



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION JOHANNESBURG)

Case No: 43362/12

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

24 March 2014

EJ FRANCIS

In the matter between:

B[...] M[...] obo MINOR

Plaintiff

and

MINISTER OF POLICE

1st Defendant

MEC FOR BASIC EDUCATION – GAUTENG

2nd Defendant

JUDGMENT

FRANCIS J

Introduction

1. The plaintiff instituted an action for damages against the Minister of Police being the first defendant and the MEC for Basic Education Gauteng being the

second defendant on behalf of her minor son who was injured by a fellow learner at the E[...] T[...] P[...] School (the school) on 14 June 2012. At the commencement of the proceedings the plaintiff withdrew her action against the first defendant and tendered costs.

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2. During the proceedings the parties reached an agreement that should this court find that the second defendant was liable, that the plaintiff should be awarded damages in the sum of R4 523 952.00. It was also agreed that the plaintiff is the mother and natural guardian of T[...] M[...] (T[...]) and that the school is a public school.

3. It was contended in the pleadings that the members of the South African Police Services (SAPS) were negligent in that they ought to have searched all the students entering the premises and if not at least ought to have seen that M[...] P[...] (M[...]) was carrying a sharp object and they failed to do so and when the minor was attacked they ought to have avoided the fight by taking away the tomahawk and they failed to do so. It was contended that the second defendant, its staff members, teachers or employees of the second defendant were negligent and/or wrongful in that they ought to have provided a safe environment or security for the school children and they failed to do so.

The evidence led

4. The plaintiff's first witness was K[...] M[...]. He testified that he was a learner at the school in 2012. He knows T[...] who was a learner at the

school. On 12 June 2012 after they had written their examinations they went to the tennis school grounds during school hours when a fellow learner M[...], assaulted him, T[...] and L[...]. M[...] slapped him with an open hand on his face, pushed L[...] with his hand on his face and slapped T[...] with an open hand. They were assaulted for no apparent

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reason. He was a grade 8 learner, T[...] and L[...] were grade 9 learners and M[...] was a grade 11 learner. M[...] was first taken to Mr Ndebele's office and they also went there after they were told to do so by an educator. Ndebele enquired from them what had happened and they explained that M[...] had assaulted them. Ndebele then went to fetch documents for them to give to their parents. When he returned, M[...] tendered an apology so that they would not be given the forms to take to their parents. Ndebele wrote down their statements and had asked them to write down their names on it which they did. M[...] tendered an apology which was accepted by Ndebele. During the school breaks most of the high school learners play soccer at the tennis grounds. The tennis grounds serve as a playground. They had finished writing exams at 10h00 and went to the grounds. The school is a combined school comprising of a high and primary school. The playground is two lengths of the ground where soccer is played. During a normal school day they have two breaks. There are some other children who are not learners at the school who enter the school premises through the holes in the palisade fence to play soccer there. Those children do not wear school uniform. There are no teachers at the playgrounds during the breaks or any other persons of

authority there. When the assault took place there was no person of authority who was supervising them.

5. M[...] testified that on 14 June 2012 after they had written their exam paper at 10h00, they went to the tennis courts. There are soccer grounds adjacent to the tennis courts. Most of the grade 8 and 9 learners were at the

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tennis courts. They were watching a soccer game between the learners and the boys who had entered the school premises in the holes in the palisade. Those boys are older than them. M[...] then assaulted T[...] with an axe on his head during school hours long after they had written their exams. The incident happened at the tennis court. There were no adults present when the incident happened. After M[...] had chopped T[...] with the axe, it fell and M[...] picked it up and ran away with it holding the axe. M[...] was wearing a pair of grey school trousers with a background jacket that went over his knees, black shoes and had a school bag over his shoulders and was not wearing a shirt. M[...] was supposed to have written an exam with the grade 11 learners but did not do so. He had assaulted T[...] whilst the other learners were busy write their exams. At the time of the incident there were no teachers supervising or watching them or any person of authority.

6. During cross examination he said that after the first assault they met an educator called Sephaka who had asked them if they were also involved in a fight and he took them to the office. He suspects that Sephaka had seen the incident when M[...] was taken to the office by a certain boy. They had

retaliated by assaulting M[...] after he had assaulted them first. Ndebele was going to give them the forms to give to their parents so that they could accompany them to the school to discuss it and to prevent it from happening in the future. They all shook hands to indicate that everything was over. He and his friends apologised. He said that M[...] was wearing a long jacket and had hidden the axe under his jacket. The axe was concealed. He insisted that

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he did not see any educators in the playing areas on 12 and 14 June 2012 and they were not there. They were on the side of the classes at the school. There was no person in authority and if there was such a person he would have stopped the fight. A person in authority is a person who looks after the children so that they do not fight. He was not aware of patrollers who patrolled the school and there were no such persons. If there were patrollers he wanted to know how other people entered the school through the holes. He admitted that the police used to visit the school but does not know what the reason was for that. To his knowledge they did no conduct drug raids of learners but he said he could not dispute that. No students were searched by the police.

7. The second witness called by the plaintiff was J[...] K[...] T[...]. He testified that he is a grade 10 learner at the school and has been at the school since grade 4. He confirmed that on 12 June 2012 he and his friends were assaulted by M[...] at the tennis grounds after they had written their exams. There were no adult persons supervising them at the time. He does not know of patrollers and if there were patrollers patrolling inside and outside of the school, he

would have known about them. In June 2012 there was no educator supervising the children on the playgrounds nor did they supervise the children during the breaks. On 14 June 2012 there was no one supervising the children nor were there any patrollers. He saw M[...] assaulting T[...] with an axe after the children had written the exams and were playing on the tennis courts. He could not estimate how many boys were playing but they

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were many. There were also children who do not attend their school who got into the school through the holes in the palisade fences behind the school. The holes are not a distance away from the gate which is about the length of a soccer field. The tennis court is a little bit further away. Whilst they were being chased by M[...]’s friends, there were no teachers and patrollers who assisted them. After M[...] had assaulted T[...], he ran away through one of the holes and still had the axe on him. The high school is on the one side and the primary school on the other side. He said that there three holes which were there about two to three months before the incident.

8. During cross examination he said that he does not know who had reported the incident of 12 June 2012 to the educators but they were fetched and told that they were needed at the office since they were involved in a fight. He denied that there were patrollers inside and outside the school and at the gates and had never seen them. He said that the repairs in the fence were repaired from time to time but they would be broken again. The repairs would take place after a long time. He was present on 14 June 2012 when M[...] assaulted T[...] with an axe. He did not see him carry the axe since he did not see him approaching

T[...] but saw it when he struck him. He was wearing a long jacket with his hands in his pocket and assumed that the axe was hidden. During re-examination he said that there are patrollers at the gate. There are two official entrances to the school. The big gate at the high school that is used by vehicles is been guarded by the Community Police Forum (CPF). The CPF do not patrol the school grounds. He does not know of any other incidents of boys fighting at the school except for the one that he was involved in.

9. The second defendant's first witness was Christine Manyaka. She is a principal at the P[...] primary school. In 2012 she was the acting principal at the school for 5 months prior to June 2012. She was unaware of the incident of 12 June 2012 which was resolved between the boys and an educator. She was not present at the school on 14 June 2012 and was on leave attending an interview for the principal's post. She returned to school on the Monday when the incident of 14 June 2012 was reported to her. She went to the deputy principal of the high school, a Mr Mbatha and had asked him about what had happened. He referred her to Mr Molefe who was the head of commerce in the high school section. She investigated the matter and spoke to Molefe who reported to her what had happened. When asked what measures had been put in place for the safety of the learners and the school, she said that they have a safety security policy and a disciplinary policy. They have a code of conduct for practices and procedures at the school. The policy is to ensure that safety prevails at the school environment. This is communicated at the assembly about what they can do and cannot do. The teachers in the classes also talk about it. There are safety awareness campaigns and they call the police. They

teach the learners to tolerate and love one another and that they must comply with the regulations at school. They are thought that there is no bullying, fighting and stealing. They have duty rosters where there are four educators who monitor in the morning the assembly and do late coming control and ensure that the learners are safe in the student environment. She

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said that they have a roster document. There are four educators and the roster contains different dates about who should monitor. Dates are allocated for educators who are on duty. The document is amended yearly and they used the old one when they amend it. There are four educators assigned for the high school for safety and to direct them about the duties for the day and the other educators who are not on duty would assist with monitoring. They will be on duty to ensure the safety of learners. The roster is for the entire school. The other learners go to the feeding scheme, some stay in the classes, others in the environment and others play on the play grounds. They had about 1500 learners at the time and about 43 educators for both schools in total. There is a representative's council of learners (RCL) which is like the old prefect system. There were more than 20 RCL's who were elected democratically. There are two learners per class who are part of the RCL. They are trained by the department and the teachers location officer. They assist the educators and report events to the educators. They are the eyes and ears of the educators at school. The school has an extra school support programme (ESSP) which is employed by the Gauteng Education Department. Their function is to patrol the school to ensure safety and work with the CPF. They patrol inside and outside the school and are employed on a 24 hours basis. There are two shifts

starting from 6h00 to 18h00 and 18h00 to 6h00. There were four such employees, two worked during the day and two during the evening. Whilst she was acting as a principal, she knew the patrollers and interacted with them. If they saw that something was wrong, they would report it to her. Their school was not a problematic school and this was the first incident since she

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started there as a deputy in 2008. There are two entrances at the school. There is one from the primary school and one from the high school. There are guards at the gate and they have access control for any vehicle coming in and they would write down time, the date and the person must sign. They patrol the school area for safety. If there is something unusual, they report this to the office. The patrollers started in 2011 and were still in operation during the incident.

10. Manyaka testified that there is a problem with holes in the fences. If the ESSP and grounds men observed a hole in the fence, they would fix it. There is a palisade fence where one or two bars would be removed to enter and if this happened late, they would fix. They have a person who has a welding machine and he will be contacted to fix it. Once one hole has been fixed, another would be opened. She is aware that she has the legal authority to search students if she has a reasonable suspicion. Since the school is not violent they had no suspicion and they never searched any learners. After 14 June 2012, they did a reinforcement at the assembly about tolerance, that they must love one another and the principles of ubuntu. They did not do any random searches as she did not suspect anything. During the exams a

timetable is drawn up with rules and regulations that must be adhered to. The exams start at 9h00 and the learners leave at 10h00. They remain in class until 10h00 and then go out. This is for safety reasons that they all leave together as there is nobody to monitor them and the teachers are busy invigilating. The school has soccer grounds and tennis courts. The tennis court is next to the

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palisade fence and the soccer fields are near the gate which has access control and during teaching time, the gates are locked and only opened during the break. She was not at school on 14 June 2012 but said that the practices and procedures she had put in place were in place and the learners knew that even if she was not there they had to comply with it. She was asked whether she or the others would have been able to detect that M[...] came with an axe to school on 14 June 2012. She said that there are many learners who go to school and they cannot detect if they have weapons. Nobody saw that he had a weapon in his hand and the weapon was invincible. They have school uniform. There are orphan vulnerable children at the school and not all of them have uniforms. In June it is very cold and some of the learners do not have any jerseys to wear and they allow them to wear anything. A learner can wear a jacket to keep warm and they were writing their examinations. Their school is a no fee school and they provide the learners with free transport and most of them eat at school. There are orphans and vulnerable children who live on grants. The vulnerable parents are not working and some are single parents who do piece jobs and some children stay with their grandparents and extended family and some are child headed families. The size of the school is the length of 3 to 4 soccer fields and the primary school is the length of 3

soccer fields. The tennis courts are close to the palisades and it has walls on the side and people at the access gate can view what is happening there. An educator who parks his vehicle next to the tennis courts can see what is happening there. She works with the police and the school has adopted a cop policy. The police would come to the school unannounced to see if everything

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was fine. There is a bush behind the school and the police would patrol the area. If they found a learner there, they would bring the learner to school. The police assist them a lot. In 2011 the police came to their school with her approval and explained about drugs and how to avoid crime. They did drug raids. Whilst she was the acting principal the learners were not searched since they had not experienced violence and there was no need for them to do so. The ESSP do not search students because there was no need to do so. There is a RCL for the high school and they assist with leadership skills and monitoring. They are trained by the teachers and the department. They do what they are taught at workshops. The primary school has a prefect system in place.

11. During cross examination Manyaka said that there is a duty roster in place for the teachers to do monitoring during the school breaks and to ensure the safety of learners. This contributes to the safety of learners. The 1500 learners are not at the same place during the breaks. The roster was introduced for their safety. The two incidents happened when the learners were writing their exams. If they completed their exams at 10h00, and had no other exams the learners would remain at school until 14h45. There is a second exam. She was

asked who would monitor the children between 10h00 and 14h45. She said that they have a time table and some would write until 10h00. After that they would return to classes until the school closed for the day. On 14 June 2012 when she was at school the deputy high school principal and the school management team were on duty. She said that she did not have the roster to

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see who had managed the children on 14 June 2012. It was put to her that two witnesses testified that no one had monitored them on 14 June 2012. She said that the educators complied and they were on duty so they had to comply. She said that although she was not at school, they did comply with it. The patrollers and the CFP people were not the same but worked together. The CFP works with the patrollers inside the school. The patrollers would patrol every day during the breaks and if they saw something they would report it to the office. They would intervene and bring the learners to the office. If there was no teaching and learning they would patrol during the day. There are two patrollers during the day and two at night. There are two entrances and the main entrance is at the high school. The entrance at the primary school is used mainly for buses and then it is locked and they use the main entrance. The ESSP wear any clothes and they are not provided with uniform. The CFP wears orange uniform. They come if there is a need to assist and they are not assigned any work at school. The ESSP works inside the school. The prefects only assist when there was for example a window that was broken etc. It was put to her that on 12 and 14 June 2012 there were no educators who monitored the children on the playgrounds. She said that on 12 June 2012 one educator had intervened and she heard that the matter was resolved and they were on

duty. She insisted that there were patrollers despite the evidence of the plaintiff's witnesses that there were none. It was put to her that there were no patrollers and no supervision of the children had taken place on 12 and 14 June 2012. She said that they were patrolling and there was a report to an educator who supervised and the educator interacted about the problem that

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was brought by the ESSP. The educators cannot be everywhere. They move around the school and not all learners go to play at the sports fields ground. Some are in the classes and the others go to the feeding scheme etc. They did not count the number of learners who were at the sports fields.

12. The second witness called by the second defendant was Shirley Gqoba. She is sergeant in the SAPS and is stationed at Mondeor police station. She is employed as a social crime prevention co-ordinator and her job entails visiting the schools and asking them about the problems that they were facing. She has contact with the head of the school. After the problem has been explained to her she would search the schools and would sit with the school safety committees. She would conduct educational programmes at the school if the head of the school had asked for that. The school is one of the schools under her jurisdiction. They visit the school from time to time and she is still doing so. She would enter the school and go to the school principal's office as she must first contact her. She would sit with the principal and talk about the problems that the principal was facing. She did not encounter any problem at the school that she was aware of. She has previously done searches for drugs at the school before. She does not recall that she was called about fighting or

assault at the school. She was asked if she had arranged patrolling at the school as co-ordinators. She said that if she could not go, she would ask the patrolling van to patrol around the school. She tried to go to the school once a week. If she is near the school she will enter and inspect it to see if it was in order without the principal's invite. In some other cases she would go to the

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school when she is invited and the principal would tell her to go and see if things were in order and at times they would sit in the office and discuss problems and solutions.

13. The third witness called by the second defendant was Montha Monanyane. She testified that she was an ESSP patroller at the school since 15 November 2011. She worked shifts at the school from 6h00 to 18h00 for two days and would then be off for the next two days and would work night shift starting from 18h00 to 6h00 for the next two days. She was a patroller on 14 June 2012 and was working day shift. There were two of them who worked as a patroller. One of them worked at the gate for access control and she patrolled around the school. There were two patrollers on duty at a particular time. When she patrolling she would look around the school. If there was a group of children standing around and she was suspicious, she would go to them and enquire what was happening. If there were small fights or problems she would report it to the principal. *****They were not allowed to search school children. They were trained by the department of safety at the Mondeor police station about what to do with crime and domestic violence. As patrollers they wore orange skippers with CPF written on it and reflecting jackets with

community patrollers written on it and had boots and jeans. The current patrollers at the school no longer wearing uniform since the department does not have a budget for uniform. She was a patroller on 14 June 2012 and was patrolling alone. She starts patrolling at the grounds and then go the tennis fields and around the school and then to the primary school. On that day she

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did what she usually did on a daily basis. Whilst she was at the primary school after having passed the test courts, a group of children reported to her that children were fighting at the tennis courts. She went to the tennis court and found children at the gate. They told her that the children were at the clinic. She went there and found the injured child and a doctor helped him. An ambulance was summonsed and the child was taken away. She did not see how the child was injured and he had been injured at the grounds. When she is at the primary school she cannot see what was happening at the tennis courts. She did not see children carrying weapons. She was asked whether from November 2011 to February 2013 she had witnessed any incidents of violence and she said that there were children who fought and she had stopped it. They did not injure each other and had fought with their hands. This happened outside the school premises after school. She knows Thabani who was in that fight and she does not remember the other boy. She does not remember when that incident happened and no exam was written on the day in question. It happened in the middle of June 2012. She went to them and stopped them and told them to go home.

14. During cross examination she said that in June 2012 she was wearing uniform and it would have been easy for learners to recognise them if they were present. She agreed that she was not at the playground when the incident happened on 14 June 2012. It would take her about 15 minutes to patrol the entire school. She would start at the playgrounds and move on. She said that she would patrol mostly when the children were outside and it would depend

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when the school went out and it could be 2 or 3 times. She repeated that one of the patroller remained at the gate and she patrolled the school.

15. The fourth witness called by the second defendant was Maria Molefe. She is employed as an educator at the school. She is the head of the department and is employed since 2001. She said that on 14 June 2012 she had just entered the office to put away some exam papers during the exams when children came to the office and told her that one child had been chopped with an axe by another. She went out of the office and followed those children and other children came along with the child and there were other teachers. She asked the other children and the teachers to take the child to the clinic which was behind the school. She was told that he had been chopped by Mduduzi. She said that on 14 June 2012 the learners were writing exams. The first paper was written at 8h30. There were 2 hours papers and 3 hours paper. After writing the exams those who finished their papers would go out not at the same time. If another paper had to be written a siren would go off for them to return to write. The learners reported to her between 9h45 and 10h00 about the injured boy. She said that exhibit E is roster for the educators who had to

do certain assembly and gate duties in 2014. The first column contains the dates. The second is for assembly duty and those responsible for the running of the assembly. Another showed the gates where the educators who has to do there. There is also a column for the short and long break and there are also teachers who look at the children who were eating and playing. She said that the educators walk around during the breaks to supervise and see if the

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children are safe and see if the outside people are coming in and bringing outside things in. Exhibit F is the roster for March 2014 and is a time table for the ESSP patrollers. They do gate control and help to patrol the school yard and move around. There was a similar duty roster for 2012 and the educators did duty in terms of the roster. On 14 June 2012 they adhered to the roster. It was put to her that evidence was led that the teachers did not patrol and remained in the staff room. She said that the teachers patrolled and if one looked at the roster there is a column for the managers who would see whether the teachers were at the work. The patrolling by teachers happened in 2012 and even on the day of the incident.

16. During cross examination she said that on 14 June 2012 the incident happened whilst the other children were still busy with the exams. It was put to her that this meant that the educator on duty were still busy with the exams. She said that not all the educators were in the exam rooms and there are ESSP that helped with patrols. She said that the educators on duty only go after the exams to the playground to monitor. She was asked whether if the incident happened whilst the exam was not over, the duty educators would not have

gone on duty yet. She said that she was not sure of that and could not answer it. She said that she was not present at the playgrounds when the incident happened. She could not say if the educator on duty was at the playground and she could not answer the question. It was put to her that the evidence was that the educators were never on duty during the breaks and at the playground. She said that roster showed that there are managers of the educators who had to

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go to the playground. She said that she does not remember who the manager was because she does not have the 2012 roster.

Analysis of the evidence and arguments raised

17. It is common cause that T[...], the plaintiff's son and M[...] were both learners at the school. On 12 June 2012, M[...] had assaulted T[...] and two other learners by slapping him. They reacted and slapped and kicked M[...] which resulted in all of them landed at an office where they saw Ndebele. He wanted to give them letters to take to their but after M[...] had apologised for the incident and they had shaken hands he decided against doing so. It appears from the evidence that was led that M[...] was taken to Ndebele's office by learners and that T[...] and his friends were told by an educator, a Sephaka that since they were involved in the fight they had to go to the office.
18. It is further common cause that two days later on 14 June 2012 after some of the learners had written an exam, went to the tennis grounds where a soccer match was taking place at the tennis grounds. This was at about 10h30 when M[...] who was wearing a long jacket, took out an axe and struck T[...] with it on his head. M[...] had hidden the axe in one of his pockets and none of the

witnesses had seen the axe before the assault took place. They saw it after he had struck T[...] with it. He then fled from the scene and the school premises. T[...] suffered head injuries which caused the plaintiff to institute action for damages against the defendants.

19.

19. A number of witnesses were called by both parties in these proceedings. The plaintiff's case is that the school did not provide any patrollers and educators to monitor the learners during the school breaks and in particular on 12 and 14 June 2012. The defendant contended that it provided patrollers and there were educators who were rostered to supervise the learners during the school breaks and at assembly.

20. The plaintiff sought to hold the second defendant liable on the grounds that the second defendant, its staff members, teachers or employees of the second defendant were negligent and/or wrongful in that they ought to have provided a safe environment or security for the school children and they failed to do so. The conduct of the employees of the second defendant, teachers and/or staff members of the school were negligent and wrongful and caused the said child to be injured.

21. The requirements for liability in our law are set out in *Kruger v Coetzee* 1966(2) SA 428 (A). Holmes JA held at 430E:

“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. Whether a diligens 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 upon the particular circumstances of each case. No hard and fast basis can be laid down. Hence the futility, in general, of seeking guidance from the facts and result of other cases.”

22. This exposition of the requirements of liability was accepted in *Minister of Education and Another v Wynkwardt NO 2004 (3) SA 577 (C)* in which a grade 3 learner at a school with 900 learners and 32 educators was injured. At the time the learner was 9 years and 7 months old. He had climbed over a locked gate and had fallen and injured himself. The learners were warned not to use the gate which was locked. The Court at 580 A to D stated as follows:

“It was not in dispute that 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’ (See: BOE Bank Limited v Ries 2002 (2) SA 39 (SCA)). The conclusion of the Court a quo is premised upon the core finding that the Appellants failed to take ‘reasonable steps to ensure that R, like all his peers, left the school through the correct exit gate’. Mr Gauntlett in my view rightly, points out that the true enquiry is not as to foreseeability but as to what constituted reasonable steps for the Appellants to take the circumstances, and whether these, if taken, would probably have averted the harm”.

23. In *Minister of Safety and Security v Van Duivenboden 2002 (6) 431 (SCA)*, applying *Kruger v Coetzee (supra)*, 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 of 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.

24. The duty of care depends on the risks that school children are subjected to. In

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Rusere v The Jesuit Fathers 1970(4) SA 537 (R) a group of children between the ages of seven and ten were left unattended in the school grounds and engaged in a game using bows and arrows during which an eight-year-old child sustained a serious injury to his eye. It was held at 539F-H that at:

“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 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.”

25. It is apparent from the authorities referred to above that where learners are not kept under the constant supervision of educators this is not in itself a breach of the duty of care owed to such learners. It would depend on the circumstances of each case and to the risk that the learners were exposed to. One should be careful not to place undue demands on public authorities and functionaries 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.

26. The plaintiff contended that the second defendant ought to have provided a safe environment or security for the school children and they failed to do so.

The issue to be determined in this matter is what reasonable steps should the second defendant have taken in the circumstances and whether, if the second defendant had taken those steps, the harm complained of would probably have been averted.

22.

27. The plaintiff's son was 15 years and 7 months old at the time of the assault on him. In my view a learner at his age need not have to been kept under continuous supervision on the school grounds unless there was some hazardous feature present. The evidence led before this court was that the school was not a violent school and this was the first incident of its kind. This was confirmed by J[...] T[...] the plaintiff's second witness and the second defendant's witnesses. It was common cause that the school has a Code of Conduct for both the learners and educators and a safety policy at school. Sergeant Gqoba testified that the police met regularly with the safety committee of the school. The school had adopted a cop policy. The school conducted regular safety awareness campaigns and learners would on a regular basis be thought to be tolerant of each other and about the spirit of Ubuntu. When the incident of 12 June 2012 was brought to the attention of Ndebele he set the disciplinary code and procedure in place by wanting to hand to M[...] and T[...] copies of letters to give to their parents. He did not proceed with it after they had apologised. The school had an elaborate safety and security policy in place.

28. The plaintiff's witnesses testified that the school did not have any patrollers in place. This is obviously not correct since the evidence given by the second defendant's third witness Montha Monanyane that she was employed by the second defendant as a patroller on 15 November 2011 to February 2013 was not disputed or challenged. J[...] T[...] during re-examination testified that there were patrollers but they were manning the main gate. Monanyane

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testified about how she did the patrols. She was doing this alone and had to patrol the combined school which is some 7 lengths of a soccer field. At the time of the incident of 14 June 2012 she was patrolling at the primary school when she was told about the incident. When she went to the scene she found that they had moved. If she was not a patroller, it would mean that she lied about the incident. If she lied and was not there it is unclear how she would have known about the incident. She struck me as an honest witness when she testified and had no reason to tell lies. She had stopped working at the school in February 2013 and no longer had links with the school.

29. The evidence given on behalf of the second defendant that it worked closely in conjunction with members of the CPF and the police was not challenged. It is my finding that the school had four patrollers at the school who were employed by the second defendant. Two worked day shift and the other night shift. During the day shift one of the patrollers manned the main gate and the other did patrol duties. The size of the school was about the lengths of five soccer fields. There were only two gates leading into the school. There were holes made to the perimeter of the wall which used to be closed by the school

at the earliest possible opportunity. Much was made about this by the plaintiff but nothing turns around this since, T[...] was assaulted during school hours by a fellow learner. The position may have been different if he was assaulted by one of the boys who did not belong to the school.

30. Evidence was led by the second defendant that the school comprised of 1500

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learners and about 43 educators. The school had introduced a roster where educators were assigned certain duties. Not all the children played at the soccer and tennis grounds. Some went to the vendors, other to the soup kitchens, other remained in the class rooms and the others played at different places. The school also had 20 learner council representatives who were the eyes and ears of the school. In addition to this as stated above they had two patrollers who worked during the day and other at night. The plaintiff disputed that the educators or persons in authority supervised the learners during the breaks. The evidence led about the roster that was in place was not seriously challenged. An explanation was given why the 2012 roster was no longer available. The explanation was that the school would use the existing roster to draw up a new one. That evidence was not challenged. It is so that none of the educators who were assigned to do duty on 14 June 2012 were called. They should ideally have been called but since the 2012 roster was no longer available it is not sure who should have been called. Both Maria Molefe and Christine Manyaka testified about the existence of such a roster. J[...] T[...] conceded during cross examination that a Mr Sephaka who was an educator probably saw the fight that had taken place on 12 June 2012 which

was the reason why they were told to go to the office. He also conceded that some of the educators used to sit next to the classes during the school breaks. It is my finding that the school had educators who supervised the learners during the breaks but on 14 June 2012 when the incident took place at the tennis grounds there was no adult supervision that had taken place. However it does not follow that the plaintiff has proven its case against the second

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defendant.

31. Did the plaintiff establish that the second defendant and its employees were negligent in that they ought to have provided a safe environment or security for the school learners and did they fail to do so? It is common cause that none of the witnesses saw that M[...] had an axe on him since it was concealed. The school had allowed children who could not afford jerseys to wear jackets etc. as protection to winter. It is clear from the evidence led that no one would have been able to have prevented M[...] from assaulting the plaintiff. Neither a patroller or an educator would have been able to do so. As stated earlier the school did not have a history of violence. No body searches were conducted on the learners when they went to school due to the fact that it was not a violent school. The school had on a regular basis emphasised that bullying would not be allowed and that there should be tolerance towards each other. The police also confirmed that the school had no history of violence so there was no need to conduct body searches on the learners. The incident of 14 June 2012 was the first of its kind at the school. .

32. In my view, the plaintiff did not establish on the evidence that a failure by the second defendant to take reasonable steps which, if taken, would have prevented T[...] from being assaulted by M[...]. It is also not clear what reasonable steps the second defendant should have taken to prevent harm to be caused to T[...]. The plaintiff did not show that other steps not taken by the second defendant constituted reasonable measures which, if applied, would

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have prevented M[...] from doing what he did. It was not the plaintiff's case that the school should after the incident of the incident of 12 June 2001 have foreseen that M[...] was going to take revenge. There is no evidence before this court that M[...] was known to be a violent person or had threatened to get even with T[...]. He had assaulted T[...] and his friends two days before the incident but got off worse after he was assaulted and kicked by T[...] and his friends. All the parties involved in the first incident than made peace and the matter was laid to rest.

33. The school did provide the school children with a safe learning environment. What should be taken into account is that the school did not have a history of violence. This was the first violent incident that had happened at the school. The incident of 12 June 2012 was not that violent that should have raised the alarm bells. The school does not cater for affluent learners. It is a combined school and is a non fee school. It serves the poorest of the poor learners. It had patrollers and educators supervising learners. As stated earlier the school has a disciplinary code and procedure applicable to learners and educators. It has a safety policy in place. Learners were encouraged to love one another

and to be tolerant towards each other. The contents of these documents were brought to all the learners attention from time to time during discussions in class and during school assemblies. The numerous means implement by the school in order to ensure the safety of learners were extensive and reasonable under the circumstances. It could not be expected of the educators or the second defendant to have ensured the safety of each student by ensuring that

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each learner is kept under constant surveillance.

34. The primary objective of educators and schools is to educate. The question of the security of learners is ancillary thereto only by virtue of them being in the custody of the head of the school. To expect a school to ensure the full security of each and every learner during the entire school day will necessarily detract substantially from the primary objective of educating.
35. The plaintiff has failed to prove any grounds of negligence and or wrongfulness on the part of the second defendant and or its employees. The action stands to be dismissed.
36. I do not believe that this is a matter where costs should follow the result. An appropriate order is that each party is to pay for its own costs.
37. In the circumstances I make the following order:
 - 37.1 The action is dismissed.

37.2 Each party is to pay their own costs.

28.

FRANCIS J

JUDGE OF THE HIGH COURT

FOR PLAINTIFF : H B MARAIS SC WITH D J COMBRINK
INSTRUCTED BY DUDULA ATTORNEYS

FOR 2ND DEFENDANT : R BEDHESI SC WITH M ZULU
INSTRUCTED BY STATE ATTORNEY

DATE OF HEARING : 10, 11, 12, 14 MARCH 2014

DATE OF JUDGMENT : 26 MARCH 2014