IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GRAHAMSTOWN)

CASE NO: 5517/2015

Date heard: 5 -6 March 2019

Date delivered: 15 March 2019

In the matter between

LUSAKHANYA GORA	**Plaintiff**
And	
KINGSWOOD COLLEGE	**First Defendant**
JONATHAN GOLDBERG N.O.	**Second Defendant**
KINGSWOOD COLLEGE COUNCIL	**Third Defendant**
DANIEL MOORE	**Third Party**

JUDGMENT

PICKERING J:

[1] Plaintiff is Lusakhanya Gora, presently a 20 year old student studying at Varsity College in Port Elizabeth. On 13 February 2014 plaintiff, who was then enrolled as a pupil at Kingswood College, Grahamstown, was struck in the eye by one Daniel Moore, also an enrolled pupil attending Kingswood College.

[2] In consequence of this incident plaintiff sustained a serious injury to his right eye, resulting in a permanent impairment of his visual ability. He accordingly issued summons against Kingswood College as the sole defendant. Thereafter when the issue of the locus standi of Kingswood College was raised, two other defendants were joined by order of the Court on 24 January 2017 namely Jonathan Goldberg in his capacity as the Official Trustee of Kingswood College Trust IT 129/2005 as second defendant and Kingswood College Council, as third defendant. Jonathan Goldberg was in due course substituted by William Strachan N.O. in his capacity as the Official Trustee, Kingswood College Trust IT 129/2005.

[3] The three defendants were cited by plaintiff as follows:

> "*2. The first defendant is Kingswood College, a private school registered in accordance with the laws of the Republic of South Africa, located at Burton Street, Grahamstown.*
>
> *3. The second defendant is Jonathan Goldberg N.O. an adult male born on 27 May 1962 and who is cited herein in his capacity as the Official Trustee, Kingswood College Trust IT 129/2005 (hereinafter referred to as the Trust) c/o Kingswood College, Burton Street, Grahamstown.*
>
> *4. The Trust is charged with the sole object of carrying on the activities of conducting an independent school, namely first defendant.*
>
> *5. The third defendant is Kingswood College Council, a body corporate created in terms of the Kingswood College Trust Deed c/o Kingswood College, Burton Street, Grahamstown.*
>
> *6. The third defendant is vested with the supreme management, administration and control of all property, affairs and concerns of the first defendant.*
>
> *7. The second and third defendants in their respective capacities exercise control over and have purview of all matters concerning the first defendant.*"

[4] Plaintiff, for some reason, did not join the aforesaid Daniel Moore as a defendant but at some later stage he was joined as a third party at the instance of the defendants.

[5] Plaintiff pleaded that the injuries sustained by him were caused by the negligence of the three defendants and its employees in failing to ensure adequate supervision over him and the other pupils in his class, including Daniel Moore, by

negligently leaving the said class unattended for an hour in the absence of the regular teacher, one Ms. Sullivan.

[6] The defendants denied liability, admitting only that the physical altercation between plaintiff and the third party occurred during the temporary absence of the teacher. They denied that they or their employees had acted wrongfully and negligently in leaving the class unattended.

[7] Although wrongfulness was initially denied by the defendants it was later conceded that in fact it had been established that the teachers at Kingswood College owed the pupils the legal duty to act positively to prevent physical harm being sustained by them through misadventure. This concession was correctly made. See Minister of Education and Another v Wynkwart N.O. 2004 (3) SA 577 (C) where the following was stated 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'*.*

[8] This passage was approved in Hawekwa Youth Camp v Byrne 2010 (6) SA 83 (SCA) at paragraph 25.

[9] The three defendants raised a special plea to plaintiff's claim in the following terms:

> "1. Zukiswa Gora and Manana Siyanda (who are the parents of the plaintiff) applied in writing for the admission of the plaintiff (then a minor) as a learner at the first defendant and the application form comprised the basis of the enrolment contract of the plaintiff, duly represented as aforesaid.

2. The first defendant accepted the enrolment application at Grahamstown at the end of 2002 in writing and the plaintiff was admitted as a learner at the first defendant.

3. A copy of the enrolment contract is annexed hereto marked "A".

4. By enrolling the plaintiff with the first defendant, the plaintiff and his parents accepted the first defendant's terms and conditions as contained in the enrolment contract."

[10] The enrolment contract contained the following indemnity clause:

"*The applicant hereby Indemnifies and agrees to hold harmless the Official Trustee, the Kingswood College Council, the College, its Headmaster and Staff, or their authorized agents or representatives, against any and all claims, howsoever arising, including negligence, but not gross negligence, arising out of any injury, death, loss, damage, costs or expense, including legal costs suffered as a result of or during the enrolment of the Pupil at Kingswood College. Without limiting the generality of the aforegoing, the Official Trustees, the Council, the College, its Headmaster and/or staff shall not be liable to the student and/or his/her parents and/or legal guardians for any loss or damage of whatsoever nature and/or howsoever arising, (including consequential or incidental loss or damage) or for any costs, claims or demands of any nature, whether arising directly or indirectly from the conduct of the Council, the College, its Headmaster and/or staff (gross negligence excluded).*"

The defendants pleaded therefore that plaintiff's claims were excluded by virtue of the provisions of the indemnity clause.

[11] Plaintiff duly replicated to this special plea. This replication was filed at the time when Kingswood College was the only defendant hence the reference to "*the* defendant" as opposed to "*the* defendants." The allegations contained in paragraphs

1,2, and 3 thereof were admitted. In respect of paragraph 4 plaintiff replicated as follows:

> "*Save to plead that the rights of the plaintiff's minor son, Lisakhanya, were not capable of being waived, abandoned or diminished by the plaintiff, without the express knowledge and agreement of Lisakhanya (which was never obtained), the remaining terms and conditions of the enrolment contract were accepted by the plaintiff in order to secure a place at the defendant, and to regulate the payment of fees by the plaintiff, and ancillary matters.*

[12] The issue raised by plaintiff in paragraph 4 of the replication to the effect that his rights as a then minor were not capable of being waived, abandoned or diminished by his parents without his express knowledge and agreement was, correctly, not pursued.

[13] Plaintiff's mother Mrs. Gora testified that she and plaintiff's father signed the application form for admission of plaintiff to Kingswood. In effect, all that she was concerned about was ensuring that plaintiff was accepted as a pupil. She believed that she was negotiating with Kingswood College.

[14] Both plaintiff and the third party, Daniel Moore, testified. It emerges from their evidence that on 12 February 2014, the day before the incident occurred, the History teacher of their grade 9G class, Ms. Sullivan, told the class that she would be absent from class the following day but that a substitute teacher would be present. It is common cause that through some miscommunication which I will deal with hereunder no substitute teacher was present in the classroom at the relevant time and it was left unattended. The grade 9G class consisted of approximately 20 – 30 pupils, both boys and girls.

[15] Approximately half an hour into the hour long class plaintiff, on his version, decided to have a bit of fun with Daniel Moore who was a new boy at Kingswood College. He took Moore's pen as a way, so he said, of trying to get to know him "*so I could hang out with him after school.*" At his disciplinary hearing, however, Moore stated that he had been bullied by plaintiff in the two weeks preceding the incident.

Having taken the pen plaintiff and Moore ran around, chasing each other. Moore eventually cornered plaintiff and, according to plaintiff, although this is denied by Moore, stabbed him with a pencil on the hand. Plaintiff then told Moore to sit down and he would return the pen. Moore did sit down and plaintiff returned the pen to him. There is some dispute as to where exactly plaintiff was sitting in relation to Moore. According to Moore plaintiff was seated directly behind him but according to plaintiff he was seated diagonally behind Moore and another boy one Tembinkosi was seated directly behind Moore. In the circumstances of this case, however, nothing turns on this. What is relevant is that once they were all seated Moore was poked in the back with a pencil. According to plaintiff Tembinkosi was responsible for doing this whereas, according to Moore, plaintiff was responsible. Matters escalated and eventually according to plaintiff, Moore turned around, pointed at plaintiff and said to him "*if you touch me I will kill you.*" Plaintiff pushed his hand away and Moore then punched him in the face. These blows smashed plaintiff's glasses thus resulting in the serious injury to plaintiff's eye. Moore denied that he had threatened to kill plaintiff but conceded that he had told him that if plaintiff did not stop poking him in the back he would hit him. It was when he was poked again that he turned around and hit plaintiff in the face.

[16] The defendants adduced the evidence of two witnesses, namely Mr. Opperman and Ms. von Mollendorf. Mr. Opperman was on 13 February 2014 the Director of Academic Studies at Kingswood College. He stated that he was acutely aware that the school acted in *loco parentis* and that the teachers in charge of the pupils took on the responsibility of a parent. He stated that one of his duties involved the administration of a so-called "*batting procedure".* In terms of this procedure, if a teacher knew in advance of a particular class that he or she would be absent from that class on a particular day, the teacher would advise Mr. Opperman of this by completing a so-called batting form indicating the class which would be missed. Mr. Opperman would then draw up a list of teachers who were free at the particular time and could accordingly act as a substitute teacher instead of the regular teacher. The primary purpose of a substitute teacher was, he said, to have a teacher present to ensure that pupils were doing the work assigned to them. He conceded that the presence of the teacher to enforce discipline was also a factor. He denied, however, that it was foreseeable that in the absence of a supervisor matters would get out of

hand, saying that ill-discipline was no more than a possibility. To his knowledge it happened quite often that classes were left unattended but, in his twenty years at Kingswood College, this was the first incident involving violence which had occurred in a classroom in the absence of a teacher.

[17] He stated that in the present matter he had not received any notification from Ms. Sullivan concerning her proposed absence on 13 February. It appears from an email trail that somewhere along the line there must have been a miscommunication because Ms. Sullivan was adamant that she had sent the information to Mr. Opperman and he was equally adamant that he had not received it and stated that the possibility that he had accidently deleted it was extremely remote. It can be accepted therefore that there may have been some degree of negligence resulting in the failure to provide a substitute teacher for the class on 13 February.

[18] Ms. von Mollendorf has been employed at Kingswood College since 2007. She has been the Deputy Head of the school since September 2018 and is presently the acting principal. She stated that in all her time at the school the present matter was the only incident involving violence in the classroom of which she was aware. There were to her knowledge many occasions during the day when pupils were left unattended and unsupervised outside of the classroom and yet there had been to her knowledge only two incidents involving violence of some sort outside the classroom. These incidents had occurred in the unsupervised environs of one of the boarding houses. She stated that in her career at Kingswood she had never had reason to have been concerned about the possibility of pupils becoming embroiled in a physical altercation when a class was for some or other reason left unattended. She confirmed Mr. Opperman's evidence concerning the batting procedure but stated that it also did happen on occasion that classes were perforce left unattended when, for instance, teachers were attending conferences. She confirmed that the primary purpose of a substitute teacher was to ensure that learning took place. It was put to her by Mr. Jooste for the plaintiff that if no teacher was present there was a high likelihood that the work would not be done and that the presence of a teacher was necessary to enforce discipline. She replied that "*we don't teach through discipline."*

[19] Ms. Molony, who appeared with Mr. Jooste for the plaintiff, made certain submissions concerning the reliance by defendants on the indemnity clause. She submitted that Ms. Gora believed herself to be contracting with first defendant and that the special pleas specifically referred to the enrolment contract as being a contract between plaintiff's parents and the first defendant. The enrolment contract itself stated that it was subject to acceptance by Kingswood College and recorded that it was a contract between the applicant's parents and the College. Ms. Molony submitted that it was accordingly clear that the parties to the enrolment contract were the parents and the first defendant but that despite this the indemnity clause purported to indemnify, inter alia, the second and third defendants, along with the first defendant. She submitted that the second and third defendants, however, were not parties to the contract and to the extent that the contract had been entered into for their benefit (a *stipulatio alteri*) it was required that they accept the benefit in question. The defendants had not pleaded such acceptance nor alleged it in evidence. She submitted accordingly that the indemnity could not operate in favour of the second and third defendants.

[20] In my view this is an entirely fallacious argument that in any event was not raised on the pleadings. It completely ignores the admitted relationship between Kingswood College, the Official Trustee and the College Council. In the light of the submissions some background to the establishment of Kingswood College is necessary.

[21] In terms of section 15 of the South African Schools Act 84 of 1996 every public school is a juristic person with legal capacity to perform its functions in terms of the Act. Section 45 provides for the establishment of an independent school and provides that, subject to the provisions of the Act, any person may, at his or her own cost, establish and maintain an independent school. In terms of section 46 no person may establish or maintain an independent school unless it is registered by the Head of Department. An independent school is defined as a school registered in terms of section 46.

[22] Section 53 contains certain transitional provisions and provides that a private school which was duly registered and which existed immediately prior to the

commencement of the Act is deemed to be an independent school. Importantly, unlike in the case of public schools, an independent school is not created a juristic person.

[23] It is clear that Kingswood College is indeed not a juristic person. It was established by the Kingswood College Trust in August 1895, the Trust's sole object being to carry on the activity of conducting an independent school. The administration and control of all property, affairs and concerns of the College reposes in the Council, notwithstanding the fact that all or any immovable property may be registered in the name of the Official Trustee. As appears from clause 20 of the Trust Deed (Exhibit B15) the Kingswood College Council is a separate entity in its own right and a body corporate.

[24] It is clear from the above that Kingswood College came into existence as a result of the Trust which had as its sole objective the establishment of an independent school. Kingswood College has no existence other than as the object of the Trust and other than being administered and controlled by the Council. In these circumstances, whatever the enrolment contract may have stated, it is abundantly clear that the contracting party is not Kingswood College but is in fact Kingswood College Council. There can therefore be no question of the enrolment contract being only between Kingswood College and the parents. The enrolment contract does not create a *stipulatio alteri.*

[25] With reference to certain authorities including Minister of Education and Cultural (House of Delegates) v Azel and Another 1995 (1) SA 30 (A) Ms. Molony submitted that the indemnity clause must be read in the context of the enrolment contract, paragraph 2 of which had the effect of placing the defendants in *loco parentis*. (See Annexure B96). She submitted that the contents of paragraph 2 of the enrolment contract served as a precondition for the operation of the indemnity clause and that defendants were accordingly required to take reasonable steps to ensure the safety of pupils whilst they were on school premises. She submitted that if paragraph 2 did not serve as a precondition to the indemnity clause then it essentially rendered the undertaking in regard to being in loco parentis and acting in the best interest of the child superfluous. The defendants did not comply with the

precondition in that they wrongfully and negligently permitted a situation to arise which caused serious physical injury to the plaintiff. According to Ms. Molony the above interpretation would not substantially reduce the range of the indemnity, in that it would still allow for the application of the indemnity if the precondition was met, and would, given the extensive range of the wording involved, allow for its application in, for example, claims involving loss or damage of property.

[26] These submissions were also not based on any pleading contained in the papers and were specifically not part of plaintiff's replication to the special plea, the only issue on the pleadings being, in effect, whether the failure to arrange for a substitute teacher and the fact that the class was therefore left unattended constituted negligence of such a degree as to render the terms of the indemnity inoperable.

[27] Be that as it may I am of the view that the submissions are in any event without merit. The cases referred to by Ms. Molony are entirely distinguishable. In my view it goes without saying that the school was required to act in *loco parentis* and in this regard there is no dispute between the parties. Obviously the indemnity must be viewed in that light. The fact that the school is in *loco parentis* to the pupils, however, is not a precondition for the operation of the indemnity. On the contrary, the indemnity covers the situation where the employees of the school, despite being in *loco parentis*, act in a negligent manner, thereby occasioning injury to a pupil.

[28] I turn then to consider the issue of negligence. It is trite that the requirements for liability are those so succinctly expressed by Holmes JA in Kruger v Coetzee 1966 (2) SA 428 (A) at 430E, namely:

> *"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."

[29] In Minister of Education and Another v Wynkwart N.O. *supra* Desai J, with whom Erasmus and Yekiso JJ concurred, stated at 582G – I:

*"In a more recent judgment the Court in Minister of Safety and Security v Van Duivenboden 2002 (6) SA 431 (SCA), applying Kruger v Coetzee (*supra*), pertinently 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 for 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.' *It is apparent from the authorities referred to by counsel that where pupils are not kept under the constant supervision of teachers this is not in itself a breach of the duty of care owed to such pupils. The degree of supervision required depends on the risks to which the pupils are exposed."*

[30] In Rusere v The Jesuit Fathers 1970 (4) SA 537 (R) a child of 8 years sustained an injury to his eye when, during an hour of unsupervised free time between a game of soccer and evening prayers, he and some 26 other little boys of his age group commenced to play a game of "*cowboys and Indians*" resulting in his being struck in the eye by a grass arrow.

[31] At 539D Beck J remarked that:

"*The duty of care owed to children by school authorities has been said to be to take such care of them as a careful father would take of his children. This means no more than that schoolmasters, like parents, must observe towards their charges the standard of care that a reasonably prudent man would observe in the particular circumstances.*"

[32] It was submitted on behalf of the boy that it was negligent on the part of the school authorities to allow children between the ages of 7 and 10 to play in the school grounds for any appreciable length of time without the presence of some responsible person to keep them under surveillance. Beck J stated with regard to this submission as follows at 539F – G:

> *"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. No doubt, a reasonable man who is in charge of a number of young children at the seaside would be guilty of negligence if he were not to keep them under constant observation. 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*."*

[33] Reference may also be made to the matter of Knouwds v Administrateur, Kaap 1981 (1) SA 544 (KPA), a matter in which a lawnmower was being used on school grounds just before school started. Plaintiff's 8 year old daughter was injured when she fell on the lawnmower whilst she and another school girl were racing each other. Friedman J held that having regard to the well-known conduct of young children it should have been foreseeable to those involved that the children could for one reason or another have stumbled into the lawnmower and that the risk to which the children were exposed that day was such that they should have been kept constantly under supervision. With reference to Rusere's case *supra*, Friedman J stated that whilst it was unnecessary for school employees to have the children in their care under supervision for every moment of the day, the degree of supervision expected from the school personnel naturally depended on the risks to which the children were exposed.

[34] At the other end of the spectrum is a case such as Long and Another v Jacobs [2012] ZASCA 58. In that matter the plaintiff who was attacked with a hammer by a 13 year old learner in her class sustained serious injuries. It appeared that the plaintiff was invigilating a class writing a comprehension test and observed

that the learner in question was not writing. She approached him only to discover that the learner was drawing in his journal. She requested him to stop. He refused to do so. She then observed that there was a death certificate in the journal, made out in her name. Naturally alarmed at what she had seen she approached the Head of the General Education Band at the school, Ms. Hutchings, to report the incident. The learner was called out of the class to meet with Ms. Hutchings in the corridor. Hutchings then took the learner to the principal, Mr. Long. Hutchings told the principal that the learner had made death threats against the plaintiff. The principal told the learner to sit on the chair outside his office, instructing him not to leave whilst he studied the journal. He described that what he saw in the learner's journal was the "*stuff of nightmares.*" He then caused the police to be called. When he returned to where the learner was supposed to be he found that he was gone. The learner had indeed left and proceeded back to the classroom where he attacked the teacher.

[35] The court found that the principal, by placing the learner on a chair outside his office unsupervised, and letting him out of his sight and control, should reasonably have foreseen the probability that the learner would slip away to his classroom and carry out the imminent death threats. The principal should have taken reasonable measures to ensure that it did not happen by asking him to wait in his office in his presence or getting a senior educator to supervise him. His failure to take these measures constituted negligence on the part of the principal.

[36] It emerges clearly from the above authorities that the fact that pupils are not kept under the constant supervision of the teachers is not in itself a breach of the duty of care owed to the pupils and that the degree of supervision depends on the risks to which they are exposed in their particular surroundings.

[37] As was pertinently submitted by Mr. Smith for the third party there was in the present case, unlike in the Knouwds case, nothing in the classroom environment that would pose an inherent risk to any of the learners. He stressed, as was stressed in Rusere's case, that the position would be entirely different if for example the children were left unsupervised at the school's swimming bath. I agree.

[38] It is common cause that Kingswood College is one of South African's private-educational schools. It has a strict code of conduct for pupils as well as procedures and routines outlined in the School Regulations (B49). Of particular relevance in this regard is regulation A1.1 which provides:

> *"Classrooms – Kingswood pupils are expected to*
> *1.1.1 enter the room and wait quietly for the teacher. As a token of respect, pupils are expected to stand when an adult enters the room.*
> *1.1.2 Respect the opinions of others. Listen.*
> *1.1.3 Do nothing to diminish the opportunities for others students to learn or for teachers to teach effectively. Respect the property of others and the school. … acknowledge the efforts of the teacher by conducting themselves in a responsible and mature manner.*"

[39] The "*Pupils Code of Conduct*" (B82) states as follow:

> "*Mission Statement*
> *Kingswood College provides an education in a family-like environment, developing the self-worth and academic, leadership, spiritual, social, moral, cultural and physical potention of every pupil and staff member.*
>
> *Core Value Care*
> *Caring discipline, children matter, honesty, humility, integrity, justice, respect, responsibility, tolerance, Ubuntu.*"

[40] As was submitted by Mr. van der Linde, who appeared for first, second and third defendants, the campus at the school is extremely well regulated and pupils are required to conduct themselves in accordance with the regulations. Mr. van der Linde submitted further that it appears also from the evidence that pupils are left unsupervised out of the classroom at various times of the day and that despite this, only two incidents involving violence have occurred in the twelve years that Ms. van Mollendorf has been employed at the school. Furthermore, this is not a case involving young children under the age of 10 years. Plaintiff and Moore were 15 year old pupils who could be expected to act maturely and responsibly in the safe

environs of the classroom. In my view therefore it was not reasonably foreseeable that an incident such as the present would occur and the conduct of the school employees in leaving the class unattended did not amount to negligence.

[41] Even were I to be wrong in coming to this conclusion and were it to be found that in fact the defendants were negligent this, in my view, would in no way assist plaintiff. In order to succeed in his claim and to avoid the operation of the indemnity he would be obliged to prove gross negligence. In MV Stella Tingas Transnet Ltd t/a Portnet v Owners of the MV Stella Tingas 2003 (2) SA 473 (SCA) the following was stated by Schott JA at [7]:

> "*[T]o qualify as gross negligence the conduct in question, although falling short of* dolus eventualis*, must involve a departure from the standard of the reasonable person to such an extent that it may properly be categorized as extreme; it must demonstrate, where there is found to be conscious risk taking, a complete obtuseness of mind or, where there is no conscious risk-taking, a total failure to take care. If something less were required, the distinction between ordinary and gross negligence would lose its validity.*"

[42] In the judgment the learned Judge referred to certain examples from cases where gross negligence had been held to have been established, these examples reflecting "*the extreme nature of the negligence required to constituted gross negligence*" namely: "*no consideration whatever to the consequences of his action*"; "*a total disregard of his duty*"; "*negligence of a very serious nature*"; "*a particularly high degree of negligence*"; "*ordinary negligence of an aggravated form which falls short of willfulness*"; "*an entire failure to give consideration to the consequences of one's actions*".

[43] It is abundantly clear when regard is had to the above that there can be no question of the school and its employees having been guilty of gross negligence.

[44] Accordingly the plaintiff's action cannot succeed.

[45] There is no reason why costs should not follow the result and why plaintiff therefore should not pay the costs of first second and third defendants. With regard to the third party Mr. Smith submitted that there was no *lis* between third party and plaintiff and that the third party had been joined as such at the instance of the defendants. He submitted accordingly that the defendants should pay the costs of the third party. In my view there is merit in this submission. Accordingly the following order will issue:

1. The plaintiff's action against first, second and third defendants as well as the third party is dismissed.

2. Plaintiff is ordered to pay the costs of first, second and third defendants.

3. Defendants are ordered to pay the costs of the third party.

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J.D. PICKERING
JUDGE OF THE HIGH COURT

Appearing on behalf of Plaintiff: Adv. P. Jooste, together with Adv. N. Molony

Instructed by: N.N. Dullabh Attorneys, Mr. Dullabh

Appearing on behalf of First, Second and Third Defendants: Adv. Van der Linde S.C.

Instructed by: Netteltons Attorneys, Mr. Hart

Appearing on behalf of Third Party: Adv. D. Smith

Instructed by: J.D. Haydock Attorneys, Mr. Haydock