THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

CASE NO: 20853/2014

In the matter between:

PRO TEMPO AKADEMIE CC **APPELLANT**

and

C S VAN DER MERWE obo H VAN DER MERWE **RESPONDENT**

Neutral Citation: *Pro Tempo v Van der Merwe* (20853/2014) [2016] ZASCA 39 (24 March 2016).

Coram: Navsa ADP, Wallis, Saldulker, Zondi JJA and Kathree-Setiloane AJA

Heard: 10 March 2016

Delivered: 24 March 2016

Summary: Delict – erection by school of steel rods on playground to support recently planted saplings – school catering for learners who struggle with learning disabilities – child impaled on steel rod after leaning or sitting on it – appellant negligent – considerations of public and legal policy do not dictate exclusion of liability.

ORDER

On appeal from: The Gauteng Division of the High Court, Pretoria (Strauss AJ sitting as court of first instance).

The appeal is dismissed with costs including the costs of two counsel.

JUDGMENT

Navsa ADP (Wallis, Saldulker, Zondi JJA and Kathree-Setiloane AJA concurring):

[1] On 2 September 2009, Jacobus Hercules Van der Merwe (Jaco) was 13 years old and in attendance at a school that caters for children with learning disabilities when he became impaled on one of five steel droppers, each of which was placed alongside one of five saplings planted within the playground. The steel dropper tore through Jaco's rectum and bladder with obvious resultant pain and discomfort and consequently Jaco required medical attention and surgery. The question in this appeal is whether the court below, the Gauteng Division of the High Court, Pretoria, correctly held Pro Tempo Akademie CC (Pro Tempo), the close corporation that owns and conducts the school at which the incident occurred, liable for the damages sustained by Jaco on the basis of negligence. The respondent, Ms Cornelia Van der Merwe is Jaco's mother. In her capacity as his guardian, she instituted action against Pro Tempo in the court below for recovery of damages sustained by Jaco. At the commencement of the trial, it was agreed that the court would decide only the merits of the claim and that the question of quantum would be held over.

[2] It is undisputed that the tree and dropper in question were situated in a separate part of the playground, where the senior learners at the school, including Jaco, played

games such as rugby and cricket. Shortly before the incident referred to above Jaco and other senior learners were playing cricket on that field. The uncontested evidence was that senior learners at the school would, in the normal course of play, run around the tree and dropper on which Jaco had become impaled. The tree was approximately 30 centimetres high and the dropper extended 60 centimetres from the ground and thus protruded 30 centimetres above the tree.

[3] From the evidence adduced in the court below, it is not entirely clear how Jaco came to be impaled on the dropper. There was the evidence on behalf of Pro Tempo by Mr Johan Hartman Cilliers, who was the headmistress' brother and who performed certain limited tasks at the school. According to Mr Cilliers, after being informed by Jaco's fellow students about the mishap, he found the latter seated in one of the toilets, with a pool of blood and urine visible on the bathroom floor near the toilet. Mr Cilliers testified that Jaco had told him that he had sat on the dropper. However, Jaco himself was uncertain about how he had come to be impaled. Jaco testified that he had not been feeling well on the day in question and said the following:

'[E]k, daar, ek was gedisoriënteerd. So, ek was moeg. Ek het 'n hoofpyn gehad.

. . .

Ek weet ek het op 'n *dropper* gesit. Maar ek kan nie heeltemal onthou wat, hoe ek dit gedoen het, of wat my gemaak het dat ek op dit, dit doen nie.'

[4] Mr Cilliers testified further:

'So, was daar enige verdere bloed op sy boude, by sy anus, wat u gesien het? --- Nee. Ek dink, toe ek daar kom, het hy al afgevee, . . . want hy het, *hy het seker self nie regtig besef wat aangaan nie.* En . . . [tussenbei] . . .So, dit was, dit sou, sy anus was skoon.' (My emphasis.)

This indicated that Jaco was traumatised and uncertain about how events had unfolded, as testified to by him.

[5] The headmistress at the relevant time, Ms Anneli Cilliers confirmed, during her testimony, that she had completed an insurance claim form in which she had stated that Jaco had become impaled on the dropper after he had leant against it. The following appears in the statement:

‘Jaco . . . het saam met sy maats krieket gespeel op die speelgrond. Hy was besig met veldwerk en het moeg geword. Omdat dit ‘n nuwe terrein is, is daar klein boompies aangeplant vir latere skaduwee. Om die boompie te ondersteun, is daar ‘n yster “dropper” aan hom vasgemaak. Die boompie het egter ook ‘n lae ogiesdraad omgehad (om hoenders uit die bedding rondom die boompie the hou.) Jaco het op die dropper geleun . . . Alhoewel daar ‘n damespersonneellid op diens was, wou hy nie hê sy moes hom help nie. . . .’

When asked whether the statement reflected what had in fact occurred, Ms Cilliers answered in the affirmative. Although the respondent and Jaco disputed the presence of the chicken mesh, it was never suggested that the chicken mesh would have impeded access to the dropper. As recorded by the court below, it is disconcerting that when Ms Cilliers was informed about the incident she did not immediately go to the scene to see to Jaco.

[6] Ms Mariaan van Rooyen, the first teacher on the scene who was supervising younger children in a different part of the playground when the incident occurred, testified as follows:

‘Hulle sê vir my, juffrou, kom help. Jaco het met sy boude in ‘n paal gaan sit.’

Jaco landed up in the bathroom, as aforesaid, because he did not want to be tended by a female teacher. Mr Cilliers who was the first to examine Jaco, summoned Jaco’s mother, who took him to hospital.

[7] At para 42 of the judgment of the court below the following appears:

‘The only evidence thus before this court of how the incident happened was most probably that the minor child either sat on the dropper or leaned against the dropper and the dropper thereafter penetrated his rectum and caused the injuries he sustained afterwards. . . .’

[8] The court below (Strauss AJ), also had regard to the further evidence of the teacher, Ms van Rooyen and that of Mr Cilliers, both of whom considered the dropper protruding above a tree in a playground to be dangerous. More particularly, they envisaged that a child might fall on a dropper and be injured. Other evidential detail is set out in the judgment of the court below which it is not necessary to repeat.

[9] The court below considered the facts and reasoning in *Transvaal Provincial Administrator v Coley* 1925 AD 24 to be instructive. The following appears in the headnote:

'Appellant administration through its servants planted a number of young trees upon a portion of the playground of a school under its control, and in order to protect the trees erected wooden stakes with sharp and jagged points round each tree. These stakes were pressed into the ground and brought together at the top in the form of a pyramid. The area covered by the trees had become overgrown with grass, and in that area a hole had been dug, and the earth heaped up at the side of it, forming a mound two or three feet in height. Respondent's daughter, a child of six years, when playing on the mound ran down it and fell on one of the stakes, which pierced her eye in such a way that it had to be removed.'

[10] In *Coley*, at page 28, the following is stated:

'. . . .[I] have come to the conclusion that a prudent and careful man, who gave his mind to the matter as such a person would naturally do, should have foreseen that the sticks with such sharp projections in the neighbourhood of the mound where children would naturally play, were a source of danger to very young children and sooner or later might result in injury. If the sticks had been placed in the middle of the playground where children are wont to play hockey, for instance, it can hardly be doubted that that would constitute negligence. And, apart from the presence of the mound in the immediate vicinity, there is also much to be said for the view that a prudent man should not have placed sticks where the accident occurred, for although they were not on the cleared space it was admitted that they were on ground which formed part of the playground.'

Innes CJ had regard to the notorious fact, accepted by the appellant's witnesses, that children are impulsive[1] (at 25-26):

'She was told by her teacher to play under a certain tree, but child-like she wandered a little further into the playground and accompanied by a companion, began to run up and down the mound which has been described in the evidence. She fell while running down and one of the stakes near the foot of the mound penetrated her eye. . . From these facts a duty arose to prevent those stakes being a danger to children playing in the vicinity, if such danger ought to have been apprehended. And the question whether danger ought to have been apprehended resolves itself into an enquiry whether a *diligens paterfamilias*, a reasonably prudent person,

[1] See *Knouwds v Administrateur Kaap* 1981 (1) SA 544 (C) at 553D-554D and the authorities there cited.

would have foreseen that they would be likely to cause harm – in which case he would have been bound either to remove them or to take other steps to obviate the danger.'

[11] The court below also had regard to the oft cited dictum in *Kruger v Coetzee* 1966 (2) SA 428 (AD) at 430E-G and sought to apply it:

'According to this test negligence will be established 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.

This has been constantly stated by this court for some 50 years. Requirement *(a)* (ii) is sometimes overlooked. Whether a *diligence 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 on the particular circumstances of each case.'

[12] Strauss AJ considered the submission on behalf of the appellant that *Coley* was distinguishable on the basis that in that case a child was injured due to the fact that she had run over a mound, whilst in the present case Jaco had injured himself by sitting on a dropper which could not have been foreseen, and rejected it. At paras 70 and 71 of its judgment the court below stated:

'The defendant, I find, when planting the specific tree that caused the damage and inserting the dropper next to the tree in the general playing field where children were known to play rugby, cricket and other ball games, created a hazardous and dangerous situation. I find, that the foreseeability of damage was present, due to the fact that it is general knowledge that if children run in a specific area where a dropper is protruding above a tree any of these children could fall and injure themselves on the protruding dropper. This was also confirmed by two of the witnesses for the defendant.

I find that, as set out in [*Coley*], . . . a prudent man in the shoes of the defendant would not have placed the dropper in the vicinity where children were known to run and play. The prudent man might also have secured this specific tree by other means, less hazardous and or less potentially harmful.'

[13] In dealing with the appellant's plea of contributory negligence, Strauss AJ had regard to Jaco's youthful inability to control irrational and impulsive acts. She took into account that Jaco was hyperactive, had learning disabilities and had suffered some sort of trauma because of his parents' divorce and made the following order:

'1. [T]he defendant is 80 % liable to compensate the plaintiff in the amount of damages the plaintiff is able to prove.

2. [T]he defendant shall pay the plaintiff's costs of the action, finding in favour on the merits, which costs shall include the costs of senior counsel.'

It is against these orders that the current appeal, with the leave of the court below, is directed.

[14] Before us it was submitted that the court below erred in not having sufficient regard to wrongfulness as a requirement for delictual liability. It was contended in written heads of argument that in the present case public policy considerations demanded that 'in view of the most extra-ordinary and peculiar act of Jaco when he sat on a dropper', liability should not be extended to [the] Appellant'.

[15] As pointed out by the Constitutional Court in *Carmichele v Minister of Safety and Security & another (Centre For Applied Legal Studies Intervening)* [2001] ZACC 22; 2001 (4) SA 938 (CC), wrongfulness, as a requirement for delictual liability, more particularly in relation to omissions and the breach of a legal duty, has been developed over the years in our common law prior to the advent of our new constitutional dispensation.[2] Wrongfulness assumed greater prominence in relation to claims based on negligence leading to pure economic loss.[3]

[16] In *Hawekwa Youth Camp & another v Byrne* [2009] ZASCA 156; 2010 (6) SA 83 (SCA), this court had to consider whether a teacher, and by extension the responsible Minister, was liable when a child, during a school excursion, fell from an upper bunk bed with an inadequate protective barrier. Brand JA said the following in relation to the principles concerning wrongful omissions (para 22):

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[2] See para 42.

[3] See J R Midgley and J C van der Walt 'Delict' in 8(1) *Lawsa*, 2ed at 112 para 68.

'. . . [They] have been formulated by this court on a number of occasions in the recent past. These principles proceed from the premise that negligent conduct which manifests itself in the form of a positive act *causing physical harm to the property or person of another is prima facie wrongful*. By contrast, negligent conduct in the form of an omission is not regarded as prima facie wrongful. Its wrongfulness depends on the existence of a legal duty. The imposition of this legal duty is a matter for judicial determination, involving criteria of public and legal policy consistent with constitutional norms. In the result, a negligent omission causing loss will only be regarded as wrongful and therefore actionable if public or legal policy considerations require that such omission, if negligent, should attract legal liability for the resulting damages (see e g [*Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* [2005] ZASCA 73; 2006 (1) SA 461 (SCA)] para 14; [*Local Transitional Council of Delmas & another v Boshoff* [2005] ZASCA 57; 2005 (5) SA 514 (SCA)] paras 19-20; *Gouda Boerdery BK v Transnet* [2004] ZASCA 85; 2005 (5) SA 490 (SCA) para 12).' (My emphasis.)

[17] In *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* [2014] ZACC 28; 2015 (1) SA 1 (CC) para 22, Khampepe J reaffirmed what is set out in the first part of the quote in the preceding paragraph:

'Wrongfulness is generally uncontentious in cases of positive conduct that harms the person or property of another. Conduct of this kind is prima facie wrongful.'

[18] As to a legal duty arising where there is prior positive conduct, see 8(1) *Lawsa* 2 ed para 65 at 103-104, where the following is stated:

'A duty may arise when the defendant has by lawful prior positive conduct (*commissio*) created a potential risk of harm to others. If the actor then omits to take reasonable steps to prevent the risk from materialising (*omissio*), the duty is breached.'(Footnotes omitted.)

[19] In *Le Roux & others v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)* [2011] ZACC 4; 2011 (3) SA 274 (CC), Brand AJ writing for the majority explained the wrongfulness enquiry as follows (para 122):

'In the more recent past our courts have come to recognise, however, that in the context of the law of delict: *(a)* the criterion of wrongfulness ultimately depends on a judicial determination of whether — assuming all the other elements of delictual liability to be present — it would be reasonable to impose liability on a defendant for the damages flowing from specific

conduct; and *(b)* that the judicial determination of that reasonableness would in turn depend on considerations of public and legal policy in accordance with constitutional norms. Incidentally, to avoid confusion it should be borne in mind that, what is meant by reasonableness in the context of wrongfulness has nothing to do with the reasonableness of the defendant's conduct, but it concerns the reasonableness of imposing liability on the defendant for the harm resulting from that conduct.' (Footnotes omitted.)

[20] In *Hawekwa*, Brand JA warned against confusing the delictual elements of wrongfulness and negligence and went on to state that, depending on the circumstances, it may be appropriate to enquire, first, into the question of wrongfulness, in which case negligence might be assumed and in other cases it may be convenient to do the opposite. In *Hawekwa* a substantial part of the contentions on behalf of the Minister was devoted to the element of wrongfulness.[4] Brand JA dealt with wrongfulness before considering negligence and stated the following:

'. . . [I] am satisfied that wrongfulness had been established. In this regard I am in full agreement with the following statement by Desai J in *Minister of Education & another v Wynkwart NO* 2004 (3) SA 577 (C) at 580A-C:

"It was not in dispute that [the respondent's minor son] 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'."'

[21] In *Coley* the planting of wooden stakes in a play area was rightly seen as constituting a sufficient basis to create a duty on the part of the Administration to prevent there being a danger to children in that vicinity.[5] *Coley* is not distinguishable from the present case. By placing a steel rod within a playground where children engaged in ball games the appellant created a dangerous situation. It did not take reasonable steps to prevent a foreseeable risk of harm through misadventure from materialising. Section 28(1)(*b*) of the Constitution dictates that every child has the right to appropriate alternative care when removed from the family environment. Having

[4] Para 20.
[5] At 26.

regard to all the circumstances of the case, including the fact that one is dealing with children who struggle with learning disabilities and that Jaco's hyperactivity was known to the school and considering the factors set out in para 19 above, the conclusion is compelled that the appellant's submission that public policy considerations demand that liability should not be extended to the appellant is wholly unfounded.

[22] The following order is made:

The appeal is dismissed with costs including the costs of two counsel.

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M S NAVSA

Acting Deputy President

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