. Genoegdoening weens aantasting van liggaamlike integriteit word gevorder met die besondere aksie wat in die Romeins-Hol/andse reg, onder invloed van die Germaanse gebruiksreg, ontwikkel het. (Voet, 9.2.11; Grotius, 3.34.2; Union Government v Warneke, 1911 AD 657 op bl. 665 - 6; Hoffa, N.O. v. S.A. Mutual Fire and General Insurance Co. Ltd., 1965 (2) SA 944 (K) op bl. 950 e.v., en Government of the R.S.A. v Ngubane, 1972 (2) SA 601 (AA) op bl. 606).

(Loosely translated: Appellant's action is an action ex delicto for compensation and damages for shock, pain, harm and disability. Compensation due to impairment of bodily integrity is advanced with the particular action developed in Roman-Dutch law, under the influence of Germanic customary law.)

[29] The emotional and psychological impact on the plaintiffst brought about by the untimely death of the learners is not in dispute. What remains for this Court is to determine the quantum to be awarded to the plaintiffs'. The overwhelming approach adopted by our Courts in determining the award of general damages follows the ratio in the leading case of *Sandler v Wholesale Coal Suppliers Ltd*⁶, which was re-affirmed in the oft-quoted case of *Southern Insurance Association v Bai/ey*⁷. A flexible approach is called for in terms of which *"The amount to be awarded as compensation can only be determined by the broadest general considerations and the figure arrived at must necessarily be uncertain, depending on the Judge's view of what is fair in all the circumstances of the case."*

⁵ 1973 (1) SA 769 (A) at 7760.

⁶ 1941 AD 194 at 199;

⁷ 1984 (1) SA 98 AD.

- [30] The plaintiffs' have by way of comparison referred this Court to three cases, of which the most relevant is probably the well-known case of *Komape and others v Minister of Basic Education and others*⁸, where the SCA awarded Mr and Mrs Komape, the parents of the deceased learner an amount of R350 000,00 (current value R374 000,00) each.
- [31] The plaintiff's in the present matter as either guardians of two of the deceased learners, whose parents had passed on previously and parents of the third learner, are in a position akin to that of the *Komape* parents. The death of the three learners and in particular L..... undoubtedly still begs more questions than answers, even following the evidence of Mrs O [REDACTED]. The incident transpired on 19 March 2016, more than 6 and a half years, with no closure for the plaintiffs'. Regrettably, indications are that an Informal Inquest was held without informing the plaintiffs' and the Magistrate finding no liability for the death of the learners. A formal inquest would in the circumstances of this matter in all probability have been the most appropriate manner to determine the circumstances surrounding the death of the learners. The failure to hold a formal inquest and to inform the plaintiffs' of the informal inquest has clearly done nothing to allow closure for those affected. The Department of Education contributed an amount of RS0 000.00 to each of the families towards funeral costs.
- [32] Having regard to the peculiar circumstances of the matter, I am satisfied that an amount of R375 000,00 in general damages for each of the three plaintiffs' would be both fair and appropriate.

⁸ 2020 (20 SA 347 (SCA)).

Costs

(33) Costs ordinarily follow ruit. I can find no basis on which costs should not follow suit. Costs of suit are accordingly awarded to the plaintiffs'.

Order

[34] Consequently, the following order is made:

- (1) The claims of the first, second and third plaintiffs' succeeds.
- (2) The defendant is ordered to pay each of the first, second and third plaintiffs' an amount of R375 000.00 (three hundred and seventy-five hundred thousand rand).
- (3) The defendant is ordered to pay the costs of action.

AH PETERSEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG

APPEARANCES

For the Plaintiffs'

Instructed by

ADV. P UYS

Nyakale Attorneys

c/o Molefakgotla Attorneys

17 Minerva Drive

Riviera Park,

MAHIKENG

For the Defendant

Instructed by

ADV. X NYOKA

LEEPILE ATTORNEYS

c/o Motshabi and Associates Inc.

12 Havenga Street

Golfview,

MAHIKENG

Dates of Hearing

: 22 February 2022; 23 and 24 August 2022

Date of Judgment

: 27 September 2022