

REPUBLIC OF SOUTH AFRICA




IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

17/5/16

CASE NO: 36348/2010

(1)	REPORTABLE: NO/YES
(2)	OF INTEREST TO OTHER JUDGES: NO/YES
(3)	REVISED.
(4)	<div style="display: flex; justify-content: space-between;"> <div>Signature </div> <div>Date 17/05/2016</div> </div>

MRS J ROUX

PLAINTIFF

and

THE MEMBER OF THE EXECUTIVE COUNCIL

OF THE DEPARTMENT OF EDUCATION OF GAUTENG

1st DEFENDANT

HIG SCHOOL DIE WILGERS

2nd DEFENDANT

JUDGMENT

KHUMALO J

[1] This is an action that Mrs J Roux ("the 1st Plaintiff") instituted in her personal capacity and representative capacity on 22 June 2010 as the legal guardian of her son Tony Roux (who was then a minor and referred to as "Tony"), against the Member of the Executive Council of the Department of Education, Gauteng, ("the 1st Defendant"), and Tony's erstwhile school, Hoerskool Die Wilgers ("the school") as the 2nd Defendant, claiming damages she allegedly suffered as a result of injuries sustained by Tony during a rugby practice at the school on 15 April 2008.

[2] Tony has since attained the age of majority and subsequently joined as the 2nd Plaintiff.

[3] The Plaintiffs allege in the particulars of claim, in brief that:

[3.1] Tony was tackled during a rugby practice by one, Francois Postimus, an educator at the school in the employ of 1st Defendant, alternatively of the 2nd Defendant in negligent breach of his duty of care towards the minor child to:-

[3.1.1] ensure that the minor child is safe and protected from danger or harm; and /or

[3.1.2] provide a safe environment for the minor child during all educational activities; and /or

[3.1.3] ensure that all rugby training methods applied are safe; and or

[3.1.4] provide the minor child with a physically and emotionally safe environment; and

[3.1.5] refrain from directly or indirectly physically injuring the minor child; and/or

[3.1.6] refrain from applying any physical force on the minor child.

[3.2] As a direct result of Postimus's breach of duty of care in one or all of the aforementioned duties Tony sustained a tibial fracture on the left and also suffered psychological shock and trauma.

[3.3] Consequent thereupon he received medical and hospital treatment and will in future require further medical and hospital treatment which will necessitate the incurring of expenses. In addition he experienced pain, suffering, disfigurement and discomfort, suffered a loss of amenities of life which he will continue to experience and suffer in future. He also experienced shock and psychological trauma.

[3.4] As a result of the aforementioned injuries suffered by Tony, the Plaintiffs suffered the following damages:-

In her personal capacity

[3.4.1] Past medical and hospital expenses R26 983,64

In her capacity as minor's mother and legal guardian

[3.4.2] Future hospital, medical and ancillary costs, which include conservative treatment, physiotherapy, examinations and consultations with doctors and medication. R8 000,00

[3.4.3] General damages in respect of pain, suffering, discomfort, loss of amenities of life, shock and psychological trauma. R200 000,00

[3.5] In the premises the Defendants are liable to the plaintiffs, that is 1st Plaintiff in her personal capacity and to Tony in the amount of R234 883,64, together with interest and costs.

[4] The Plaintiff further alleges that the injuries happened during or at an educational activity as contemplated in terms of s 60 (1) of the South African Schools Act 84 of 1996 ("the SASA") that reads:

"(1) The State is liable for any damage or loss caused as a result of any act or omission in connection with any educational activity conducted by a *public school* and for which such *public school* would have been liable but for the provisions of this section.

(2) The provisions of the State Liability Act, 1957 (Act No. 20 of 1957), apply to any claim under subsection (1).

[5] Nonetheless the 1st Defendant in its Plea disputed liability on the basis, inter alia, that Postimus is employed by neither the 1st or 2nd Defendant but by the school's Governing Body in terms of s 20 (4) read with s 20 (10) of the South African Schools Act, 84 of 1996 which is insured for that purpose by Santam Insurance (Pty) Ltd and therefore pleaded non-joinder.

[6] The Plaintiffs subsequently joined the School Governing Body.

[7] Another contention that was raised *in limine* regarding the Plaintiff's failure to comply with s 3 of Act 40 of 2002 was resolved before the commencement of the trial, with condonation for such failure being granted by the court.

[8] Apart from the aforementioned contentions the 1st Defendant furthermore denied having any knowledge of the Plaintiff's allegations as regards the occurrence of the incident and the nature of the injuries sustained by Tony putting Plaintiff to the proof thereof.

[9] On the contrary the school admitted that Postimus was at all relevant times employed by the school and that 1st Defendant will in terms of s 60 (1) of SASA be liable for any damages suffered by the Plaintiff should the court find that the school would be liable but for the provisions of s 60 (1).

[10] The school further pleaded that the Plaintiff and Tony had knowledge of the risks of possible injury to the minor child when partaking in the sport of rugby, during training and/or playing the sport, appreciated the ambit of the risk and consented to the risk, alternatively that, should the court find that Postimus had a duty of care towards the minor child and he negligently breached such duty then the school pleads that the 1st Defendant is liable for any damage or loss suffered by the Plaintiffs in terms of s 60 (1) of SASA.

[11] Unlike the 1st Defendant, the school admitted to the incident occurring but denied any knowledge regarding the nature of the injuries sustained by Tony and put the Plaintiff to the proof thereof. It also prayed for an order for its costs to be payable by the 1st Defendant in the event that the court find the school liable for the payment of Plaintiff's damages.

[12] During the pretrial conferences that were held by the parties, the parties agreed that the matter will proceed on merits only. 1st Defendant abandoned its assertion that Postimus was employed by the School's Governing Body and agreed that he was employed by the school.

[13] The 1st Defendant further agreed to the incident that the tackling by Postimus caused an injury to Tony but not admitting to the nature of the injuries sustained.

[14] The 1st Defendant further amended its Plea on 3 November 2,014 a day before trial agreeing that Postimus had a duty of care towards Tony, however pleading that such duty was circumscribed by the risk involved inherent in participating in sporting activities which Plaintiff and Tony had assumed by consenting to participate in the sport of rugby at school thereby expressly consenting to physical force being applied to Tony during practice and or play, in that case alleging that the injury suffered by **Tony occurred reasonably within the ambit of the game of rugby.**

[15] At the request of the parties an order was made for the separation of the merits from the quantum and that the issue of quantum will be postponed *sine die*, the matter proceeding on the merits only .

[16] The issue that was to be resolved at the beginning of trial was whether or not Postimus breached the duty of care he had towards Tony in the context of the rules of coaching the sport of rugby and was such duty circumscribed by the risk inherent in participating in such sport (contact sport) and if therefore the injury occurred reasonably within the ambit of the game.

LEGAL FRAMEWORK

[17] The parties agreed that the Plaintiff carries the overall onus to prove his claim and the duty to begin. Plaintiff was then to prove that Postimus failed to act in accordance with the duty of care (was negligent) (breached the duty of care); see *Eversmeyer (Pty) v Walker* 1963 (3) SA 384 (T). Plaintiff will do that by setting out facts that could or should have been foreseen by Postimus. Plaintiff must establish that a reasonable man in the position of Postimus:

[17.1] would foresee the reasonable possibility that the conduct (whether an act or omission) would injure another's person or property and cause that person a patrimonial loss,

[17.2] would take reasonable steps to guard against such occurrence, and

[17.3] that the Defendant failed to take such reasonable steps.

[18] Whilst Defendant carries the evidential burden to prove that such duty was limited/circumscribed by the risk inherent in such sport and whether or not Plaintiff assumed such risk when he consented to participating in the sport? **and the tackling by Postimus was within the risk inherent in participating in such a sport.**

[19] In respect of the *voluntati non fit iniuria* raised by the Defendants, they must allege and prove that Tony and the Plaintiff knew of the risk of sustaining an injury from the training and coaching and voluntarily accepted that risk; see *Joubert v Combrink* [1980] 2 All SA 205 (T), and that the injuries must have been sustained in consequence of a risk falling within the ambit of the consent and the following elements must then be proven:

[19.1] That the Plaintiff had knowledge of the risk;

[19.2] appreciated the ambit of the risk;

[19.3] consented to the risk.

[20] All the above still does not exonerate Postimus from acting with duty of care and thus negligently, which is where reasonableness becomes relevant.

[21] The supervening injury must have been sustained in consequence of a risk falling within the ambit of the consent which may be express or implied. It can be shown that **the Plaintiff foresaw the risk of injury and had knowledge and an appreciation of the danger, in that instance consent will be implied; see *Santam Insurance Co Ltd v Vorster* [1973] 4 All SA558 (A), 1973 (4) SA 764 (A) at 779.**

[22] Now the game of rugby is a physical contact sport involving a great risk of injury inherent in the game. It is therefore generally accepted that the participant assents to the risks inherent in the game. Therefore in a normal game of rugby, a participant can only be held liable for injuries suffered by his opponent if he acted negligently or with intent, however if the negligent or intentional conduct causing the injury is also held to be wrongful; see *Roux v Hattingh* 2012 (6) SA 428 (SCA). Generally where the loss resulted from a positive act giving rise to physical damage to the person or property of the Plaintiff, the Defendant's conduct is regarded as prima facie wrongful; see *Gouda Boerdery BK v Transnet* 2005 (5) SA 490(SCA) para 12. It is trite that it follows that **the onus is on the Defendant to rebut the inference of wrongfulness that arises from the physical harm** (see *Mabaso v Felix* 1981 (3) SA 865 (A) at 871 -874.

[23] In elucidating the aspect of wrongfulness (or unlawfulness) in the context of sports Brand JA in *Roux* referred to a statement by Basson & Loubser *Sport and the Law in South Africa*, 7ed chapter 5 at 13-14 that was relied upon by the court a quo, that;

“Both wrongfulness and fault in respect of a sports injury essentially involves the question whether the Defendant acted reasonably or unreasonably; and these two elements of the delict are mostly telescoped into one when the courts examine the reasonableness of the Defendant's conduct. **Reasonableness is determined with reference to the rules and conventions of the sport concerned, the standard of care and skill can be expected of a participant in the sport, and the circumstances of the incident.** Injury caused by unreasonable conduct falls outside the ambit of consent to the risk of injury, **because participants are taken to consent only to the normal and reasonable risks of the sport concerned.**” (my emphasis)

[24] The court then has to decide if the harm that actually eventuated can be said to fall within the ambit of the inherent risk associated with the activity of participating in a rugby game, although in this instance the participation is vis a vis a coach in a training session (as compared to one player against the other player). Where the highest standard of care is expected as they are to lead by example. They are expected to encourage safe playing, practicing sound strategy and enforcing the rules of the high school and national high school programs.

EVIDENCE

[25] According to Tony the incident occurred three months after he started playing rugby, for the under 14 team. He was 13 years old boy. The training sessions were afterschool with Mr Postimus. The injury occurred during training whilst they were practising tackling. Postimus had, in the middle of practice stopped the whole team and, speaking specifically to Tony said that 'You are not tackling like I have shown you and you must not tackle like girls.' **Following his utterings with an instant demonstration of the 'soft like a girl' tackle on Tony, by grabbing Tony by his hamstring and softly putting him on the ground, falling on top of him. Tony says** thereafter he was busy getting up from the ground and not yet ready for another tackle when he was tackled by Postimus for the second time. His one hand and buttocks had just left the ground and the left hand still on the ground, when he heard Postimus saying "this is how you tackle" executing another tackle on him a lot firmer than the first one. Postimus' left leg was in front and his weight went on his knee. Tony says he heard a snap and fell on his back with Postimus on top of him. Postimus got up and he could not move it, he was yelling and saying his leg was broken. Postimus took him to hospital where they found that it was indeed broken.

[26] At the time of the incident, he says there was a group of boys in the rugby field, divided into small groups of 2 or 3. The one group was coached by another coach, De Kock and Tony's group coached by Postimus. It was three o' clock in the afternoon and practise had been going on for some time when the incident happened right towards the end of the practice. **Postimus was complaining that they were not tackling properly and motivating them to tackle like men. They were practising the front tackle.**

[27] He agreed that he has been practicing at school and playing in matches where he has been tackled many times from the side and in front. He also agreed that Postimus's first tackle was soft and when he put him down he was lying on his back with Postimus on top of him. **He was not yet ready for another tackle. Postimus stood up and moved away to a distance of about 4 meters. He was busy getting up when Postimus charged and tackled him without warning and that is when the accident happened.** It was put to him that Postimus was going to say only one tackle happened and it was from behind. He insisted that there were 2 tackles and both from the front. He explained that front tackle meant running with the ball and the person who would tackle would be the opponent coming from the front. He insisted that Postimus was teaching him frontal tackle, tackling him lying on the ground that would be a frontal tackle. **Postimus's body was too heavy for him being a boy of 14. It was put to him that Postimus came from behind whilst they were both walking away, he called him and said "here is how you tackle".** He agreed that he did say that but he was not from behind or the back. The rest of the boys were not on the other side of the field but around them. He said Postimus' intention was not to hurt him but unfortunately he broke his leg. **His leg broke because of the position he was standing in, he was not ready for another tackle.** The impact on his bone broke it.

[28] The second witness was Levy Nel, a Grade 8 learner at the school at the time of the incident, he was also playing for the under 13 practice on the day of the incident with coach Postimus. He also said they were busy with some kind of practice when suddenly Postimus told them to stop and line up on the lane. They followed the instructions and Postimus said to them **"they tackle like girls" and demonstrated a tackle on Tony.** He moved back slowly and laid Tony down. He had picked Tony up very slowly and dropped him down very slowly. **Tony was lying on the ground on his back.** Postimus then said to them **"this is how you**

tackle", and **they heard a snapping noise. When he was asked what position was Tony he said he did not see that he just heard a snap** not very long after seeing Tony lying on his back. He was talking to his friend next to him then he heard the snap, **5 seconds after Tony fell**. Otherwise he could have seen. This is how you tackle, Postimus told them. Tony was on the ground swearing at the teacher. **They surrounded Tony whose leg was broken.**

[29] The third witness Groenewald, an expert rugby coach put his very long qualifications on record, inter alia, that he has been involved in rugby since 1963 and qualified as a coach in 1973. He attended training in Europe and Australia, and started coaching in 1974. In 1979 he coached provincial rugby. He has been inter alia, an educator for 8 years at FH High Odendaal School and has extensive experience in coaching rugby to school boys. At present he trains coaches for school rugby and is also the Blue Bulls coach.

[30] He spoke of a new requirement brought 3 or 4 years ago, that every coach must have a Boksmart Card that certifies formal qualifications and involves training rugby coaches, referees, administrators and players. Each coach is required to attend one and certification is valid for 2 years. The primary purpose is to make it safe and to give all coaches a safe knowledge. They are provided with the correct knowledge, skills and leadership abilities to ensure that safety and best practice principles are incorporated into all aspects of contact rugby in South Africa. The coaches are targeted because they are key decision makers who control both the game and the players on the field. They are viewed to be extremely influential on how players behave both from a safety perspective and their attitudes towards the game, other players and officials on the field. Basic safety measures are taught to help coaches to coach basic principles of all the best schools to promote safety rugby techniques and basic medical and injury prevention practices. Most of the times in matches or practices coaches and referees are the only people available to intervene and ensure the safety of the players on the field, and are therefore viewed as the first line of defence in the prevention of serious and/or catastrophic injuries. Basic principles of SAFTU molded to international rugby manual information, level 1. It is an introduction to beginners which consists of basic principles with a primary focus on safety in tackling.

[31] His evidence on basic principles- he said tackling is one of individual skills. So when coaching school rugby first thing a coach must make sure is that he has a background of contact confidence redoing the tackle or making the tackle. He mentioned that side and front tackle will have the same back effect. On the side and front tackle basics, the sequence is to show them where you can tackle a player, on all the parts that can bend so that he can absorb the tackle, some positions were to be avoided, that is above the belt on the waistline, from the side above the belt, on the side and the hamstring underneath the short **not on the knee it will break**. The tackle from behind should be above waist line under the buttocks you get a kick on the face, grab, pull closer, get your hands behind and put the player down. A player can only be rounded but not with a shoulder.

[32] In respect of the Receiver - the guy who is doing the tackling must make sure that (1) his head is always behind the player (2) Head must be up. (3) Eyes open all the time. (4) His **back straight and contact always on shoulder** (5) Hands always be lower than the contact point so that he can be flip the receiver over with his hands at the back. **Then in the whole process there must first always be contact confidence.** The tackle done from the side.

B. The coach is to divide players in groups of two. The receiver and executor standing far apart with enough space in between them. He will change their position with each one getting a chance, always start with the tackle on the side. **When one is on their knees tackling should be from the side towards the tackler. A coach cannot coach the front tackle when a player is on his knees, when you are on the side they can roll with the tackle.**

C. On Progress of the front tackle – he said when a coach sees that the players have got contact confidence or he goes where they are sitting on their haunches and the tackle will be on their haunches. The receiver will walk past and be tackled from the side, using a tackler's back- so that the players are standing back straight. He hits the tackler's back above the belt. Drive into the tackle being key must get the arms around- One of many ways of making the tackle when they start with them not to make the impact hard.

[33] Groenewald was adamant that a guy like Tony on the ground (whilst trying to stand up) is not to be tackled. He was asked if in his opinion he agrees that for a player in a position like that it is difficult to absorb the impact. He said all the time, or most of the time a tackle is done on the command of the coach so that everybody knows that they are to be tackled and be ready for or expect the impact. There is already a high risk- when you are in such an awkward position and your hand has just left the ground. He said Tony seemed to have been on a crouched position, if you make a frontal tackle it will be impossible to adhere to the principle of tackle in front. In the first place, he said the tackler cannot aim above his waist. When a receiver is leaning to a forward position how can one get to him above the waist? He should be up straight so as to identify a place to attack safely. When his one leg is in front the other one is still lifted from the ground then you will tackle on the leg, because if you go straight for his leg from the front, his leg goes nowhere to absorb the impact. It does not go with principle of tackling where receiver can be tackled-that is a transgression of the basic principle his leg cannot bend either way.

[34] On the tackle from behind- the target was not underneath the buttocks whilst receiving the tackle. Otherwise he will be booted on the chin which is dangerous for the tackler. There is no risk of injury to the receiver but to the tackler. A tackler with more experience will do much more complicated moves. Contact and confidence exercises starting on his knees. With experienced players it is possible to move much faster. In the process of teaching, the coach that is to tackle a boy getting up is not to execute a full tackle on such a small player, instead demonstrate one player on another boy, because he is in a risk position. He cannot defend himself when he is in that position. The risk is if he does not injure one's ligament around the knee or ankle he will have a fracture.

[35] In addition he testified that a tackler is encouraged to move away once he has effected a tackle. It never happens that a tackled player still in the process of standing up gets tackled again. It would be illegal. It suggests to him, rather improbable that Postimus, a coach of his caliber, being a level 1 coach who would know about the basic principles of rugby, a coach of that level would execute a tackle that is manifestly illegal. He said maybe if he can know the circumstances under which it has happened he will understand. His grasp was that when Tony was standing up he was tackled so he viewed it as being the front

attack. If it was a front one and he was standing a different technique would be applicable. Tony told him about a frontal attack. In terms of the International Rugby Body Level 1 Coaching: Introducing Rugby, which is a Manual of training coaches, there will be a penalty or contravention **If a player tackles another one illegally or contrary to the manual.** If tackle illegal or indicated by the manual to be so. The rule of the game is that a player can tackle by whatever way even risking his life will not be penalized **if he does not break the rules.** This is only in a practice field, they will adhere to all the different scope, techniques and rules of the game. There is a difference- A player may go for the thigh area tackling the player to bring him down with his head, he will not be penalized, if he has not broken any rules.

[36] The Plaintiff's case was closed. The Defendants proceeded then to lead the evidence of Postimus who was the sole witness for the Defendants.

[37] Francis Postimus confirmed that he coaches mostly juniors under 14, 15 and 16. He also coached the under 19 at the Springs Rugby Club. According to him Tony was injured whilst busy practicing how to tackle, the reason being that at the last game he did not defend properly. They had decided, him and De Kock (the other coach at the school) that they were going to go through the usual practice discipline. They discussed methods of tackling from the manual, **demonstrated and showing them how to do it on slow procedure and picked up the speed thereafter, how to tackle from the front, side and behind showing them how it is done by the book.** After they have done the side tackle, they progressed on the practice with tackling and with walkthroughs, making it more acceptable or gaining experience. They formed 4 in a team, 1 was to run from one side line, player to follow and player 2 to complete to tackle from behind, if they complete it player 3 was now to be tackled by no 4 from side line to side line. There were 4 lines divided into 4 groups. Player behind to tackle the player in all 4 groups.

[38] The boys were joking around every time he looked at them. They decided to get better control and decided that there will be divided into two groups. He sent his group to complete the moves. Mr De Kock took the other group. Tony was in his group. He instructed Tony to do the exercise. On their return he instructed them to do it again, they turned around and did it again, that was the overtime. They turned around reluctant to do so, and he again asked Tony to do it again. Due to the boys being reluctant, he said 'this is how you tackle,' **approaching Tony and he said he can demonstrate the tackle the way he has done it.** He went on to show them how to make contact with left shoulder under his buttocks closed right arm on his wrist brought Tony down to complete the tackle. He did not close his left hand instead of closing left hand he used it to minimize impact on the ground. He concluded the tackle going down with Tony and **Tony was lying on the ground the back of Postimus head was behind Tony who started mourning.** He says Tony made a comment that he broke his leg. He told Tony to stop joking around. **At that moment Tony got up still mourning. He asked Tony to turn on his back.** Tony wanted to get up and he told him to stay down. At that stage De Kock moved the whole team to the other side of the field. After inspecting Tony's leg he concluded out of his experience as a medical **orderly that he could not see anything wrong. Tony insisted that his leg is broken.** After a while he **observed some discoloring and swelling on his lower leg** and he made a decision and informed De Kock to take Tony to hospital for safety sake.

[39] At the time he had completed level 1, which entails that coaches are to follow instruction manual, how to coach safe rugby. He was involved for about 6 years. He has used training correctly he had not had anything like this in the six years that he has been involved in showing players how to do some things themselves. **He had no such incident before like he did not close his left arm, to render full impact on the ground.** He was supposed to close both hands **Tony was the biggest of the group.**

[40] Regarding tackling him- **When they were on the ground and getting up, he was on his way walking away from Tony and he tackled him from the back.** He did not want to cause him harm as they do not have enough players. Booksmart system came into effect in 2011 and he went on a course in 2010. It was the last time he went on a course.

[41] Under cross examination he said if Tony came and said he was tackled whilst standing it would be difficult totally insane risk of injury is a given. **He was not prepared to tackle in that fashion its wrong.** They players were playing sideline to sideline and were fooling around. He said he instructed them to do it again. On the way back they were not doing it correctly still running around. So he said they must do it again, they turned around reluctantly. It was put to him that **so they were not expecting a coach to tackle them without warning. He said, replying to that question 'that is how a person tackles.'** They were moving away. When asked whether Tony was not warned in advance? He said, he clearly said to the players that "that is how a person tackles", that is supposed to indicate that something is going to happen and they must be prepared. He considers it enough if it is in a practice environment.

[42] It was his further testimony that **the tackle was right because they were informed that this is how you tackle whether he was on the ground or at the back of that person.** With a controlled situation it can be done. He said when he demonstrates a skill he has the attention of the players. He may say they were not co-operating and that is where the problem could have happened, since the proper way of demonstrating a technique in the process of coaching is to have the attention of the players. He did not agree when it was put to him that he was frustrated. But agreed that the players were not paying attention or looking at their shoulders thinking what is coming now. The incident therefore could have happened because of lack of attention or cooperation. He was asked if as a coach he would tackle the players from behind. He said he only tackled Tony. He went on record that he never tackled from the front to perform safely. That **teaching is totally different that is why he cannot perform a frontal tackle on a player whilst coaching. It is difficult to even initiate that he did a frontal tackle. He agreed that tackling a player who does not expect a tackle is manifestly illegal and worse is a tackle from behind.**

ANALYSIS OF THE EVIDENCE

[43] There is corroboration in the evidence of the Plaintiff's witnesses that Tony was tackled twice by Postimus and in both instances being a frontal tackle. They both testify that the first one was a demonstration of what Postimus said was a girlie tackle, which was softly executed with no harm to Tony. The tackle followed immediately after Postimus criticised the way they do the tackle. They say Postimus did not issue a warning that he was going to tackle Tony, he just simultaneously tackled Tony whilst complaining about the way they were doing the tackle. They say the second tackle followed quickly after Tony's fall from the first tackle, also without a warning, such that Nel did not even see it happening but only

heard the snapping sound. If there was a warning, this was during practice they would have expected it and would have been watching to see how the tackle is executed. Tony says he was still trying to rise up from the first fall on his back, one hand was still on the ground and lifting his buttocks, when he was tackled again. It was unexpected and so fast that Nel missed its execution which he says could have happened 5 seconds after the first one. Both Tony and Nel were impressive as witnesses, and never contradicted themselves. Most importantly very sincere. They agreed that Postimus did say, "this is how you do it" but which was said with the tackling of Tony ensuing. Tony even said that Postimus' intention was not to hurt him but unfortunately he broke his leg. He also correctly and honestly said **his leg broke because of the position he was standing in, he was not ready for another tackle.** The impact on his bone broke it. I find both Tony and Nel to be credible witnesses.

[44] Evidently, Tony and Nel's testimony establish facts that show that Postimus was negligent and that such negligence resulted in Tony being injured. Therefore at the end of the Plaintiff's case there was prima facie evidence of negligence from which arose an inference of wrongfulness. The Defendant had then to rebut the prima facie established wrongfulness inferred from the established negligence by proving facts that indicate that Plaintiff had knowledge of the risk, appreciated the ambit of the risk and consented to the risk.

[45] Postimus on the other hand insisted that there was only one tackle and it was a back tackle. Now the problem with that version is that he also said about the tackle, that **"When they were on the ground and getting up, he was on his way walking away from Tony and he tackled him from the back."** The statement contradicts, first, that he tackled Tony only once since he is confirming that him and Tony were rising or getting up from the ground. (How did they end up on the ground?) On a balance of probability they were getting up from the fall of the first tackle. He says he got up and was on his way walking away from Tony when he then tackled Tony allegedly from the back. Since Postimus was on top, he would have got up and was walking away from Tony after the first tackle (as it should be) and then tackled him again, which was the second tackle. Tony also said in respect of the second tackle Postimus got up from on top of him and moved about 4 meters away. Postimus then charged and executed his second tackle whilst he was still getting up from the first tackle. Postimus further talks of the time when they were fooling around and not cooperating after he had told them to do it again. He says he then approached Tony and tackled him. On a balance of probability that was the first tackle as it was alleged by Tony and Nel, and the tackle was also from the front. Postimus' answer to Plaintiff's counsel did not make sense as well when he said "if Tony came and said he was tackled whilst standing it would be difficult, totally insane because risk of injury is a given. He was not prepared to tackle in that fashion its wrong. That is an incongruity. He is therefore confirming that Tony was in a crouch, not standing straight when he tackled him. A crouch which was as a result of the first tackle. He was therefore not telling the truth about the tackle being only one. It was also evident that his evidence not true that he tackled Tony from the back.

[46] His refusal that he demonstrated the front tackles were absurd as well because he confirmed that during the tackle practice he **demonstrated and showed them how to do the tackles on slow procedure and picked up the speed thereafter, demonstrating and showing them how to tackle from the front, side and behind, showing them how it is done by the book..**

[47] Postimus also testified that the said **tackle was right because they were informed that this is how you tackle whether he was on the ground or at the back of that person as a result sufficiently warned.** According to him by saying to them, that “this is how you tackle” the players should have expected that a tackle by him was imminent, therefore Tony and the others should have expected a tackle. Whilst at the same time conceding that when a coach demonstrates a skill the attention of the players is required and the process must take place in a controlled manner. He was certainly not in control, by his version they were not paying attention or looking at their shoulders thinking what is coming now. He says he uttered the words whilst behind the players who were walking away, followed by the immediate execution of the tackle on Tony. How was Tony or any of the boys supposed to have known that an immediate demonstration upon one of them was intended or to be aware which one of them was targeted for the tackle? He was well aware as he conceded that they were not paying attention and knew the consequences of demonstrating a tackle on a player that is not paying attention but nevertheless knowingly executed the dangerous tackle on Tony. It also cannot be said that the players were alerted to the ensuing tackle. No matter how we look at it, whether done from the front or back, the tackle executed on a player in that manner was inappropriate, neither was the alleged warning proper or sufficient. It did not give Tony an opportunity to anticipate the tackle and be ready for it. He was also on a crouch and therefore could not be tackled safely without an injury a fact that Postimus would be aware of as the coach.

[48] Furthermore Tony would not have been ready for a simple reason that as a 13 year old boy he would not have been expected to know how to deal with a full tackle of a grown man of Postimus’s size. He first has got to be taught how to deal with a tackle of that magnitude and be contact confidence. Postimus realizing that offered an excuse that Tony was the biggest of the group. When Tony signed up, he was not assenting to a risk that included physical harm by a rugby coach. The risk posed by Postimus goes beyond the inherent risk expected from the game, which is recognized across many countries. In the state of Virginia in *Koffman v Garnett*, 265 VA 12(Va 2003), a middle class school football player sued his football coach for negligence, assault, and battery after the coach thrust his arms around the player’s body, lifted him off his feet, and slammed him to the ground to display proper tackling technique. The coach weighed approximately 260 pounds compared to the boys 144 pounds. The force of the tackle broke the humerus bone in the boy’s left arm. In finding for the boy, the Supreme Court of Virginia held that the boy consented to physical contact with players of like age and experience but that he did not expect or consent to his participation in aggressive contact tackling by adult football coaches.

[49] The extent of Postimus’ negligent conduct is exposed and clearly outlined by Groenewald’s testimony on the principles and rules applicable in coaching rugby especially at school level. He confirmed that the proper way of demonstrating a technique in the process of coaching is to have the attention of the players. The expert’s version which is very lucid and logical is that it is negligent and illegal to execute a tackle like that as a coach, rather it be done with the boys matched against each other for the simple purpose that their bodies are small and will not be able to deal with a tackle of a grown man. Most of all the tackle must be anticipated as well because if received without anticipation it can result in a serious injury. He explained that in the process of teaching, the coach that is to tackle a boy getting up is not to execute a full tackle on such a small player, instead demonstrate one player on another player, because he is in a risk position. He cannot defend himself

when he is in that position. The risk is if he does not injure his ligament around the knee or ankle he will have a fracture. To that Postimus proffers an irrational excuse or justification that Tony was the biggest amongst the boys. He is still required to exercise the same duty of care and adhere to the same basic principles and rules of coaching 13 year olds, irrespective of the player's physique, particularly one who was only 3 months in the game.

[50] Groenewald said all the time, or most of the time a tackle is done on the command of the coach so that everybody knows that they are to be tackled and be ready for the impact. I would add that the tackle that is expected and whose risk he has consented to is that of his fellow players. He pointed out that there is already a high risk- when you are in Tony's position, rising from the ground, which is an awkward position and his hand has just left the ground. He said Tony seemed to have been on a crouched position, if you make a frontal tackle it will be impossible to adhere to the principle of tackle in front. In the first place the tackler cannot aim above his waist. When a receiver is leaning to a forward position how can one get to him above the waist? He said a player should be up straight so as to identify a place to attack safely. When he was in the position that Tony was, with his one leg in front the other one still lifted from the ground then the tackle will be on the leg, and if you go straight for his leg from the front, his leg goes nowhere to absorb the impact. He said that does not go with principle of tackling where receiver can be tackled, because his leg cannot bend either way, that is therefore a transgression of the basic principle.

[51] The second tackle's ghastliness is exposed by Groenewald's statement that a tackler is encouraged to move away once he has effected a tackle, which is something that the coach is to encourage to the players. Since, he says it never happens that a tackled player still in the process of standing up gets tackled again. He says it would be illegal and suggests to him, rather improbable that Postimus in his caliber, being a level 1 coach who is supposed to know about the basic principles of rugby, a coach of that level would execute a tackle that is manifestly illegal. He should also know that with the front tackle key factors had to be known by the receiver of the tackle what should he do to receive the tackle safely. With his experience Groenewald would know all these and I have no problem in relying on his coherent and lucid evidence. On the other hand Postimus' expertise are suspect as he has not only contradicted himself, his evidence is also improbable. He also has not bothered to undergo constant training as a coach to bring up to date his knowledge and capabilities.


[52] Postimus' conduct was not only grossly negligent, but unreasonable. He owed Tony and the players a duty of care and breached such duty when he failed to ensure their safety by warning Tony and the other players properly and sufficiently of the imminent danger or risk posed by the tackle that was to be demonstrated by him on Tony and make sure that they are paying attention. His conduct was unreasonable when he proceeded to tackle the young player, the danger he posed being outside the inherent risk associated with the game of under 13 players (a tackle by the coach instead of a fellow player). Postimus agreed that **tackling a player who does not expect a tackle is manifestly illegal and worse is a tackle from behind by the coach on the young player.** Tony's injury is directly connected (linked) to Postimus' unreasonable conduct of deviating from or acting contrary to the basic principles and rules of coaching the game from his level 1 training. Under the circumstances

1st defendant failed to discharge the onus of proving its reliance on the plea of *volenti non fit injuria*.

[53] I accordingly make the following order:

[53.1] The 1st Defendant is liable and ordered to compensate Plaintiffs for 100% of their proven or agreed damages resultant from the injury sustained by the 2nd Plaintiff.

[53.2] The Defendant is ordered to pay Plaintiff's costs to date.



N V KHUMALO J

JUDGE OF THE HIGH COURT
GAUTENG DIVISION: PRETORIA

For the Plaintiff: ADV F FERGUSON
Instructed by: WEAVIND & WEAVIND
Tel: (012) 346 3098
Ref: D Van Wyk/MD/R36135

For the Defendant: M JOZANA
Instructed by STATE ATTORNEY
Tel: (012) 309 1500
REF: 3756/10/Z77/sc