REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

CASE NUMBER: 4242/2016
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO THE JUDGES: YES/NO
(3) REVISED.
Signature:
Date: 24/02/2025

In the matter between:

R[...] M[...] **PLAINTIFF**

AND

MEC FOR THE DEPARTMENT
OF EDUCATION, LIMPOPO **DEFENDANT**

JUDGMENT

STRöH JA

[1] The *Plaintiff* (R[...] M[...]) instituted an action for damages and compensation against the Member of the Executive Council of Education, Limpopo (hereinafter the *Defendant)*, claiming an amount of:

1. R 20 000,00 (Twenty Thousand Rand) for Estimated Past Medical Expenses,

2. R 150 000,00 (Hundred and Fifty Thousand Rand) for Estimated Future Medical Expenses,

3. R 1 500 000,00 (One Million Five Hundred Thousand Rand) for Past and Future Loss of Earning

4. R200 000,00 (Two Hundred Thousand Rand) for Damages for Loss of Amenities

5. R 350 000,00 (Three Hundred and Fifty Thousand Rand) for Damages for Pain and Suffering, Disfigurement, Shock and Discomfort as a result of damages suffered due to the *school*'s negligence.

At the commencement of the trial (as agreed between the parties) the merits were separated from the quantum and only the issues relating to the ***Defendant's*** liability are adjudicated upon. Quantum of damages, if it arises is postponed *sine die.*

[2] The *Plaintiff* in her Particulars of Claim, stated that an accident/incident occurred when she slipped in the field of play whilst practicing for a Netball match and sustained a fracture of her right arm.

[3] In her Particulars of Claim, the *Plaintiff* submit that the *Defendant* failed to comply with the Regulations for Safety Measures at Public Schools,[1] in the event of an activity by the school, amongst other things:

[1] Regulation 8A(2) Published under *Government Notice 1040 in Government Gazette 22754 of October 2001 and amended by GN R1128 in Government Gazette 29376 of 10 November 2006*

‘(i) A public school must take measures to ensure the safety of learners during any school activity, including –

(a) Insuring against accidents, injuries, general medical experiences, hospitalisation and theft that may occur, depending on the availability of funds;

(b) Ensuring where reasonably practicable, that learners are under supervision of an accompanying educator at all times;

(c) Requesting parents or other adults to assist in the supervision of learner.’

[4] The *Plaintiff* stated in her Particulars of Claim, that the state (Limpopo Department of Education) is liable for any damages of loss caused as a result of any act or omission in connection with any education activity conducted by a public school and for which such public school would have been liable for provisions under the State Liability Act.[2]

[5] The *Plaintiff* in her Particulars of Claim, stated that the *school* breached it’s statutory duties and acted negligently in one or more of the following respects:

5.1 ‘it failed to insure against accident, injuries and general expenses that may occur, depending on the funds;

5.2 It failed to insure that where reasonable and practicable that learners are under supervision of an accompanying educator at all times, more particularly with the *Plaintiff*;

5.3 It failed to request the parents and or other adults to assist in supervision of learners;

5.4 It failed to take and implement the necessary measures to ensure the safety of learners more particularly with the *Plaintiff;*

[2] Act 20 of 1975

5.5 It failed to insure that the learner is not injured on the school premises;

5.6 It failed to take reasonable and necessary steps to prevent the accident from occurring when it could have or should have done so;

5.7 It failed to take the necessary steps to repair and or maintain the said netball field to a playable condition;

5.8 It failed to assist or care for the learner after the accident even though she was still under its care.

Alternatively to the above mentioned breached by the school:

5.9 The employee or employees responsible for control and supervision of learners during school breaks failed to ensure that there was sufficient control and supervision on the 30th July 2015;

5.10 The employee responsible for control and supervision of learners on the 30th July 2015 failed to exercise such control and supervision, alternatively failed to effectively exercise such control and supervision when, in the circumstances, they could and should have do so;

5.11 The employees responsible for control and supervision of learners failed to inspect the field of play or area if it was in such condition that it was not dangerous for learners to practice and ultimately avoid harm;

5.12 The employee(s) responsible for control and supervision of learners failed to take reasonable precautions to prevent injury to learners, alternatively failed to ensure that such precautions were adhere to when, in the circumstances, they could and should have done so;

5.13 The employee(s) responsible for control and supervision of learners failed to prevent the aforesaid dangerous activity taking place when, in circumstances, they could and should have done so.'

[6] In the amended Plea (dated the 20th October 2020) the *Defendant* pleaded to the *Plaintiff's* amended Particulars of Claim (dated 4th January 2020) as follows:

6.1 'Netball is a contact sport;

6.2 the *Plaintiff* had knowledge of the risk in playing Netball;

6.3 the *Plaintiff* appreciated the ambit of the risk; and

6.4 the *Plaintiff* consented to the risk;

6.5 the *Plaintiff* misconstrued the Regulations (Regulation 8A(2)) and avers that the Regulation make provision for the school to take insurance , subject to availability of funds, against accidents, injuries, general expenses, hospitalization, theft that may occur as a measure to ensure safety of learners during school trips activities.

6.6 the school grounds were well maintained and still are.

6.7 the *Plaintiff* was visited by the former Principal of the school at the hospital and even at home;

6.8 the principal even paid some of the hospital bills from the school coffers;

6.9 the *Defendant* pleads that the *Plaintiff* relies on a breach of duty of care, however, the *Plaintiff* fails to set out facts that could or should have been foreseen by the *Defendant.'*

Common Cause

[7] During the opening remarks in the trial it was conceded that:

1. The *Defendant* is the MEC of Education, for Limpopo,

2. The *Plaintiff* was at the time of the incident, a learner at D[...] K[...] Secondary School (hereinafter the 'school'),

3. The injury sustained by *Plaintiff* was not in dispute,

4. The *Plaintiff* complied with Section 3 of Act 40 of 2002,[3]

5. The school ground where the incident/accident occurred was not in dispute and,

6. The *School* had a legal duty or duty to care.

Issues in Dispute

[8] (i) Causation - What caused the injury to the *Plaintiff*;

(ii) Whether the *Defendant* had a statutory duty to prevent the injury, taking into account how the incident happened;

(iii) Whether the *Defendant* failed in its duty to prevent;

(iv) Whether the *Defendant* was negligent

It is the *Plaintiff's* case that she 'tripped' and fell. The *Defendant's* case is that Netball is a contact sport and that the school grounds were well maintained. The Cambridge, Collins and Oxford Dictionaries define *Tripping/Tripped* as *to lose balance or fall because the foot hits against something, or to fall over, to stumble on, or to slip on*

[3] Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002

something, and *Uneven surface/ground* as ‘not smooth, level flat, straight or continuous.’

Evidence in the Trial

Plaintiff’s Evidence

[9] The *Plaintiff* testified that she was in Grade 11 (eleven) when the incident/accident occurred. She confirmed that she was a member of her school Netball team at the time. The day prior to the incident, the Netball team of which she was a member played against another school and won. Following this occurrence, the following day the team, including herself, where in the classroom when they were requested to go practice Netball at the Netball sport grounds.

[10] The *Plaintiff* testified that on the day of the incident when she practiced at the Netball grounds, they (she and her Netball teammates) were not under supervision.

[11] Regarding the injury sustained by the *Plaintiff,* her evidence was that she tripped and fell down and injured her right arm.

[12] The Netball grounds’ condition according to the *Plaintiff’*s evidence are the following and are quoted verbatim, ‘the ground was uneven ground; the color of the ground was red with patches of grass and even some stones. Evidence was presented by the *Plaintiff* with pictures confirming the red ground, patches of grass and some stones.’

[13] During cross examination the *Plaintiff* conceded that she only started playing Netball in Grade 10. When asked to whom she complained about the unevenness of the Netball ground, her answer was the teacher. Regarding the question of the red soil and what is wrong with the red soil, she replied red soil is slippery.

[14] She also testified that the ‘squad’ (Netball team) usually clean the Netball ground before they play. She testified that at the day of the incident, and I quote verbatim, ‘they *(Netball team)* did not clean the Netball ground due to short noticed.’

[15] The *Plaintiff* further testified that she 'tripped' due to the uneven surface and the grass. It was also her evidence that she was not assisted by the teacher after the injury, it was her evidence that she was assisted by other Netball players.

[16] The court asked the question whether the *Plaintiff* was tripped by somebody when playing Netball to which the *Plaintiff* replied and I quote verbatim, 'No, I was only tripped by the uneven ground.'

[17] During re-examination the *Plaintiff*'s evidence was that they (Netball team) usually clean the Netball grounds the day before they play (practice). They use a spade and rake to level the playing field. She further confirms on the day of the incident there was no time to clean the Netball grounds before they went on to play netball.

Evidence by the Plaintiff's Netball teammate

[18] During her testimony she confirmed that she played with the *Plaintiff* in the same Netball team and that they were instructed by the sport teacher on the day of the incident to go practice Netball. She also described the Netball surface as red soil, patches of grass and some small stones. When asked about the 'level of ground' she replied, 'uneven.' She could not assist the court by describing how the incident happened.

[19] In cross examination she confirms that she only saw when the *Plaintiff* had already fallen. She could not tell the court why the *Plaintiff* fell.

[20] She also testifies that they usually clean the Netball field themselves before they play.

Evidence of B R M[...]

[21] This witness confirms to be family of the *Plaintiff* and more specifically his niece. B R M[...] confirm that he only visited the *school* on the 7th August 2015 and that was

also the date that he took the pictures. His reason for taking so long to take the pictures after the incident happened, was because he stayed in Gauteng.

[22] B R M[...] said he visited the *school* where the *Plaintiff* was injured and spoke to the school principal regarding the incident/accident. B R M[...] was asked and I quote verbatim, 'When they took you to the Netball ground, what did you observe regarding the description of the playground?' B R M[...] answered, 'The playground they showed him there was some grass, some stones and some slopes, small slopes.'

[23] The witness was asked if he took a picture of the entire sport ground or just a certain section of it, to which he testified that the picture show the Netball ground that was indicated to him.

[24] In cross examination, B R M[...] was asked where in the picture one can see the date on which the pictures were taken. M[...] was unable to show the court, the date the pictures were taken. He said that the school principal showed him where the incident happened however his evidence was that he was not accompanied with the principal to the playground. It is also his evidence that he was alone when he took the pictures.

[25] M[...]'s evidence was also that on the day that he met with the school principal, Mr Mashaba was not present.

[26] During cross examination M[...] was asked what the reason was for why the principal did not accompany him to the sportsground, to which he replied and I quote verbatim, 'after the school principal explained what happened he was satisfied.' However, when he saw the playing field he was not satisfied anymore.

[27] He also testified that the playground is outside the school ground and that the pictures he took and showed the court did not indicate the date the pictures were taken. When asked the question and I quote verbatim, 'You cannot say someone tempered with the ground?', to which M[...] replied, 'correct.' He further confirmed that Mr Mashaba (Sport Teacher) was not present at the time that he met with the

principal. He decided that after the meeting with the principal, not to speak to Mr Mashaba.

[28] In re-examination M[...] said the school principal showed him (from inside the fence) where the sportsgrounds were. The picture (numbered 4) was used by the witness to show the fence he was referring to. In the picture (numbered 3) the court could see there were some patches of grass on the sportsground. The witness was asked how did he know where to take the pictures of where the incident happened, to which he replied, that there was a Netball pole and he referred to picture numbered 1.

[29] When the court asked and I quote verbatim: 'Where on the pictures is the other pole. A Netball court has two poles?,' he replied, 'Upon arrival the second pole was not there.' He was also asked by the court, 'Why did the *Plaintiff* not show you where the *Plaintiff* fell*?'* to which he replied, 'Due to her condition, she was not in a good position.' The last question the court asked this witness was and I quote verbatim, 'You were not sure where the incident, area where incident happened?' to which he replied, 'It could be like that, they showed me the playing ground and they showed where the Netball was played.'

[30] During re-examination in respect of the Picture and the Pole, the *Plaintiff's* legal representative asked and I quote verbatim, 'Is it that the picture only show one Pole?,' to which the witness replied, 'The position I took and time (it is so depict on pole) the *school* must be depicted from that photo.' He was also asked, 'If you have taken a different picture, would it have depicted more than one pole?', to which he replied, 'that did not come to mind that the other pole should be depicted.'

[31] It is appropriate even at this stage of my judgement to note and comment on the significance of the evidence of the *Plaintiff* and her teammate with regards to the surface of the Netball ground. Both testify that the surface was 'uneven, red soil with patches of grass.' This entails that the surface of the Netball grounds was an issue. It is against this background that at the closure of the *Plaintiffs*' case I dismissed the *Defendant*'s application for absolution from the instance and called upon the

Defendant to lead their evidence in rebuttal of the *prima facie* version of the *Plaintiff*'s.

Defendant's evidence

Mr Mashaba

[32] The *Defendant* started with their case and decided to call Mr Mashaba. He confirmed that he remembered the incident that occurred on the 30th July 2015. He was asked to testify 'in his own words' what happened and his evidence was and I quote verbatim, 'It was a Wednesday, Sports day and they (he together with the teachers) control the learners, those we allow them to go play.'

[33] He testified that they (he together with the teachers) control the learners by calling them one by one and if a player is unknown to them, they don't allow the player to go and play.

[34] Mr Mashaba also testified that when the group arrived at the gate, they (he together with the teachers) gave the group a ball and I quote verbatim, 'we will follow.' They (he together with the teachers) were still at the gate controlling the players when the *Plaintiff* together with the group arrived back at the gate with a hand that was dislocated.

[35] It was also Mr Mashaba's evidence that the *school* had two fences namely, the smaller fence for the school buildings and a gate with a bigger fence for the playground.

[36] Mr Mashaba explained that after the incident, they phoned the parents of the *Plaintiff* and an ambulance was arranged to take the *Plaintiff* to the hospital where the mother met the *Plaintiff.*

[37] The witness (Mr Mashaba) further testified that the learners practice Netball in their sport attire. When asked and I quote verbatim, 'It seems that *Plaintiff* fell before

getting into her sports attire?' to which he replied, 'We were not there when she fell however, she still had her school clothes on.'

[38] He also testified, '…they went to the hospital and was welcomed by the mother and doctors and that the principal went to the family to talk to the child.'

[39] When considering ***the repair of the Netball field***, it was Mr Mashaba's evidence that the Lepelle Nkumbi Local Municipality repaired the field, in the beginning of the year and he also denied that learners helped to repair the field during the year.

[40] When considering the ***red soil, stones, unevenness and patches of grass,*** the evidence of the witness was, that they cannot do anything about the red color of the soil, but they would not allow the learners to play if there are humps and stones on the field. He further testified that if there was grass, the grass was at the level of the ground.

[41] He also testified, and I quote verbatim, 'that the Netball field was playable. Netball is a contact sport and if a learner plays rough, you have to stop them. If the surface is slippery it doesn't mean the ground is uneven.'

[42] His further evidence was that before learners play, they look around the ground to see if something is wrong before they play. They also look for places that is dangerous for them.

[43] When he was asked about the pictures taken and shown in court, his initial response was and I quote verbatim, 'Let me not be part of the picture.'

[44] When asked to look at the pictures, the witness responded and I quote verbatim, 'Who was with the person taking photographs, photographer throw stones on ground, I don't know ground with one pole, is it playable.'

[45] He also testified to the fact that the *Plaintiff* was still in her school uniform and not in her sport attire which was an indication to him that, she was not on the sport field when the injury occurred.

[46] During cross examination the witness testified that the 30th July 2015 was a Wednesday.

[47] The witness denied they (*Plaintiff* and her teammates) played against another school, the day prior to the incident.

[48] The witness was confronted with the fact that the following questions were not asked to the *Plaintiff* to respond to:

> ‘(i) you and the other colleagues were controlling the gate?;
>
> (ii) *plaintiff* was injured wearing school uniform?;
>
> (iii) before play look if ground was playable?.’

[49] The witness denied that the incident occurred due to the uneven playing ground.

[50] The witness was also asked during in cross-examination, how could he testify that the ground was not playable to which he responded and I quote verbatim, ‘I can’t say, they were playing. I don’t know what happened.’

[51] The witness further testified that in the morning, prior to the time the learners go and play Netball, they (he and the teachers) checked the ground and he testified that they also, do not force learners to play.

[52] It is the witness’ testimony that they (the learners) only play Netball on Wednesdays and that they cannot play on other days because there is transport to be arranged for the children when they play netball.

[53] The witness testify that in the morning of the incident, they (he and teachers) cleaned the sports ground. The witness was confronted with the fact that the legal representative for the *Defendant* did not inform the *Plaintiff* that Mr Mashaba was going to testify that they (he and teachers) cleaned the sportsground, the morning prior to the time the *Plaintiff* and her teammates will be practicing on the Netball ground.

[54] The Court asked if the learners were allowed to play Netball alone, to which the witness replied, 'no.'

[55] Ms Mashaba was the Netball coach. The witness also testified that she was at the gate when the incident happened together with the rest of the sport committee.

[56] When the witness was asked once more if they (Netball team) could play alone on the Netball field, witness denied this and stated that the coach was also the referee.

[57] The witness also testified that there was only one Netball field at the *school.*

[58] When asked by the Court and I quote verbatim, 'Don't you think you must go with a student to the Netball field?' the witness replied, 'It is necessary, we gather here at the gate, all of a sudden they disappear to the ground site.'

[59] The *Plaintiff's legal representative* confronted the witness with the question of why controlling the gate by Mr Mogodi and Mr Makaba was never asked to the *Plaintiff* to respond to.

Applicable Legal Principles

[60] The test for negligence is: *whether the reasonable person in the position of a Defendant in a matter would have foreseen the reasonable possibility of his conduct injuring another and causing him patrimonial loss, and if so, whether the reasonable*

person would have taken reasonable steps to guard against the occurrence of harm. The test was formulated as follows by Holmes JA in **Kruger v Coetzee:**[4]

> 'For the purpose 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.'

[61] What steps would be reasonable are dependent upon the facts and the circumstances of the case. In **Ngubane v South African Transport Services,**[5] the Court said:

> 'Once it is established that a reasonable man would have foreseen the possibility of harm, the question arises whether he would have taken measures to prevent the occurrence of the foreseeable harm. The answer depends on the circumstances of the case. There are, however , four basic considerations in each case which influence the reaction of the reasonable man in a situation posing a foreseeable risk of harm to others: (a) the degree or extent of the risk created by the actor's conduct; (b) the gravity of the possible consequences if the risk of harm materiales; (c) the utility of the actor's conduct; and (d) the burden of eliminating the risk of harm.'

[62] In **McIntosh v Premier, KwaZulu Natal**[6] Scott JA held:

---

[4] **Kruger v Coetzee** 1966 (2) SA 428 (A) at 430 E-F
[5] Ngubane v South African Transport Services 1991 (1) SA 756 (A) at 776 E-1
[6] McIntosh v Premier, KwaZulu Natal 2008 (6) SA 1 (SCA) par 12

'The second enquiry is whether there was fault, in this case negligence. As is apparent from the much-quoted dictum of Holmes JA in *Kruger v Coetzee* 1966(2) SA 428 (A) at 430 E-F the issue of negligence itself involves a twofold inquiry. The first is: "was the harm reasonably foreseeable?" The second is: "would the *diligens paterfamilias* take reasonable steps to guard against such occurrence and did the defendant fail to take those steps?" The answer to the second inquiry is frequently expressed in terms of a duty. The foreseeability requirement is more often than not assumed and the inquiry is said to be simply *whether the defendant had a duty to take one or other step, such as drive in a particular way or perform some or perform some or other positive act,* and, if so, *whether the failure on the part of the defendant to do so amounted to a breach of that duty*. But the word *'duty'*, and sometimes even the expression *'legal duty'* in this context, must not be confused with the concept of *'legal duty'* in the context of wrongfulness which, as has been indicated, is distinct from the issue of negligence. I mention this because this confusion was not only apparent in the arguments presented to us in this case but is frequently encountered in reported cases. The use of the expression *'duty of care'* is similarly a source of confusion. In English law *'duty of care'* is used to denote both what in South African law would be the second leg of the inquiry into negligence and legal duty in the context of wrongfulness. As Brand JA observed in ***Trustees for the Time Being of Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd***[7] at 144 F, *'duty of care'* in English law, 'Straddles both elements of wrongfulness and negligence.'

[63] In **Cecilia Goliath v Member of the Executive Council for Health, Eastern Cape**[8] the Supreme Court of Appeal held: 'In **Sardi v Standard and General Insurance Co Ltd**,[9] Holmes JA simplified this concept by explaining that it is inappropriate to resort to piecemeal processes of reasoning and to split up the enquiry regarding proof of negligence into two stages. He emphasized that there is only one enquiry, namely whether the Plaintiff, having regard to all of the evidence in

[7] (545/2004) [2005] ZASCA 109; [2007] 1 All SA 240 (SCA); 2006 (3) SA 138 (SCA) (25 November 2005)
[8] (085/2014) [2014] ZASCA 182 (25 November 2014) para 11
[9] 1977 (3) SA 776 (A0 at 780C-H

the case, has discharged the onus of proving, on a balance of probabilities, the negligence averted against the defendant. In that regard the learned Judge of Appeal stated:

> "As INNEs, C.J., pertinently insisted in **Van Wyk v Lewis,**[10] "It is really a question of inference." It is perhaps better to leave the question in the realm of inference than to become enmeshed in the evolved mystique of the maxim. The person against whom the inference of negligence is so sought to be drawn, may give or adduce evidence seeking to explain that the occurrence was unrelated to any negligence on his part. The Court will test the explanation by considerations such as probability and credibility, see **Rankisson & Son v Springfield Omnibus Services (Pty) Ltd**.[11]

In consideration, the Court has to decide whether, on all of the evidence and the probabilities and the inferences, the *Plaintiff* has discharged the *onus* of proof on the pleadings on a preponderance of probability, just as the Court would do in any other case concerning negligence."

[64] The legal question of factual causation is whether the wrongful conduct or omission was a factual cause of the loss. In **Lee,**[12] the Court described that enquiry as follows: 'The enquiry as to factual causation generally results in the application of the so-called *'but for'* test, which is designed to determine whether a postulated cause can be identified as a *causa sine qua non* of the loss in question. This test is applied by asking whether but for the wrongful act or omission of the defendant the event giving rise to the loss sustained by the plaintiff would have occurred.'

[65] In **Bentley,**[13] the Court, Corbett CJ enunciated that enquiry:

> 'The enquiry as to factual causation is generally conducted by applying the so-called *'but for'* test, which is designed to determine whether a postulated cause can be identified as a causa sine qua non of the loss in question. In

[10] 1924 AD 438 at p.445, lines 8-9
[11] 1964(1) SA 609 (N) at p.616D.
[12] Lee v Minister of Correctional Services 2013 (2) SA 144 CC
[13] International Shipping Co (Pty) Ltd v Bentley 1990 (1) SA

order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such a hypothesis the plaintiff's loss would have ensued or not. If it would in any event ensued, then the wrongful conduct was not a cause of the loss; alter, if it would not have ensued.'

[66] In **Lee v Minister of Correctional Services,**[14] the Court held: 'In the case of 'positive' conduct or commission on the part of the defendant, the conduct is mentally removed to determine whether the relevant consequence would still have resulted. However, in the case of an omission the *'but-for'* test requires that a hypothetical positive act be inserted in the particular set of facts, the so-called 'mental removal of the defendant's omission.' This means that reasonable conduct of the Defendant would be inserted into the set of facts. However, as will be shown in detail later, the rule regarding the application of the test in positive acts and omission cases is not inflexible. There are cases in which the strict application of the rule would result in an injustice, hence a requirement for flexibility. The other reason is because it is not always easy to draw the line between a positive act and an omission. Indeed, there is no magic formula by which one can generally establish a causal nexus. The existence of the nexus will be dependent on the facts of a particular case.'

[67] In **Lee v Minister of Correctional Services,**[15] the Court held:

'Application of the 'but for' test is not based on mathematics, pure science or philosophy. It is a matter of common sense, based on the practical way in which the ordinary person's mind works against the background of the everyday-life experiences.'

[68] The criterium of wrongfulness ultimately depends on a judicial determination of whether, assuming all the other elements of delictual liability are present, it would be reasonable to impose liability on a defendant for the damages flowing from specific

[14] 2013 (2) SA 144 CC
[15] 2013 (2) SA 144 CC

conduct. Whether conduct is wrongful is tested against the legal convictions of the community which are, '*by necessity underpinned and informed by the norms and values of our society, embodied in the Constitution.'*

[69] In **Stellenbosch Farmers' Winery Group Ltd & Another v Martell et Cie Others**[16] Nienaber JA held: 'To come to a conclusion on the disputed issues a court must make findings on

(a) the credibility of various factual witnesses.
(b) their reliability; and
(c) the probability

As to (a), the court's finding on the credibility of a particular witness depends on its impression about the veracity THE WITNESS. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as

(i) the witness' candor and demeanor in the witness-box,

(ii) his bias, latent and blatant,

(iii) internal contradictions in his evidence,

(iv) external contradictions with what was pleaded or put on his behalf or with established fact or with his own extra curial statements or actions,

(v) the probability or improbability of particular aspects of his version,

(vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events.

As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the

[16] (427/01) [2002] ZASCA 98; 2003(1) SA 11 SCA

event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be rare one, occurs when a court's credibility finding compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.'

[70] The Supreme of Appeal, in **Gouda Boerdery Bk v Transnet Ltd**[17] the Court held:

> '[12] It is now well established that wrongfulness is a requirement for liability under the modern Aquilian action. Negligent conduct giving rise to loss, unless also wrongful, is therefore not actionable.
>
> But the issue of wrongfulness is more often than not uncontentious as plaintiff's action will be founded upon conduct which, if held to be culpable, would-be prima facie wrongful. Typically this is so where negligent conduct takes the form of a positive act which causes physical harm. Where the element of wrongfulness gains importance is in relation to liability for omissions and pure economic loss. The inquiry as to wrongfulness will then involve a determination of the existence or otherwise of a legal duty owed by the defendant to the plaintiff to act without negligence: in other words to avoid negligently causing the plaintiff harm. **This will be a matter for judicial judgment involving criteria of reasonableness, policy and, where appropriate, constitutional norms (own emphasis).** If a legal duty is found to have existed, the next inquiry will be whether the defendant was negligent. The test to be applied would be that formulated in **Kruger v Coetzee,**[18] involving as it does, first, a determination of the issue of foreseeability and,

---

[17] (314/03) [2004] ZASCA 85; [2004] 4 All SA 500 (SCA); 2005 (5) SA 490 (SCA) (27 September 2004) para 12
[18] 1966 (2) SA 428 (A) at 430 E-F

second, a comparison between what steps a reasonable person would have taken and what steps, if any, the defendant actually took. While conceptually the inquiry as to wrongfulness might be anterior to the enquiry as to negligence, it is equally so that without negligence the issue of wrongfulness does not arise for conduct will not be wrongful if there is no negligence. Depending on the circumstances, therefore, it may be convenient to assume the existence of a legal duty and consider first the issue of negligence. It may also be convenient for that matter, when the issue of wrongfulness is considered first, to assume for that purpose the existence of negligence. The courts have in the past sometimes determined the issue of foreseeability as part of the inquiry into wrongfulness and, after finding that there was a legal duty to act reasonably, proceeded to determine the second leg of the negligence inquiry, the first (being foreseeability) having already been decided. If this approach is adopted, it is important not to overlook the distinction between negligence and wrongfulness.'

Causation

[71] The element of causation consists of factual causation and legal causation. The former is based on the relevant facts whether is a break in the chain of events that caused the harm. Legal causation on the other hand determines whether damage that occurred is too remote to reasonably be imputed to the defendant.

[72] The courts, in determining factual causation have employed the *conditio sine qua non* theory or the *'but for'* test. In **Minister of Police v Skosana**[19] the Court held:

'causation in the law of delict involves two distinct enquiries, namely (a) whether the defendant's wrongful act was a cause in fact of the plaintiff's loss, and (b) if so, whether and to what extent the defendant should be held liable for the loss sustained by the plaintiff this latter enquiry often being referred to as the question of the remoteness of damage) …. The enquiry as to factual

[19] 1977 (1) SA 31 (A) 34 F

causation generally results in the application of the so-called but-for test, which is designed to determine whether a postulated cause can be identified as a *causa sine quo non* of the loss in question. This test is applied by asking whether but for the wrongful act or omission of the defendant the event giving rise to the loss sustained by the plaintiff would have occurred… **in order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the unlawful act or omission of the defendant (own emphasis)**. In some instances, this enquiry may be satisfactorily conducted merely by mentally eliminating the unlawful conduct of the defendant and asking whether, the remaining circumstances being the same, the event causing harm to plaintiff would have occurred or not. If it would, then the unlawful conduct of the defendant was not a cause in fact of this event, but if it would not have occurred, then it may be taken that the defendant's unlawful act was a cause. This process of mental elimination may be applied with complete logic to a straightforward positive act which is wholly unlawful…'

[73] In **Dlamini v Member of the Executive Council, Department of Education, Mpumalanga Provincial Goverment**[20] the court held: 'the legal duty or duty of care towards learners by the school exists or is inferred by the nature of the relationship between the school, parents and learners…'

Application of the Law on 1. The legal principles; and
2. The evidence given in the trial

[74] Before we start applying the legal principles to the evidence lead by all the witnesses in this trial, it is important to look at the court case quoted in this judgement, **Stellenbosch Farmers' Winery Group Ltd & Another v Martell et Cie Others.**[21] The Honorable Judge Nienaber JA held: 'To come to a conclusion on disputed issues, a court must make findings on

(a) the credibility of various factual witnesses.

[20] (885/2016[2017] ZAGPPHC 814, para 22
[21] (427/01) [2002] ZASCA 98; 2003(1) SA 11 SCA

(b) their reliability; and
(c) the probabilities.'

[75] In this trial as already mentioned, the *Plaintiff* testified together with her teammate and the photographer. It is the Defendant's view that only the sport teacher is required to testify.

[76] As the presiding Judge in this matter, I was able to make a finding on the witnesses' (*Plaintiff* and her teammate's) credibility by looking at the witness' candor and demeanor in the witness box, to which I was impressed by the way that both these two ladies handled the questions put to them by their legal representatives and the cross-examination by the defence. They were calm and their answer was clear and without a doubt true. There was no bias, latent and blatant internal contradiction in their evidence regarding the day of the incident as well as to how the incident occurred. The quality of their evidence, their integrity and the independence of the recall of the incident on the 30th July 2015 was clear.

[77] The *Plaintiff* and her teammate's evidence correlated with one another regarding the following aspects:

(i) The Netball team *were instructed in class to go and practice netball* on the netball grounds.

(ii) Regarding the surface, both described the *surface as red soil, patched of grass and stones.*

(iii) As to the question to describe the *level of the ground* (Netball ground), both replied *uneven*.

(iv)

(v) They also testified that prior to practice during the school year, they (netball players) will clean the Netball field themselves.

[78] The teammate's evidence was not helpful as to how the *Plaintiff* fell. This is further confirmation of the reliability of this witnesses' evidence as to the rest of the aspect regarding the incident.

[79] The evidence of the photographer was not as pure as that of the *Plaintiff* and her teammate. One was getting the impression that the evidence of this witness was to sense a bit bias.

[80] The Defence' witness, Mr Mashaba, was not your ideal witness to say the least. His attitude was not that of a teacher (educator) one would expect to see in the witness-box. He sometimes was reluctant to answer questions and even if he answered a question there were some questions that were answered without clarity and precision.

[81] The *Plaintiff* must prove delictual liability of the Defendant in order to be successful with this action. It is trite that a delictual claim for damages should have all the elements of a delict namely: an act (*actus reus)* that is unlawful or wrongful, that was performed negligently (fault, in particular *culpa*) and that was the cause of the harm incurred.[22] In order to determine negligence, one has to decide whether or not the *reasonable person in the position of a Defendant, would have foreseen the reasonable possibility of his conduct injuring another and causing him/her patrimonial loss,* and if so, *whether the reasonable person would have taken reasonable steps to guard against the occurrence of harm.* This test was formulated by Holmes JA in **Kruger v Coetzee.[23]**

[82] To answer the question as to whether or not a *reasonable person in the position of the Defendant would have foreseen the reasonable possibility of his conduct injuring another and causing him/her patrimonial loss,* one can just look at the answer given by the teacher Mr Mashaba when he was asked and I quote verbatim: 'Don't you think you must go with student to the Netball field?" to which he replied, "It is necessary, we gather here at the gate, all of a sudden they disappear to the ground site.' His answer 'it is necessary' and 'all of a sudden they disappear to the

[22] Neethling JP, Potgieter JM and VisserPJ: The Law of Delict (2010) p 34 ff.
[23] 1966 (2) SA 428 (A) at 430 E-F

ground site', is clear that he did foresee the reasonable possibility of an injury (patrimonial loss) to the *Plaintiff.* Mr Moshaba answered the question by stating that: 'all of a sudden they disappear', is an indication that they were not supposed to leave the gate and go alone to the netball grounds.

[83] In **Ngubane v South African Transport Services** [24] the court said:

> 'Once it is established that a reasonable man would have foreseen the possibility of harm, the question arises whether he would have taken measures to prevent the occurrence of the foreseeable harm. The answer depends on the circumstances of the case. There are, however , four basic considerations in each case which influence the reaction of the reasonable man in a situation posing a foreseeable risk of harm to others: (a) the degree or extent of the risk created by the actor's conduct; (b) the gravity of the possible consequences if the risk of harm materializes; (c) the utility of the actor's conduct; and (d) the burden of eliminating the risk of harm."

[84] It is clear the court is of the opinion that a reasonable man would have foreseen the possibility of harm as set out in para 82 of this judgement.

[85] The question to be answered now is the four basic considerations mentioned in **Ngubane v South African Transport Services.**[25] The first consideration according to *Ngubane*[26] is, *'the degree or extent of the risk created by the actor's conduct.'* The risk created by the *Defendant* (Mr Mashaba) was to give the ball to the *Plaintiff* and her teammates at the gate.

The Second consideration is, *'the gravity of the possible consequences if the risk materializes.*' The *Defendant's* (Mr Mashaba's) evidence was that, 'Netball is a contact sport.' This is indicative of the gravity of the consequences if the risk materializes.

---

[24] Ibid n 5
[25] Ibid n 5
[26] Ibid n 5

The Third consideration is *'the utility of the actor's conduct.'* The *Defendant's* (Mr Mashaba's) evidence, and I quote verbatim: 'controlling the gate and learners only allowed to play Netball if recognized by the coach', is confirmation by the *Defendant* not allowing learners to play Netball if they are not part of the team. The act of giving the ball before the learners arrive at the Netball ground to the learners cannot be seen as a positive conduct.

The Fourth consideration is, *'the burden of eliminating the risk of harm.'* This falls directly or solely on the *Defendant,* if one looks at the answer given to the court by the *Defendant* (Mr Mashaba) in his evidence (para 42) when asked about the Netball ground's surface, he replied, 'that before learners play, they look around the ground to see if something is wrong before they play. They also look for places that is dangerous for them.' Having the above four considerations in mind it is clear that the reasonable man in the situation of the *Defendant* would not have acted in the way the *Defendant* acted.

[86] In **Kruger v Coetzee**[27] the court used the *words, 'diligens paterfamilias'* in the position of the *Defendant.* Indicating that *Defendant* is in the shoes of the parent when attending to children at school and school activities.

[87] Regarding duty of care Scott JA held in **McIntosh v Premier, KwaZulu Natal,**[28] 'The answer to the second inquiry is frequently expressed in terms of a duty. The foreseeability requirement is more often than not assumed and the inquiry is said to be simply *whether the defendant had a duty to take one or other step, such as drive in a particular way or perform some or perform some or other positive act, and, if so, whether the failure on the part of the defendant to do so amounted to a breach of that duty.* But the word *'duty'*, and sometimes even the expression *'legal duty'* in this context, must not be confused with the concept of *'legal duty'* in the context of wrongfulness which, as has been indicated, is distinct from the issue of negligence.' I mention this because this confusion was not only apparent in the arguments presented to us in this case but is frequently encountered in reported cases. The use of the expression *'duty of care'* is similarly a source of confusion. In English law, *'duty*

[27] 1966 (2) SA 428 (A) at 430 E-F
[28] 2008 (6) SA 1 (SCA)

of care' is used to denote both what in South African law would be the second leg of the inquiry into negligence and legal duty in the context of wrongfulness. As Brand JA observed in *Trustees, Two Oceans Aquarium Trust*[29] at 144 F, *'duty of care'* in English law: 'Straddles both elements of wrongfulness and negligence.'

[88] It is not necessary in this matter to consider all the elements applicable when discussing the concept of legal duty. In the pleadings the *Plaintiff* in paragraph 8 discussed the liability of the state which include paragraph 8.9 which I quote verbatim, 'By reason of the foregoing the employee referred to above, owed the Plaintiff a legal duty to provide control and supervision of learners that would create and maintain a safe environment, to exercise such control and supervision without negligence and to take reasonable precautions to prevent physical harm being sustained by the *Plaintiff* while attending school', to which the *Defendant* admits this duty in his Plea.

[89] As mentioned before in this judgment *it is trite factual causation asks the question of whether the wrongful conduct or omission was a factual cause of the loss.*

[90] In **Lee v Minister of Correctional Services**[30] as already quoted in this judgement the court held: 'The enquiry as to factual causation generally results in the application of the so-called 'but for' test, which is designed to determine whether a postulated cause can be identified as a *causa sine qua non* of the loss in question. This test is applied by asking whether but for the wrongful act or omission of the defendant the event giving rise to the loss sustained by the plaintiff would have occurred.'

It was further held by the court that, 'Application of the 'but for' test is not based on mathematics, pure science or philosophy. It is a matter of common sense, based on the practical way in which the ordinary person's mind works against the background of the everyday-life experiences.'[31]

---

[29] Ibid n 7
[30] Ibid n 12
[31] Ibid n 12

[91] The question as to what caused the injury and factual cause of loss, the answer is clear from the evidence of the *Plaintiff*, that being of the Netball surface being 'uneven' causing the *Plaintiff* to trip and getting injured.

[92] If one applies the 'but for' test on the evidence lead, the question that needs to be considered is:

> 'but if the teacher was present at the netball grounds at the time of the incident/accident would the *Plaintiff* also have tripped and injured herself?' To answer this question, the consideration should not be 'if the teacher would and could have prevented the *Plaintiff* in falling to the ground, by assisting her physically not to fall to the ground.' To answer this question, consideration should be given to the *Plaintiff's* and her teammate's evidence which states that, 'they cleaned the Netball ground prior to playing.' If the teacher was present, at the time that the *Plaintiff* and her teammates arrived at the Netball ground, they would have cleaned the Netball ground first (and levelled the playing field) before they started playing, as testified by the *Plaintiff* and her teammate, which was not the case on the day of the incident/accident.

[93] In light of the above, I consider whether the *Plaintiff* has on a balance of probabilities, discharged the onus of proof that rests with her. In **Selmolele v Makhado**[32] the court said that the approach to the question of whether the onus has been discharged was dealt with as follows:

> 'Ultimately the question is whether the onus on the party, who asserts a state of facts, has been discharged on a balance of probabilities and this depends not on a mechanical quantitative balancing out of pans of the scale of probabilities but, firstly on a qualitative assessment of the truth and/or inherent probabilities of the evidence of the witnesses and, secondly, an ascertainment of which of two versions is the more probable.'

---

[32] Selamolele v Makhado 1988 (2) SA 372 (V) at 374J-375 B

[94] In **Maitland and Kensington Bus Co (Pty) Ltd v Jenningswhere**[33] Davis J said:

> 'For judgement to be given for the Plaintiff the Court must be satisfied that sufficient reliance can be placed on his story for there to exist a strong probability that his version is the true one.'[34]

[95] After considering all the evidence given by the *Plaintiff* and *Defendant* and the subsequent Heads of Arguments of their legal representatives, I am satisfied that sufficient evidence has been given by the *Plaintiff* that her version is the true one and as a result proved that the *Defendant* (which consists of the school, teachers and/or employees of the *school*) are delictual liable for the injury sustained by the Plaintiff. Consequently, I find the *Defendant* liable to compensate the *Plaintiff,* all of the *Plaintiff's* proven damages arising from the injuries sustained by her on the 30th July 2015.

In the circumstances the **following order is made**:

1.The merits and quantum of this action are separated in terms of the provisions of rule 33(4) of the Uniform Rules of Court,

2.The *Defendant*'s application for absolution from the instance is dismissed with costs,

3.The *Defendant* is ordered to compensate all of the Plaintiff's proven or agreed damages arising from the injuries she sustained on 30 July 2015,

4.The *Defendant* is ordered to pay the Plaintiff's taxed or agreed costs for the determination of the issue of liability on a High Court scale, up to and including 10 December 2024, which costs shall include employment of two

---

[33] Maitland and Kensington Bus Co (pty) Ltd v Jenningswhere 1940 CPD 489 at 492

[34] It was further stated in **Ocean Accident and Guarantee Corporation Ltd v Koch** 1963 (4) SA 147 (A), at 157 D that the evidence present by the burdened party much be such that the court can say that *"[w]e think it is more probable than not"* for the burden to be discharged. However, if the probabilities [in relation to the evidence of all parties] are equal, then the burden has not been discharged by the burdened party."

counsel' fees, where applicable, and for attending court on:

4.1. 19 September 2019,

4.2 27 January 2020 (including collapse / reservation fees for 28 & 29 January 2020),

4.3. 28 February2022,

4.4 14th March 2024,

4.4. 21 October 2024,

4.5 22 October 2024,

4.6. 09 December 2024, and

4.7 10 December 2024.

The abovementioned costs shall be paid directly into the trust account of the *Plaintiff*'s Attorneys, the details of which are as follows:

ACCOUNT NAME:	**N. NKALA ATTORNEYS**
BANK:	**FIRST NATIONAL BANK**
TYPE OF ACCOUNT:	**TRUST ACCOUNT**
ACCOUNT NUMBER:	**6[…]**
BRANCH CODE:	**250-130**
REFERENCE No :	**NKA/CVL/M[...]/05161117**

In the event that costs are not agreed, the *Plaintiff* agrees as follows:

6.2 That a notice of taxation shall be served on the *Defendant*'s attorneys of record, and

6.3 The *Plaintiff* shall allow the *Defendant* 7 (seven) court days to make payment of the taxed costs.

7.The quantum hearing of this action is postponed *sine die*.

JD STRÖH

ACTING JUDGE OF THE HIGH COURT

Appearance:

For the Plaintiff: Adv P.M. Leopeng
Instructed by : Nkala Attorneys c/o Makwala & Mabotja Attorneys, Polokwane

For the Defendant: Adv M.E. Ngoetjana
Instructed by: State Attorney, Polokwane

Dates Heard: 9-10 December 2024
Date Reserved: 10 December 2024
Date Delivered: 24 February 2025