IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 16843/15

In the matter between:

AULVIN JEREMY MAGENI **Plaintiff**
(Acting in his capacity as father and natural guardian)

and

MINISTER OF EDUCATION OF THE WESTERN CAPE EDUCATION DEPARTMENT **Defendant**

JUDGMENT DELIVERED ELECTRONICALLY: WEDNESDAY, 28 APRIL 2021

NZIWENI AJ

INTRODUCTION:

[1] This is a claim founded in delict instituted by the Plaintiff acting in his capacity as a father and natural guardian of a minor child U […] M […] ("U […]") who was born on 29 April 2005. The damages claimed are a consequence of an incident which occurred on 18 September 2012, on the premises of a public school falling under the control of the Western Cape Provincial Education Department.

[2] In his summons, the Plaintiff initially cited the Minister of Education of the Western Cape, and the Bredasdorp Primary School, as the First and Second Defendants respectively. However, before the commencement of the trial, the Plaintiff withdrew the action against the Bredasdorp Primary School.

[3] In this case, the Plaintiff claims that the Defendant is vicariously liable for the damages suffered as a result of an act in connection with an educational activity as provided in section 60 (1) of the Schools Act 84 of 1996 ("the Act").

[4] As far as the special plea is concerned, the pre- trial minute prepared and signed by the parties' legal representatives, dated 27 November 2019, records the parties' agreement that the Defendant withdrew his special plea.

[5] The issue of merits and quantum were separated by agreement between the parties and an order to that effect was granted in terms of Uniform Rule 33(4). The matter then proceeded on the basis of the determination of merits only.

Pleadings

[6] In his amended particulars of claim, the Plaintiff pleaded that the Defendant owed a duty of care to the minor, to exercise such skill, diligence and competence in caring for and supervising the minor and to ensure his safety, as can reasonably be expected from the Defendant and/or their employees.

[7] The Plaintiff further lists various respects in which he contends that the incident was solely caused by the Defendant's breach of its duty of care as follows:

> '15.1 The defendant failed to foresee the possibility of harm to the learners and in particular the minor, should the learners be left unsupervised on the premises;
>
> 15.2 The defendant failed to ensure the safety of learners on the school premises;
>
> 15.3 The defendant failed to implement adequate safety measures, including ensuring adequate supervision, to ensure that learners, and the minor in particular, could safely enter, attend and leave the school premises, without being assaulted by fellow learners;
>
> 15.4 The defendant failed to ensure that there were adequate security measures in place when learners are on the school premises;
>
> 15.5 The defendant failed to avoid the incident where by the exercise of reasonable care and measure, they could have and should have done so.
>
> 16. As a result of the aforesaid facts and circumstances, the defendant owed the minor a duty of care to prevent foreseeable harm as suffered by the minor and to take reasonable steps to ensure inter alia that it was safe for learners to enter, attend and leave the school premises and / or take all further reasonable steps to ensure the safety of all learners on the school premises and at all reasonable times when entering, attending and exiting the school premises. ("the duty of care").'

[8] In the alternative the Plaintiff avers that the employees of the Defendant were negligent in the various respects alleged in the particulars of claim, and that their negligence caused the incident which led to injury and damages suffered by the minor.

[9] The Defendant, in his plea, denies that the incident of 18 September 2012 happened. However, in the pre-trial minute which was handed in on the day the trial

commenced, and which was duly admitted and marked as exhibit "A", the Defendant admits that the incident had indeed occurred.

[10] The Defendant states in his plea that he denies being under a duty of care to the minor, at the time the incident happened. The Defendant asserts in his plea that the alleged incident took place prior to the commencement of the school and it was not connected to a school activity.

[11] In paragraph 16 of the plea, the Defendant contends that in the event the court finds that the Defendant has a duty of care, it denies that it breached such duty and specifically states that the alleged incident was reasonably unforeseeable.

Evidence

[12] The Plaintiff's case is based on the testimony of U […] and N […] A […] ("N […]").The Defendant, on the other hand, led the evidence of the headmaster and deputy headmaster, who were leaders of the school when the incident occurred. A trial bundle was handed up by agreement and was duly admitted and marked as exhibit "B". The said bundle amongst others contained school behaviour reports of W […] L […] ("W […]"), which were compiled by W […]'s class teacher.

The Plaintiff's case

[13] On the fateful morning of 18 September 2012, approximately 7h00, U [...] participated in a game of tag rugby with other school learners, on the school premises, before the school commenced. During the game, W [...] intentionally hit U [...] with a raised knuckle twice on his left eye. U [...] lost his left eye as a consequence of the assault.

[14] U [...] testified that, on the day of the incident, the school gates were already open at 7h00. He normally arrives at school at 7h00 and by that time there are already a lot of school children on the school premises. The school commenced at 7h30 and before the school commences the children usually play games on the school fields.

[15] On that particular morning, he and his friends played tag rugby. When they played rugby they were not being supervised by the teachers. Had they been supervised at the critical time, they would not have been allowed to play tag rugby, as they were not even allowed to play tag rugby during break when they are supervised.

[16] It was also his testimony that in the morning caretakers and children do scholar patrol. After the incident the children were not allowed for some time to play games. When the children were ultimately allowed to play games again, teachers would be in attendance. He was never called by the headmaster or deputy headmaster to talk about the incident.

[17] N [...] testified that he would normally arrive at school at 7h10 and school started at 7h30. Whilst they waited for school to start they would play rugby. He also testified that on the morning in question, whilst they played the rugby game, W [...] punched U [...] twice in the eye with the middle finger which had the knuckle raised. W [...] also kicked him. He does not know why W [...] hit him. He then went to report the incident to the grade teacher in class. On the morning of the incident he did not see any teachers or care-takers around where the children played. During break time they would be supervised by two teachers.

The Defendant's case

[18] Mr. van der Berg, testified that at the time of the incident he was the Deputy Principal and head of discipline. The school catered for grades R to 7. In total there were about 550 learners and about 25 teachers. The school started at 7h30 and the school gates were opened early for practical and safety considerations.

[19] Before the schooling commenced, the school did not have an official supervising the children, but would have two supervisors during break time. The learners know where to play and are told how to behave. Supervision is only conducted from 7h30 till 14h00.

[20] He had had previous interactions with W [...] and to him W [...] came across as a likeable boy who was obviously troubled, and struggled with emotional intelligence. He also described W [...] as being very expressive in his behaviour. From his

interactions with W [...], there were no red flags about W [...]. As far as he was concerned, W [...] was a normal learner.

[21] He is only aware of two behavioural incidents that involved W [...], which were an incident that involved a stick and the one involving U [...]. Any other incidents were never brought to his attention, notwithstanding the fact that he was the head of discipline. He was also not aware of the reports compiled by W [...]'s class teacher, hence he laboured under the impression that there was no need to look into W [...]'s situation.

[22] He never established what medication W [...] was on, or should have been taking. If the problems involving W [...] had been brought to his attention they might have assisted him in dealing with W [...]. He conceded that the school behavioural report involving W [...] dated 25 July 2012, denotes the school dealing with a very problematic child.

[23] He also conceded that it was a red flag when W [...] was identified as hitting other children at break time and when his guardian refused to give him medication. According to him the six reports regarding W [...], contained in page five of exhibit "B", were serious incidents and were further red flags. He also testified that the transgression reported about W [...] to the grade teacher, probably fell under the bullying category in the school's code of conduct. He maintained, however, that the school did not put small learners under categories.

[24] It was his testimony that incidents do occur regularly on the fields. Learners will fight and it is a normal thing for learners to have incidents. According to him, they deal with grade one learners by talking with them and trying to guide them. Though he can see now that there was a problem with W [...] he cannot say that he was the only child who had such behavioural problems at school. It was also his testimony that although W [...]'s behaviour was bad, it is not out of the ordinary, even with the benefit of hindsight.

[25] It was also his testimony that the reports regarding W [...]'s transgressions do not reflect that the school was getting co-operation from W [...]'s guardian. He does not agree that the school let W [...] loose on other learners. According to him the only thing the school could do with learners W [...]'s age was to involve a guardian.

[26] It is his assertion that the prevention of such incidents is beyond his control. He further claims that it is very difficult to prevent such things, and that they can only teach the learners about what is allowed. Children were allowed to play tag rugby.

[27] He did not know about the incident as it was only brought to his attention when U [...]'s grandmother called, a day or two after its occurrence.

[28] He claims that the school cannot simply expel a learner for bad behaviour. He was concerned about what would happen with W [...], should he be expelled.

According to him they walk the path with the learner. In his opinion the child needs help and having children who do not listen is part of life.

[29] It was further his testimony that, W [...] left the school before the end of 2012. The school did not expel him and there were no consequences for him. However, in class his privileges were taken away and he was kept away from the rest of the class.

[30] Mr. Huyssteen testified that he was the school's Principal at the time the incident in question occurred. The incident was only brought to his attention on 21 September 2012 by Mr. van der Berg. Because they did not know about the incident, the school did not follow protocol related to injuries.

[31] It was his testimony that W [...] joined the school in June and the incident happened in September. At the time of the incident, W [...] had been at their school for three months. In the ordinary course, they do a follow up with a previous school, when they receive a new learner, but in the case of W [...], this was not done. All the incidents mentioned in exhibit "B" from page 1- 5 were brought to his attention.

[32] Before the incident in question, the school never considered expelling W [...] as an option. The matter was only referred to the governing body after the incident. There was no supervision at the time of the incident, because schooling had not yet commenced.

[33] He had an opportunity to speak with W [...] and gave him advice. As an educator he wanted to walk the road with him and his parents. The strategy was to get W [...] on his side so that W [...] could know right from wrong. The school did not fail to find out what the diagnosis of W [...] was. The time was too short to get the diagnosis and the guardian accepted the responsibility of finding out the diagnosis.

[34] They only refer a learner to a school psychologist if the parent gives consent. He agrees that W [...] had behavioural problems, but does not agree that he was let loose on other grade one learners. According to him, protocol was followed and the school did communicate with the guardian.

Evaluation

Common cause issues

a) That Bredasdorp Primary School is a public school as defined in the Act.
b) The Defendant controls and/or is responsible for the administration of the school.
c) Both U [...] and W [...] were enrolled at the school as grade one learners at the time.
d) That the gates of the school open at 7h00 and schooling commences at 7h30.
e) That U [...] was dropped off at school by his grandmother before the school commenced.
f) That the learners were on the school premises when the critical incident happened and they were not being supervised.
g) That U [...] lost his left eye.

h) That it is school policy that the leaners are not supervised before the commencement of the school.
i) That learners are supervised during break time.
j) That W [...] was a problematic child at school.
k) According to the school's records, on several occasions other learners reported incidences involving aggressive behaviour towards them by W [...].

[35] This being so, it is thus evident that the issues which are at the heart of dispute in this matter are the following:

Issues

a) Did the Defendant have a duty of care when U [...] was injured by W[...]?
b) If the Defendant had a duty of care did he breach the duty of care, or whether the school employees acting within the scope of their employment with the Defendant and/ or the school acted negligently?

[36] The questions put differently, are whether the Defendant owed U [...] a duty of care to prevent harm as suffered by U [...],whether the harm suffered by U [...] was foreseeable and whether the injury suffered by U [...] was caused by the negligence of the Defendant's employees.

[37] In *Dlamini v MEC for Education, Mpumalanga Provincial Government* (885/2016) [2017] ZAGPPHC 814 (20 December 2017), Legodi J encapsulates succinctly the essence of the instant case, when he stated the following at paras 13-14:

> ". . . There is no simple answer to the question when the school may be liable. Everything depends on the facts of the individual case. Teachers or educators have a

duty of care towards the learners, students and or pupils. The general law of negligence provides that a person may be negligent if he or she owes a duty of care to the person injured and he or she did not carry out that duty to the legal standard required and the person (in this case, the learner), suffered injuries as a result of the failure to adhere to the duty of care.

In any given case, the actual facts must be examined closely to see if all these elements set out above are present. When the duty of care of teachers towards their learners starts, where it ends and precisely what constitutes a breach of duty, are not nearly so clear-cut."

What is a school activity?

[38] It was strenuously contended on behalf of the Defendant that, in this matter, no duty of care was owed to the learner before the commencement of the schooling, because the incident did not involve a school activity. At the outset I deal with the aspect of what is meant by the term 'school activity', as mentioned in the Act. Much turns on whether the rugby game which was played by the learners, before the commencement of schooling falls, within the meaning of section 60 (1) of the Act.

[39] Seeing that the definition of the term 'school activity' is critical to this matter, I consider it necessary to quote it in full. Section 1 defines a school activity as follows:

'...any official educational, cultural, recreational, or social activity of the school within or outside the school premises;...'

[40] Notwithstanding the fact that the scope of the term 'school activity' has been described in the Act, the parties in the present matter are still at polar opposites regarding whether the claim falls within the purview of section 60 (1) (a) of the Act.

[41] The Defendant argues that the meaning attributed to 'school activity' should be restricted. It is contended on behalf of the Defendant that the word official as an adjective means: 'relating to an authority or public body and its activities and responsibilities'. It is further asserted by the Defendant that an official school activity is consequently characterised by the type of activity conducted by a public school. So the argument continues that what distinguishes an official school activity from any other activity is the fact that it relates to an authority or public body and its activities and responsibilities. I understand the assertion on behalf of the Defendant to mean that the school has no duty to supervise learners who are on school grounds before the school commences.

[42] There can be no gainsaying that on the plain wording of section 1, the drafters intended to cover certain scenarios. I do not seek to give a generous interpretation which is not promised by the wording of section 1 of the Act. However, I believe that in considering whether an activity falls within the scope of section 1 of the Act, one has to look at the surrounding circumstances of the particular activity. It is crucial in any given case to consider the context and circumstances of that particular case as well as interpretation aids. It is also significant to take into account what was said in *Cool Ideas 1186 CC v Hubbard and Another 2014 (4) SA 474 (CC)* by Majiedt AJ, when he stated the following, at para 28:

'A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:

(a) that statutory provisions should always be interpreted purposively;

(b) the relevant statutory provision must be properly contextualised and

(c) all statutes must be construed consistently with the Constitution...'(internal footnotes omitted.)

[43] In the present matter it is important to bear in mind that, on the morning in question U [...], who was a grade one learner, was dropped off at school by his grandmother, not for any reason other than to attend school. I deem it necessary to mention that registered primary school learners were allowed to play games on the school playground before the school commenced. When the tragic incident happened on the school fields U [...] and his peers were essentially killing time on school premises, waiting for the school bell to ring.

[44] It is of some significance that the school gates were officially opened; for the registered learners to enter the school premises before the school bell rung. The school principal testified that this is done in order to ensure the safety of learners. By necessary implication this leads to the conclusion that the school authorities granted access to learners to enter the school grounds, even before schooling commences, due to safety concerns. It is quite clear in my view that, even though classes had not commenced, the period between the time the gates open to allow teachers and learners into the school and for the teachers to prepare for the day's schooling can be regarded as school hours.

In *Dlamini* supra, the following was said:

> '[13] If a child has an accident in the school, in the school yard, on the way to school, on the school bus or while on a school trip, the question of whether or not the school or the teachers were negligent, may arise as it has arisen in the present case. . .
>
> [16] The duty of care by teachers towards their learners applies mostly on the school premises during school opening hours.'

[45] I find the assertion by the Defendant, that at the critical time the school did not have any duty of care towards the learners because the school bell had not yet rung and the game which the learners were playing was not a school activity as contemplated in the Act, astonishing. It is my firm view that the entire assertion is predicated upon a fallacy. This is so because, by implication, the Defendant is saying that, it is not the school's concern if there are hazards on school grounds before the school bell rings.

[46] Surely, when a child is dropped off at school that is done on a reasonable belief that the child will be safe on school premises. Because it is inherent that learners should not be exposed to harm on the school premises. As matters stand, to my mind, the moment registered learners are allowed to enter school premises in order to attend school, before the commencement of the school; the school administrators and teachers are responsible for the wellbeing of the learners. While the child is at school the teachers become *in loco parentis.* Mr. van der Berg testified that the learners were allowed to play tag rugby. The guardian or parent has put the learner in the school's care. In my mind the purpose for the child to be on school grounds and the game the learners play before the school starts are inextricably linked. When the learners engage in a game with other learners on a school playground, that game falls within

the realm of official social activity of the school. The school administrators are thus tasked with an important task of providing a safe school environment, as long as the learners are on the school grounds.

[47] Importantly, the evidence in this matter reveals that at the critical time, the employees were already exercising control over the school, as some activities were already operational. This I say because the staff was already holding a meeting, securities were manning the school entrances and scholar patrols were being performed, safeguarding pedestrian learners. Surely these features are reassuring to parents when they drop their children at school that the children will be safe on school grounds; albeit the school had not yet commenced.

In the case of *Cape Town City v Carelse and Others* 2021 (1) SA 355 (SCA), para 52, the court observed that:

> '. . . The access control at that point is, at first blush, impressive. This must be reassuring to a visitor. If one were to ask a member of the public whether they would expect to receive adequate protection at the resort controlled by the city, within means and reason the answer would be self-evident. Moreover, the constitutional right to safety of the person and the right to dignity, while visiting the resort are amongst others, implicated. It is also proper to take into account that the municipality is part of the state and that it should be concerned with public safety at a resort conducted by it.'

[48] In *Witzenberg Municipality v Bridgman NO* (685/2018) [2019] ZASCA 186 (3 December 2019), the following was stated at para 28:

> '... It gave comfort to residents that the Municipality was serious about security at the resort and that security staff would pay attention to patrolling the area. In running the resort, the Municipality bore a duty to take appropriate steps to safeguard to the best of its ability the safety of visitors and residents.'

[49] Unsurprisingly, in the *Dlamini* matter supra, the court inferred the duty of care towards a learner from the nature of the relationship between the school, parents and learners.

[50] In *Rusere v Jesuit Fathers* 1970 (4) SA 537 R, the learner was injured on Saturday after the school soccer game had ended. When the soccer game ended the school children had free time to amuse themselves on school grounds before they could return to their dormitories. Yet the school did not escape liability because it did not owe duty of care, but merely because the court found that the school was not negligent.

[51] In *M v MEC for Education, East Cape Province and Another (2367/2014)* [2020] ZAECPEHC 23 (21 July 2020), the learner was injured in class, where he was not allowed to be during break. However, the court found that the defendants correctly conceded that the defendant owed a duty of care albeit that the learner was injured at a place where he was not supposed to be.

[52] In the case of *Minister of Education and Another v Wynkwart NO* 2004 (3) SA 577 (C), although the learner was injured as he was leaving the school premises after school finishing time, Desai J opined the following, at page 580A:

> 'It was not in dispute that [the respondent's minor son] R was injured at school while under the control and care of the appellants' employee and it was fairly and properly conceded that the teachers that the teachers owe young children in their care a legal duty to act positively to prevent physical harm being sustained by them through misadventure.'

[53] In *Parktown High School for Girls v Emeran and Another* 2019 (4) SA 188 (SCA), a member of the public was injured on school premises while attending a fashion show, in the evening, that had been organised by the student body. The court found that the fashion show was a 'school activity', as contemplated in section 60 (1) (a) of the Act.

[54] More importantly, to put it bluntly, it would be irrational for the school to refuse to take responsibility for young leaners who are on their premises, to attend school, just before the school commences. More so, if the teachers are well aware that learners are on the school premises and are engaging in games. The fact that the school authorities did not stop the learners from engaging in the game before the commencement of the school, in my mind means that the school had effectively sanctioned those games.

[55] It should also be borne in mind that the definition of school activity clearly states that it is 'any official . . . activity of the school within or outside the school premises'. It is clear from the wording of the Act that it can hardly be contended that the relevant section was meant to cover only activities that fall after the school bell has rung.

[56] To my mind the use of the words *'within or outside school premises'* plainly evinces that the legislature, intended a broader meaning of the concept '*school activity'*.

[57] Consequently, I find in the circumstances of this case, that the Defendant at the crucial time had a duty of care towards the learners who were engaged in the tag rugby. The Defendant had a duty to ensure that the activities which the learners were engaging in on school premises were reasonably safe, especially when primary school learners were left unattended even before classes start.

[58] Even if I were to err regarding what constitutes 'school activity', I still hold the firm view that it cannot be accepted as a rule that the Defendant should always escape liability if an incident happens on school grounds before the school commences. Undoubtedly each case should be viewed on its own merits, to determine whether the Defendant had a duty of care, notwithstanding the provisions of the Act. I am in agreement with the submissions made by counsel on behalf of the defendant that the duty of care operates at two levels; on one level it is policy based and on the other it is fact based. It is my firm view that both levels are applicable in this case. My reasons for holding such view will become apparent hereunder.

Foreseeability

[59] It is unrealistic to require the Defendant to foresee something which is really farfetched and fanciful. In terms of our law it is expected of an individual to guard only against dangers which he or she could or should have foreseen. There can be no justification for assuming that the incident was foreseeable simply because the event occurred or did eventuate. Our courts recognise that, the precise or exact manner in which harm occurs need not be foreseeable, but the general manner of its occurrence

must indeed be reasonably foreseeable. *See Minister of Safety and Security and Another v Carmichele* 2004 (3) SA 305 (SCA).

[60] In *S v Burger* 1975 (4) SA 877 (A) Holmes JA stated the following at 879C-E:

> 'Culpa and foreseeability are tested by reference to the standard of a diligens paterfamilias. . . One does not expect of a diligens paterfamilias any extremes such as Solomonic wisdom, prophetic foresight, chameleonic caution, headlong haste, nervous timidity, or the trained reflexes of a racing driver. In short, a diligens paterfamilias treads life's pathway with moderation and prudent common sense'.

[61] The evidence in the instant matter bears the point that W [...] constantly assaulted other learners and his transgressions were brought to the attention of his class teacher and the school principal. The incident involving U [...] was not the first incident of its nature to involve W [...], on the school premises. Even more so, it was not the first time for the school to experience serious and dangerous aggression, exhibited by W [...], towards a fellow learner.

[62] Of importance to note is that, when the incident in question happened, W [...] had been a learner at the school for only three months, as he only arrived in June. Yet within a short period there were already repeated complainants of assault against W [...], reported by other school learners to the school staff. It was very apparent from very early on that the school was dealing with a leaner with aggression problems. It is significant to mention that the evidence in this matter reveals that W [...] relentlessly bullied other learners on an ongoing basis. Clearly from the facts of this matter, W [...] was not a concealed source of danger to other learners. When regard is had into the

recorded incidents concerning W [...] it becomes clear that a pattern of bad behaviour by W [...] had already formed at the time the incident involving U [...] occurred. It is clear from the school behaviour reports that, before the incident in issue, W [...] was also involved in four other incidences where he attacked other learners physically. The evidence also reveals that by the time W [...], assaulted U [...] he had already developed a history of violence. This history of violence was created within a very short period of his admission to the school. This is even after the guardian undertook to have W [...] evaluated.

[63] The incident preceding the one in question, happened on the 08th of August 2012, merely nine days before. It also appears that the incident involving U [...] was not the last one, as W [...] was involved in another incident on the 19th October, which involved him throwing scissors at another child.

[64] Notwithstanding W [...]'s behavioural problems in the past, there is no evidence in this matter to show that the school ever considered that the interaction of W [...] with other learners posed a danger to them. W [...]'s class teacher, in one of her reports, dated 27 July 2012, made the following remarks:

> 'Die aanvaarding van dissipline en reëls is vir W. . . 'n groot frustrasie en 'n groot bekommernis vir my, want hy "ontplof" baie maklik. Sy klasmaats is bang vir hom.'

[65] Unfortunately W [...]'s class teacher who appears to have recorded the incidents involving W [...], did not testify to elucidate any of the issues. Merely gleaning from the teacher's remarks, it is evident that W [...] posed a potential harm to other learners who were also afraid of him. The behavioural record of W [...] also demonstrates this.

[66] Equally, it can never be said that a learner who exhibits repetitive aggressive behaviour, for instance: attacking other learners with a pair of scissors; throws books around in class; disturbing class; swearing at class mates; tackling another learner in class; hitting other children during breaks; throwing stones at the head of other learners; is exhibiting normal expected behaviour for an average learner. It can thus never be successfully argued that such behaviour blends with the circumstances of a school.

[67] The question that then begs to be asked is: can it be said that there was no way for the school's employees to predict or foresee that someone might be injured by W [...]? I think not, because, it can never be successfully argued under the circumstances of this case that what W [...] did to U [...] was a random act. Here we have previous occurrences or offences that should have alerted the school authorities to the incident involving U [...].There were advance warnings that W[...], was an inherent danger to other learners. It does not need a rocket scientist to figure out, that W [...] was a ticking time bomb.

[68] In *Hawekwa Youth Camp and Another v Byrne* 2010 (6) SA 83 (SCA), para 28 Brand JA stated:

> '. . . As I have said, I believe that once a person of average intelligence applies his or her mind to the situation, the danger posed by an unprotected bunk becomes quite plain. Particularly when that reasonable observer is alerted by the concern of parents who refuse to allow their children to sleep on upper bunks because they regard them as dangerous'

[69] It is also significant to note, in the present matter, that Mr. van der Berg conceded that the school report involving W [...], dated 25 July 2012, indicates that the school was dealing with a very problematic child. He also acknowledged that it was a red flag when W [...] was identified as hitting other children at break time and when his guardian refused to give him medication. According to him the six reports regarding W [...], contained in page five of exhibit "B", were serious incidents and were further red flags. He also testified that the transgression reported about W [...] to the grade teacher, probably fell under the bullying category in the school's code of conduct.

Navsa JA in *Witzenberg Municipality*, supra also stated the following at para 24:

> "Moreover, in light of previous experiences, there ought to have been a greater awareness by the security services and the employees of the possibility of criminal conduct. Harm eventuating, in the absence of these measures, would have been foreseeable, *particularly in the light of prior criminal conduct experienced at the resort coupled with municipal officials expressing concerns that criminal behaviour of a kind eclipsing those hitherto perpetrated might materialise*." (My own underlining and emphasis)

[70] It is significant to note that in this matter we are not dealing with a once off incident which was totally uncharacteristic or which came from nowhere and caught everyone blindsided. In my view this is not a case which required 'prophetic foresight' but a case of *res ipsa loquitur.* The *diligens paterfamilias* in the position of the school employees would have appreciated the magnitude of the potential for harm posed by W [...] to other learners. Given the past conduct of W [...], it was surely not beyond the realms of human comprehension that, whilst W [...] was on school grounds, he was consistently a huge safety risk to other learners. Clearly, in the context of this case, the school employees should have foreseen the likelihood of W [...] attacking or harming other learners in a situation of a game being played by learners as sufficiently real and immediate.

Duty of care arising from circumstances

[71] In *Rusere*, supra at 539C-D Beck J stated the following:

> 'The duty of care owed to children by school authorities has been said to be to take such care of them as a careful father would take care of his children.'

[72] I am acutely aware of the fact that, when the learners are unsupervised it does not necessarily mean that the school gives carte blanche to learners to run amok. As testified by both erstwhile heads of Bredasdorp Primary, that learners are always told how to behave at school.

[73] It is evident that W [...] exhibited extreme behaviour, which was violent in nature. As already alluded to, W [...]'s attacks on other learners was certainly not an

unusual and rare occurrence. The attacks on other children certainly shows a persistent, and severe pattern and created a hostile environment for other learners as they were afraid of him.

[74] Significantly, it is quite evident from the evidence that the school was dealing with seven year olds, doing grade one. Consequently, the safety and protection of other learners around W [...] should have been the school employees' major concern. Hence I find it rather odd that Mr. van der Berg, as the school head of discipline, was oblivious to most of the extreme behavioural transgressions, displayed by W [...].

[75] The concessions by Mr. van der Berg, that the school's behaviour reports of W [...] reflect that the school was not getting co-operation from of W[...]'s guardian and that W [...] was troubled, are very illuminating. Given the contents of the behaviour reports the concession is well founded. Clearly W [...] was making the school an unsafe environment for other learners. It is my strong view that W [...] was a high level risk to other learners. Remarkably, the school took the risk of leaving the situation with W [...]'s guardian and only choosing to talk to W [...]. In doing so the school essentially put itself in a dilemma by taking on the risk of other learners being attacked by W [...]. The plain and implicit corollary of this in my view is that, the school assumed full responsibility for any child who was on school premises with W [...], regardless of the time.

[76] The school employees should always have been vigilant and alert as far as W [...] was concerned. More specifically so, as the protocols followed by the school were

obviously not yielding any results. The school should have taken reasonable steps to keep W [...] from harming other learners, whenever W [...] was on the school grounds.

[77] The circumstances prevailing in this case, specifically the situation involving W [...] created a duty of care on the part of the school employees to ensure safety of all the learners of Bredasdorp Primary at all times W [...] was on their premises. Conversely stated, the facts of this case reveal that at the critical time the Defendant owed a duty of care to U [...] and the other learners who were with W [...], as he was a potential and foreseeable danger to other learners. The Defendant cannot negate the obligation he has to learners who are on school premises to attend school, merely on the basis that the incident happened outside school hours. Brand JA, in *Hawekwa*, supra, par 29 pointed out that:

> "...Logic dictates that once a risk has been recognised as inherently foreseeable, such as for example, the one created by an unfenced swimming pool, the reasonable person will not disregard that risk simply because it had never materialised before."

[78] In *Witzenberg Municipality*, supra the SCA stated the following at par 25:

> 'The precise nature of harm need not be foreseen. The general nature of serious criminal conduct with attendant consequences is what ought to have been foreseen.'

[79] Essentially this means that in this case I find that the duty of care on the Defendant stemmed from two grounds. The first ground is statutory and the second ground is based on the circumstances of the case.

Did the defendant breach the duty of care?

[80] In the case of *Peri Urban Areas Health Board v Munarin* 1965 (3) SA 367 (A) at page 373 E-H, the court said that in certain circumstances negligence is a breach of duty of care. The court further stated the following:

> "Foreseeability of harm to a person, whether he be a specific individual or one of a category, is usually not a difficult question, but when ought I to guard against it? It depends upon the circumstances in each particular case, and it is neither necessary nor desirable to attempt a formulation which would cover all cases. For the purposes of the present case it is sufficient to say, by way of general approach, that if I launch a potentially dangerous undertaking involving the foreseeable possibility of harm to another, the circumstances may be such that I cannot reasonably shrug my shoulders in unconcern but have certain responsibilities in the matter—the duty of care."

[81] The critical question is whether the *diligens paterfamilias*, in the position of the school would have considered the possibility of a serious assault as requiring him to take precautions.

[82] It has been contended on behalf of the Defendant that the Bredarsdorp Primary is not a special school and that it would be unreasonable to expect that the leaners should be supervised at all times when they are at school. It was further asserted on behalf of the Defendant that the school authorities, in the context of this matter had taken reasonable steps to deal with the transgressions by W [...].

[83] As already alluded to hereinabove, it requires simple logic to discern that, the persistent and consistent complainants of bullying committed by W [...] towards other

learners were serious signs of aggressive behaviour demonstrated by W [...] on school grounds.

[84] The evidence led by the Defendant also reveals that after the school engaged W [...]'s guardian on a number of occasions regarding W [...]'s transgressions; the guardian was not ready to co-operate as she did nothing to ameliorate the situation. Even before W [...]'s assault on U [...] occurred, the evidence in this matter evinces that the behaviour of W [...] had already reached levels which required the school to intervene irrespective of a non-responsive guardian. Notwithstanding that, the evidence establishes further that, W [...] was left by the school unattended and he had free rein to roam wherever he wanted on the school premises; regardless of his propensity to violence. The evidence also shows that no corrective actions had been taken by the school, following the aggressive tendencies of W [...] towards other learners, save to engage the guardian and talk to W [...].

[85] Albeit the school tried to engage with and inform W [...]'s guardian about W [...]'s transgressions, under the circumstances of this matter, by all accounts, the school response was not adequate. Despite repeated complainants to the school about the aggressive conduct of W [...], the school did not address the situation appropriately. The school authorities, after receiving initial complaints about W [...]'s violent streak; simply threw caution to the wind and did not even do a follow up investigation with W [...]'s previous school. Mr. Van der Berg's lack of knowledge about some of W [...]'s transgressions, perfectly illustrates the inadequacy of the steps taken by the school to address the situation. Irrespective of the non-responsive

attitude from W [...]'s guardian the school should have insisted on counselling for W [...], as long as W [...] was on school premises. The school even failed to implement its own code of conduct, by taking reasonable care or proper steps to make sure that W [...] does not harm other learners.

[86] Given the circumstances in the present matter, particularly if regard is also had to the ages of the learners at the critical time, without doubt, the situation was not adequately handled by the school. Clearly, the presence of W [...] on school grounds always exposed other learners to risk of injury. It was the school's duty to protect learners against the risk of injury to which ongoing bullying by W [...] exposed them. It is evident that the school seemed to have focused mainly on accommodating W [...] at the expense of ensuring the safety of the other learners. The school did not even make an attempt to strike a balance between the interest of W [...] and the safety of other learners. Instead the other learners were left totally vulnerable to persistent bullying.

[87] The school failed to devise or implement a mechanism to respond adequately to the reported incidents of frequent violent attacks perpetrated by W [...] on other learners. Without doubt under the circumstances of this matter where the behaviour was always intensifying, it was insufficient to talk to the guardian; talk to the child and to write incident reports. The steps taken by the school were totally lacking compared to the risk posed by W [...] to other learners. It is clear that the school employees were ill equipped to respond to the bullying, the evidence suggests that the school authorities simply turned a blind eye because of W [...]'s age, because they wanted to

walk the path with him, and because they were of the view that they could not expel him.

[88] In *MV MSC Spain; Mediterranean Shipping CO (PTY) Ltd v Tebe Trading (PTY) Ltd* 2008 (6) SA 595 (SCA), para14, it was stated that:

> 'Wrongfulness and fault are both requirements for liability under the modern Aquilian action'

[89] Mhlantla J, in *Avonmore Supermarket CC v Venter* 2014 (5) SA 399 (SCA) quoted the dictum by Kumleben J, in Ngubane v South African Transport Services 1991 (1) SA 756 (A), at 776G-I where he stated the following:

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

[90] As stated hereinabove, it is imperative that schools are by their very nature, supposed to provide a safe and supportive learning environment by taking reasonable precautions to avoid incidents of this nature. I am mindful that it can never be said that there is absolute liability on the part of the Defendant for the consequences of every attack by a leaner on another learner which happens on the school premises.

[91] A school environment is an environment which at times allows children to roam free on school premises. It is also a fact that it is not possible that learners can be supervised at all times whilst they are on school premises. The case law is replete with authorities stating that the need for constant supervision depends on the circumstances of each case.

[92] In *Rusere* supra, Beck J, stated, at 554H:

> "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".

[93] In *Wynkwart* supra, the court held at 583G-584A that:

> 'The degree of supervision to be exercised in a particular case would depend upon a great variety of circumstances. It appears from the authorities referred to herein that a pupil of R.'s age need not be kept under continuous supervision on the school grounds unless there is some hazardous feature present. To guard against the possibility of a single pupil slipping away, climbing over a gate or fence and suffering injuries would require that each pupil should be kept under continuous supervision. It would not be reasonable to expect the appellants to have taken such steps in this instance.
>
> In my view the respondent did not establish on the evidence a failure by the appellants to take reasonable steps which, if taken, would have prevented R. from slipping away from his class and climbing over the locked gate which he had been repeatedly warned not to use. Nor did respondent show that other steps not taken by the appellants constituted reasonable measures which, if applied, would have prevented R. doing what he did.'

[94] W [...]'s school behaviour reports show that after his transgressions which were recorded on the 25th July 2012, he was immediately referred to the Head of School who had a serious conversation with him. It appears that certain benefits were also taken away from him. On the 3rd of August 2012, it was recorded on the behaviour report that W [...] showed no self-control. The teacher further recorded in W [...]'s behaviour report that W [...]'s guardian refused to administer medication which would have helped W [...] with calmness and self-control.

[95] It is this court's strong view that the *diligens paterfamilias* in the shoes of the school authorities, would have considered the situation as one that required extra precautions. The school was obliged to take no more than reasonable steps to guard against foreseeable harm to the learners, at all times W [...] was on school premises.

[96] Certainly the talks with W [...] by the school authorities and engaging the guardian under the circumstances of this case, were not reasonable steps to adequately control and prevent the foreseeable harm. Particularly if the guardian was refusing to administer medication to W [...], to keep him calm. The incident in question and the one which happened after this one starkly shows that the steps taken by the school to deal with W [...] were not reasonable under the circumstances.

[97] It is well known that the degree of supervision depends on the risk posed. It is my view that, a reasonable person in the position of the authorities at Bredasdorp Primary School, would have realised that if they decided to keep W[...] at their school, they should devise means to ensure that he is always kept under close observation or

that he is supervised when he interacts with other leaners, regardless of whether the school had commenced or not. This is so because the risk posed to other learners by W [...] was significant to such an extent that W [...] should have been kept under constant supervision, if no other remedies were available. If it was not possible to monitor W [...], the school could have also tried to limit his contact, with other learners. I believe that, under the circumstances of this case, this is by no means exacting too high a duty of care or demanding unrealistic standards of the Defendant. Clearly, W [...] needed monitoring.

[98] More importantly, a proper comparison between what was done by the school and the situation of W [...] which was volatile and extremely risky, reveals that the school placed its learners at high risk. The invariable consequence of this is that the school did not meet the required standard of care in dealing with the situation involving W [...].

[99] It is thus my strong view that the school employees failed to take reasonable steps which were aimed to prevent the attacks from reoccurring and eliminate the hostile environment for other learners. They failed to take reasonable precautions and to deal appropriately and sufficiently with the danger posed by W [...] to other learners.

[100] Consequently, I find that the school employees were negligent in failing to take the requisite reasonable steps to avoid a foreseeable harm. I also find that the negligent conduct by the school employees led to U [...] losing his eye. Under the circumstances the Defendant is indeed vicariously liable.

It is for these aforegoing reasons that I grant the following order:

a) The Defendant is liable for such damages as the Plaintiff may prove to have been suffered by U [...], as a result of an injury sustained by him when he was assaulted on the 18th September 2012, at Bredasdorp Primary School, situate at Buitenkant Street, Bredasdorp, Western Cape.

b) The Defendant shall pay Plaintiff's costs of suit including services of a Counsel.

CN NZIWENI

Acting Judge of the High Court