IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

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

Date: ***17th April 2019*** Signature: _____

APPEAL CASE NO: A5004/2018

COURT *A QUO* CASE NO: 2013/14863

DATE: 17th APRIL 2019

In the matter between:

THE MEMBER OF THE EXECUTIVE COUNCIL FOR
EDUCATION OF THE GAUTENG PROVINCIAL GOVERNMENT Appellant

and

R, D, for and on behalf of
R, K Respondent

JUDGMENT

Adams J (Crutchfield AJ & Mdalana AJ concurring):

[1]. On Friday, the 30th of April 2010, at approximately 15:00 in the afternoon a metal soccer goalpost, on the soccer field of Crystal Park High School, fell onto K R ('K') just before a soccer game between his school team and a team from a neighbouring school. K and two of his teammates had just finished hanging the net to the goalpost, when it fell onto him whilst he was attempting to jump off the post on which he had sat whilst hanging the net. The structure toppled onto K, who sustained serious head injuries.

[2]. K's mother, the respondent in this appeal and the plaintiff in the court *a quo*, subsequently claimed delictual damages from the appellant, the defendant *a quo*, in his official capacity as the person in charge of and responsible for the school and its authorities. On the 9th of December 2016 the Gauteng Local Division of the High Court (Mahalelo AJ) gave judgment on the liability / merits / negligence aspect of the matter in favour of the respondent against the appellant and held that the appellant is liable for the damages suffered by the respondent in her representative capacity as mother and natural guardian of K as a result of the injuries suffered by K. The judgment was based on a finding that the school was causally negligent in relation to K's injury as a result of the goalpost falling onto him. The whole unfortunate incident, so Mahalelo AJ found, should have been reasonably foreseeable by the school and its employees and they should have taken reasonable steps to guard against it. They failed to take such steps and the court *a quo* accordingly concluded that the appellant was negligent and that his negligence was causally connected to the damages which the respondent suffered.

[3]. This judgment and the findings by Mahalelo AJ are now before us on appeal, which is with the leave of the Court *a quo*. According to the appellant's notice of appeal, the appeal is mainly against the factual findings by the trial court that K was injured whilst he was hanging the net to the goalpost. The

appellant contends that the court erred in rejecting the appellant's version that K and his friends were in fact swinging from the goalpost, which caused it to tip over and fall on top of him. In my view, nothing really turns on this factual finding. As pointed out by Mahalelo AJ in her judgment, irrespective of whether K was hanging nets or swinging from the poles, his injuries resulted from negligence on the part of the school and its employees. This finding, which is a combination of factual and legal findings, is also appealed against by the appellant.

[4]. The common cause facts in this matter are the following: At the relevant time during 2010 K was a learner at Crystal Park High School. He was a member of the school's soccer team. On the afternoon of Friday, the 30th April 2010, K's school team was scheduled to play a match against Petit High School, a neighbouring school. Before the start of the game K and his team mates were on the soccer fields at Crystal Park High School awaiting the arrival of the boys from Petit High School. At some point during this time whilst they were waiting for the opposing team to arrive and whilst they were busy warming up, K was on the cross – bar of one of the goalposts, which was described as loose standing in that it was not lodged or dug into the ground, but was held upright by its structure and form, which had the two upright poles and the cross – bar, constituting the main goal post. To the back of the three-legged rectangle, which constituted the actual goalpost, was a structure that held it upright by a base that was formed by three poles which lay on the ground.

[5]. In my view, this structure was clearly unstable and the evidence for this conclusion can be found in the mere fact that it toppled over when disturbed by K's jump when he wanted to dismount himself from the cross – bar. Also, it was the evidence of one of the staff of the school that they (the administrative assistants), whose duty it was to fit the nets to the goalposts, performed this task by tipping the goalpost over, meaning that the goalposts were placed 'face down' and the staff would then simply tie the net around the goalpost and the

rear part thereof. After the nets had been fitted, they would then lift the poles back into position. As I indicated above, the goalposts, two of them, were positioned on the soccer field of the school and any and / or all school children, including K and his soccer team mates, had unfettered access to the field and the goalpost. The importance of the aforegoing relates to the fact that a dangerous situation had been created on the soccer field, to which all the school children had access.

[6]. This also means that the school should have foreseen the reasonable possibility of this dangerous situation injuring one of the learners like K and causing him damages. It cannot be otherwise. Objectively speaking, the goalpost, an unstable steel structure on a soccer field accessed by learners, which had the potential to tip over when interfered with, posed a risk to the school children. The risk would have materialised when, for example, the soccer children climbed onto the goalposts to fit the nets, as was the case, according to the plaintiff, on the day in question. Similarly, the risk would have materialised by a child swinging from the goalposts, as the defendant alleges K did on the day he was injured. Either way, as was held by Mahalelo AJ, the risk of injury to a learner was a real one and should have been foreseen by the school. A loose standing steel structure on a soccer field would also have been an invitation to young children, for example, to ‘fool around’ on or with the goalpost by tipping it over. That is how children are, and the school should have realised that and probably did so. The goalpost was ‘an accident waiting to happen.’

[7]. In fact, the school did foresee this danger. This is the reason why, according to the evidence led on behalf of the appellant, the children were not allowed to hang the nets. That, according to the practice at the school, was to be attended to only by the ground staff of the school. Furthermore, written into the code of conduct of the school, to which all parents and leaners subscribed, including the respondent and her son, K, was the following provision:

'I am not allowed to play, hang on or misuse any of the equipment of the school'.

[8]. The aforegoing, in my judgment, supports a finding that the school probably realised, generally speaking, that the sports and other equipment posed a danger to learners. It also confirms that the school specifically realised that the goalposts in particular created a dangerous situation and that they should take precautions to prevent harm to learners resulting from the dangerous situation.

[9]. In order to guard against this risk materialising, the school had put in place certain procedures with which its members of staff were required to comply. Importantly, school children on the soccer field, especially at or near the goalposts, were required to be supervised at all times. The nets, when required for a game, were required by school policy and practice to be fitted by the ground staff, identified during the trial as a Mr Moloi and a Mr Jabulani Malambe, and not by the learners themselves.

[10]. The question is this: Did the school comply with its duty to ensure that learners at or near the goalpost were supervised at all times. The plaintiff's version on this aspect of the matter is that there were no members of staff supervising K and his friends whilst they were busy hanging the nets. The version of the defendant, as per the evidence of Mr Malambe and to a limited extent that of Mr Mashiyane, who was also a learner at the school and a team member of K's soccer team at the relevant time, was to the effect that K was not involved in the hanging of the nets. There was no hanging of any nets on the day at Crystal Park High School according to the evidence of these two witnesses, as the game was going to be played on the soccer field of the nearby primary school. K and his friends were being deviant by swinging on the cross – bar of the goalposts, and, according to Mr Malambe, he had warned them not to do that, but they persisted after initially heeding his warning. An

important aspect of the appellant's version is that K and his friends were not hanging the net. They were 'delinquents' up to no good. I shall deal more fully hereunder with the evidence of these witnesses as well as their reliability as witnesses.

[11]. In the interim, and for purposes of the finding that the school failed to discharge its duty to supervise the children near the goalpost, I turn to consider the reliability of the evidence suggesting that K and two of his team mates were not hanging the net.

[12]. In my judgment, this portion of the appellant's case can and should be rejected, as was done by Mahalelo AJ, *inter alia* for the reason that it flies in the face of a contemporaneous report compiled by the coach of K's soccer team at the time ('the report'). He was Mr Mathibela, who has since died, and in his report he stated as follows:

> 'I left the soccer field at around 2:30 to welcome the visiting school and explain to them that the other team must go to the primary school. While I was explaining to the coach, two boys came running (M T and P D) to report the incident. According to M, K had himself decided to fix the nets on his own. After they were done, K decided to swing on the goal post and the post fell onto him. Immediately after the incident was reported I phoned the emergency services, the parents and the principal'

[13]. This report, which was admitted by agreement between the parties at the instance of the appellant, proves conclusively, in my view, that K and two of his teammates had hung the net to the goalpost. It follows accordingly, that Mr Malambe's evidence on this aspect should be rejected, which in turn means that his evidence that he was watching the boys at the crucial time shortly before the incident occurred, can also safely be rejected. There is another reason why the evidence of Mr Malambe and Mr Mashiyane on this aspect should be rejected.

The reason proffered by these witnesses for their claim that the nets were not hung was that the game was supposedly going to be played at the soccer field of the primary school. The difficulty with this explanation is that nowhere in their evidence and in the record of the proceedings in the court *a quo,* is an explanation given for the alleged change of venue. This, in my view, makes the appellant's version on this aspect inherently improbable and it therefore stands to be rejected.

[14]. The report is also evidence that the coach, Mr Mathibela, was not present when K was injured. We know from Mr Moloi's own evidence that he was not near the scene of the accident when it happened. I have indicated that Mr Malambe's evidence on this point stands to be rejected. The effect of the aforementioned in its entirety is a finding that the school failed to ensure that the learners, including K, were properly supervised at or near the goalposts, which posed an inherent danger to K as a learner at the school.

[15]. On this basis alone, the school and its employees were negligent and are liable for the damages suffered by K as a result of his injuries.

[16]. The *locus classicus* relevant to this issue is *Kruger v Coetzee*, 1966 (2) SA 428 (A). At paragraphs [E] and [F] at page 430 of the judgment, Holmes JA pronounced on the applicable law as follows:

> '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 results of other cases.'

[17]. In the present case, having regard to the facts alluded to above, there can be no doubt that a *diligens paterfamilias* in the position of the appellant would have foreseen the possibility of a loose standing goalpost causing injury to learners who play on or near it. Indeed, the school appears to have conceded that they were conscious of the possibility. Why else would the school have directed that the nets were to be hung onto the posts only by the ground staff? Furthermore, why was the school so eager to convey to the court *a quo* that the learners were supervised before the game when in fact and in truth they were left to their own devices?

[18]. As to the existence of a duty to take reasonable steps to guard against such an occurrence, the school was well aware of the danger created by the loose standing steel structure on the soccer field. Yet, conscious of the potential danger to the learners, the school allowed them to be unsupervised on or near the goalposts. In these circumstances, a *diligens paterfamilias* in the position of the school would not have shrugged his shoulders in unconcern; if there were reasonable precautionary steps that could have been taken, he would have taken them. The appellant did take certain precautionary steps. They wrote into the school's code of conduct that the children should not play recklessly on or hang onto sports equipment. The school also endeavoured to ensure that the learners were always supervised whilst on or near the goalposts. The question is, however, whether the respondent, on whom the onus rested, proved that there were further steps that the school could and should reasonably have

taken. The respondent had to establish this in order to prove that the appellant failed in its duty to take care and was thereby negligent.

[19]. On this aspect, I find myself in agreement with the submissions by Mr Luvuno, Counsel for the respondent, that, as a matter of logic and common sense, the easiest and simplest way for the school to have guarded against the risk of damage to the person of K would have been to secure the poles by affixing the bottom portion to the ground. This, I imagine, could and should have been done by nailing steel pins into the ground over the base of the structure. This relatively inexpensive procedure would, in my judgment, have prevented the foreseeable injury, which K sustained. This, I need to emphasise, is in addition to the fact that, on the appellant's own version, the damages could have been avoided had the school ensured that the children were always supervised at or near the goalposts. In our view, there is sufficient evidence relating to the possibility and the feasibility of the appellant taking these precautions, which no doubt would have safeguarded against injury to learners and the resultant damages. Logic tells me that there ought not to have been any issues relating to the possibility of and the cost of the school implementing and complying with these measures. In my view, we can safely say that it would have been reasonable to expect the school to put these measures in place.

[20]. In the result, I am satisfied that there were reasonable steps which the school could and should have taken. The school failed to do so. This means that negligence on the school's part was proven, and the trial court rightly ordered the appellant to pay the respondent's damages, as proven.

[21]. This conclusion is based on facts that, in my view, are unassailable in that they are either common cause facts or facts in respect of which the appellant's version stands to be rejected summarily. The converse is that, according to Mahalelo AJ, the appellant should also be held liable for the

respondent's damages on the basis of the respondent's version in its entirety, which implied a rejection of the version of the appellant and his witnesses.

[22]. In that regard, the appellant's case appears not to take issue with the fact that on the version of the respondent, liability on the part of the appellant is a given. There is merit in this approach. The reasoning being as follows. On the plaintiff's version Mr Moloi, an employee of the school, had instructed K and his teammates to go and hang the nets, which they did unsupervised by any responsible employee. In the light of the dangerous situation created by the loose standing soccer goalposts, Mr Moloi's instruction undoubtedly makes him, the coach and the other ground staff negligent in that they had failed to discharge their duty to supervise the children whilst on the soccer field.

[23]. Mahalelo AJ accepted this version by the respondent.

[24]. The manner in which the evidence stands to be assessed and analysed when, as in this matter, the court below was confronted by two mutually destructive versions is set out authoritatively by Eksteen AJP in *National Employers' General Insurance Co Ltd v Jagers*, 1984 (4) SA 437 (E) at 440E-G:

> 'It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be

inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.'

[25]. This appeal is directed at the above factual findings made by Mahalelo AJ. It is therefore necessary to revisit the authorities on the approach of a court of appeal in a case such as this. In *R v Dhlumayo & Another,* 1948 (2) SA 677 (A), at 706 Davis AJA stated:

'[8]. Where there has been no misdirection on fact by the trial Judge, the presumption is that his conclusion is correct; the appellate court will only reverse it where it is convinced that it is wrong.

[9]. In such a case, if the appellate court is merely left in doubt as to the correctness of the conclusion, then it will uphold it.

[10]. There may be a misdirection on fact by the trial Judge where the reasons are either on their face unsatisfactory or where the record shows them to be such; there may be such a misdirection also where, though the reasons as far as they go are satisfactory, he is shown to have overlooked other facts or probabilities.

[11]. The appellate court is then at large to disregard his findings on fact, even though based on credibility, in whole or in part according to the nature of the misdirection and the circumstances of the particular case, and so come to its own conclusion on the matter.

[12]. An appellate court should not seek anxiously to discover reasons adverse to the conclusions of the trial Judge. No judgment can ever be perfect and all – embracing, and it does not necessarily follow that, because something has not been mentioned, therefore it has not been considered.'

[26]. In *S v Francis*, 1991 (1) SACR 198 (A) at 204C – E, Smalberger JA reiterated the position set out in *Dhlumayo*, stating that in the 'absence of any misdirection the trial Court's conclusion', including in that case its acceptance of the evidence of an accomplice, 'is presumed to be correct'. In order to succeed in an appeal against factual findings, an appellant must convince an appeal court 'on adequate grounds that the trial court was wrong' when it accepted the evidence in issue: and 'a reasonable doubt will not suffice to justify interference with its findings'.

[27]. With those basics in place, I now turn to Mahalelo AJ's judgment and, in particular, her analysis of and findings on the evidence presented before her.

[28]. Mahalelo AJ was confronted with two mutually destructive versions, one of which, as I have indicated above, established negligence on the part of the appellant while the other may have done so. On the one hand, Mr N S ('S'), a teammate of K at the relevant time, gave evidence that on Friday afternoon, the 30th of April 2010, his soccer team from Crystal Park High School was about to start a match against the team from Petit High School, when they realised that the nets had not been hung on the goalposts. They then went to Mr Moloi, who instructed them to take the nets from the store room and to go ahead and hang them. K and two of their teammates climbed onto one of the goalposts and hung the net. K and the other two boys then jumped off the cross – bar and during that process the goalpost fell over onto K, thus injuring him. He further testified that there were no members of staff present when the incident happened. Mr Malambe, the witness confirmed, was not on the scene when K was injured and he only arrived after the fact. His evidence was also that Mr Moloi remained at the room where the nets were stored. Their coach, Mr Mathabela, had returned to his office after the players had been kitted out in preparation for the game. He also confirmed that it was the duty of the ground staff to fit the nets to the goalposts in preparation for matches.

[29]. The two witnesses on behalf of the appellant were N V ('V'), who was also a teammate of K at the relevant time, and one of the general workers at the school, Mr Malambe. Both of them testified that K was injured because he was swinging on the poles with two of his friends. They denied that K and his two friends were hanging the net to the goalpost. Mr Malambe's evidence was that he saw K and the two other boys swinging on the cross – bar and he reprimanded and warned them to desist from that action. Importantly, V heard and saw none of this.

[30]. The crux of Mahalelo AJ's judgment, after she had considered the credibility of the witnesses, some of whom made a less favourable impression on her than others, and the probabilities, was this:

> 'I have found that the incident happened as testified to by the plaintiff's witnesses. It is common cause that the goal posts were not dug down. They were movable. On either version whether K was swinging, putting up the net or warming up, fact of the matter is that he was on top of the goal post and his injuries are causally connected to that event. The fact that the goal posts were not dug down in the ground clearly created a danger to the learners which the defendant should have reasonably foreseen and taken preventative measures by ensuring that the learners were not given the nets to affix on the goal posts without supervision. Furthermore, the defendant should have ensured that the goal posts were tightly secured by digging them into the ground. The preventative measures are in my view not unreasonable.'

[31]. Mr Dlamini, who appeared for the appellant, attacked the factual findings of the trial court as well as the conclusion that, on the evidence, the respondent had succeeded in establishing negligence on the part of the appellant.

[32]. His attack on the factual findings is based on a number of alleged misdirections on the part of Mahalelo AJ. He submitted that the evidence of the

respondent's main witness, S, who was a single witness, was 'fraught with improbabilities' and illogical. The basis for this submission related in the main to the detail of the physics around K's fall. Mr Dlamini's argument dissected the manner in which K's jersey got hooked and caused him to pull the posts down. This argument is an extremely artificial one. One should never lose sight of the fact that accidents, like the one in which K was involved, happen in the 'blink of an eye' and always unexpectedly. It is unrealistic to expect a witness in those circumstances to give a 'blow – by – blow' account of every second of the event. The fact of the matter is that K fell from the cross – bar and at more or less the same time the entire structure collapsed onto this head. In my view, there is nothing illogical in S's evidence.

[33]. Mr Dlamini also argued that the appellant's version that K was not hanging nets when he fell, ought to have been accepted as probable. This was evidenced by the fact that the code of conduct of the school prohibited the learners from affixing the nets. Once again, this argument, in my view, is an artificial one and is at variance with the probabilities, which favour the respondent's version.

[34]. In the circumstances, I cannot find that Mahalelo AJ misdirected herself.

[35]. When trying the facts in a matter and when faced with two mutually destructive versions of an incident, as is the case in the matter before us, the Court is required to decide whether, on all the evidence, the plaintiff's version is more probable than that of the defendant. 'More probable' has been defined as 'more plausible' and 'more natural'. The court in *Govan v Skidmore*, 1952 (1) SA 732 (N), stated as follows:

> 'In finding facts or making inferences in a civil case, it seems to me that one may, as Wigmore conveys in his work on evidence … by balancing probabilities select

> a conclusion which seems to be the more natural or plausible conclusion from amongst several conceivable ones, even though that conclusion may not be the only reasonable one.'

[36]. As indicated above, I have significant difficulty with the fact that the version of the appellant flies in the face of the contemporaneous report by the coach, Mr Mathibela, the contents of which confirm that K and his two friends were fitting the net at the time when the accident happened. Closely linked to this apparent incongruity in the appellant's version is the apparent absence of an explanation, let alone an acceptable one, as to why the venue for K's team's soccer match was supposedly changed to the soccer field of the primary school. This, in my view, is a gaping hole in the version of the appellant and detracts materially from the probabilities of that version. Additionally, it is somewhat improbable that K's team would be getting dressed at the school's soccer field, when the match was to be played at the primary school's grounds. If regard is had to the entirety of the aforegoing, I cannot but conclude that the appellant's version is inherently improbable.

[37]. Moreover, a reading of the record of the evidence of Malambe leaves one with a feeling of unease, thus rendering the version of the appellant more improbable. His evidence was that he had warned K and two teammates not to swing on the goalposts, and they heeded his warning and dismounted from the post. Malambe had hardly walked two metres further, implying a few seconds after he had warned them not to swing on the posts, when 'he turned around' and saw that the goalpost had fallen onto K. This story raises more questions than it answers. How is it possible that K in a matter of mere seconds was able to remount the goalpost and dislodge it to the extent that it collapsed onto him, without Malambe seeing any of this?

[38]. Furthermore, it is improbable that K and his friends initially heeded the warning not to swing on the goalpost only to defy, almost immediately, Malambe and his warning whilst he was still present on the scene. There is a significant *lacuna* in Malambe's testimony. His version is also an unnatural one and not very plausible. In other words, it is an inherently improbable version.

[39]. In the result, I can find no justifiable basis to interfere with the factual findings of Mahalelo AJ. That being so, they are presumed to be correct. I also can find no basis to criticise her conclusion that the probabilities favour the version of the respondent. I therefore agree with her that the respondent had discharged the onus to establish that the appellant's employees were negligent and their negligence was causally connected to the injuries sustained by K and hence the damages incurred by the respondent.

[40]. I also agree, as elaborated on above, that even if the version of the respondent is not accepted as a whole, there remains a factual basis on which to hold the appellant responsible for the injuries suffered by K on the school's soccer field on the 30th of April 2010.

[41]. In the circumstances, we are of the view that the appeal against the order of the High Court should fail.

Order

In the result, the following order is made:-

1. The appellant's appeal against the order of the court *a quo* be and is hereby dismissed.

2. The respondent's costs of this appeal shall be paid by the appellant.

L R ADAMS
Judge of the High Court
Gauteng Local Division, Johannesburg

I agree

A A CRUTCHFIELD SC
Acting Judge of the High Court
Gauteng Local Division, Johannesburg

I agree,

M P MDALANA
Acting Judge of the High Court
Gauteng Local Division, Johannesburg

HEARD ON:	28th January 2019
JUDGMENT DATE:	17th April 2019
FOR THE APPELLANT:	Adv M W Dlamini
INSTRUCTED BY:	The State Attorney, Johannesburg
FOR THE RESPONDENT:	Adv J Luvuno
INSTRUCTED BY:	M P Mngomezulu Incorporated