Republic of South Africa

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(Cape of Good Hope Provincial Division)

Case No: A1036/02

In the matter between

THE MINISTER OF EDUCATION

First Appellant

HIGHLANDS PRIMARY SCHOOL

Second Appellant

and

PETER WYNKWART

Respondent

(obo **R.W.)**

JUDGMENT DELIVERED on 14 January 2004

DESAI, J:

The respective appellants herein are the Minister of Education for the Western Cape and a Mitchells Plain school, the Highlands Primary School. The respondent is the father of one R.W **("R").**

The events giving rise to this appeal occurred on 9 April 1990. On the said date **R.** fell off an unused, locked gate at his school and allegedly sustained very serious injuries. More than a decade later it was contended before **Ngwenya J** that the

appellants are liable *ex delicto* in damages to the respondent because **R.'s** injuries were occasioned by their negligence. The trial court eventually found in favour of the respondent and, with the leave of the court, it is that judgment which is the subject of this appeal.

Mr **J J Gauntlett SC,** who appeared together with Mr **J P White** on behalf of the appellants, submitted that in their view the judgment and orders could not stand as the trial court had erred in certain fundamental respects.

Even if **Gauntlett SC** is correct in respect of the first issue raised by him, this court still has to consider the other issues which arise in this appeal in order to determine what finding and order should be substituted. I accordingly refer only briefly to this aspect. The parties expressly agreed that there was to be a separation of issues with the merits of the respondents' claim being adjudicated separately from the *quantum* of his claim. It was argued that the trial court lost sight of this aspect by making an express finding that the appellants were liable ***"for damages sustained by R. as a result of him leaving the school via ... the unused gate..."*** and further, that ***"as a result of which he sustained serious fatal [sic] injuries which left him permanently disabled and quadriplegic"***. Furthermore, the final paragraph of the judgment reads as follows: ***"Judgment is entered for the plaintiff with costs"***.

Gauntlett SC contended that the court had no capacity to make such findings and went beyond what it was asked to decide. The judgment is perhaps somewhat incautiously formulated. However, upon a proper reading of the judgment as a whole the findings which are binding on the appellants go no further than that **R.** sustained personal injuries when attempting to climb over a locked gate in the fence surrounding the school grounds; and that they were sustained in circumstances rendering appellants liable in delict for such damages as may be proved to flow from the injuries. Questions regarding the extent and *sequelae* of the injuries remained open for the purposes of assessing the *quantum* of damages.

The next issue raised by appellants counsel is of greater significance and relates to the court *a quo's* approach to the issue of negligence. It was not in dispute that **R.** was injured at school while under the control and care of the appellants' employees and it was fairly and properly conceded that teachers owe young children in their care a legal duty to act positively to prevent physical harm being sustained by them through misadventure. It was submitted that in this instance, as in many other delict cases, the real issue is *"negligence and causation and not wrongfulness"*. (See ***BOE Bank Limited v Ries* 2002(2) SA 39 (SCA) at 46H.**) The conclusion of the court *a quo* is premised upon the core finding that the appellants failed *"to take reasonable steps to ensure that R., like all his peers, left the school through the correct exit gate"* **Gauntlett SC**, in my view rightly, points out the true inquiry is not as to foreseeability but as to what constituted reasonable steps for the appellants to take in the circumstances, and whether these, if taken, would probably have averted the harm.

Mr **W G Burger SC**, who appeared with Mr **P Tredoux** on behalf of the respondent, did not really contest the correctness of the aforementioned statements of principle. He submitted that a proper analysis of the facts must form the basis on which this issue should be decided. In effect, he argued that in the circumstances of this matter it was reasonably foreseeable that some pupils could and would climb over locked

gates and that reasonable steps could have been taken to avert the harm. I shall revert to this argument in due course.

The factual background of this matter is to a large extent not in dispute.

The Highlands Primary School is located on the corner of Eisleben and Highland Roads at Woodlands in Mitchells Plain, Western Cape. Eisleben Road is a particularly wide and notoriously dangerous road. At the time of this incident **R.** was a Grade 3 pupil at this school. He was then 9 years and 7 months old. The school had a total staff complement of 32 teachers and about 900 pupils. **R.** was one of 36 pupils in a

Miss **Nelson's** class. The school itself was surrounded by a wire mesh perimeter fence with six gates. Pupils could eggress the school grounds through three of the said gates. These were the gates marked 1, 4 and 5 on the sketch plan handed up in evidence. (Exhibit "A"). Gate 1 is on the western side leading to Ajax Way and gate 4 is on the southern side leading to blocks of flats in which some pupils lived. Gate 5 and the locked gate 6 are on the eastern side leading to Eisleben Road. Gate 5 is situated near to traffic lights. Gate 6 was permanently locked. The decision to lock the gate was made some years earlier because of perceived danger to pupils crossing Eisleben Road at that point. There was a teacher on duty at gate 1 at the end of the school day; there were no teachers on duty at gate 4 and pupils using gates 1 and 4 were not escorted to these gates by teachers. Gate 5 – leading to Eisleben Road – was controlled differently. There were teachers on duty at the said gate as well as scholar patrols to assist the pupils crossing at the traffic lights. The locked gate 6 was closer to **R.'s** house than gate 5 and on the day in question **R.** made his way to gate 6 onto which he climbed, caught his trousers and fell to the ground. At assemblies the pupils were regularly warned of the dangers of climbing over the school fences and gates – which were approximately 1,8m in height – and instructed not to do so.

There are some differences in the evidence. The court *a quo* indicated that it was reaching its finding on either evidential basis but also found that **R.'s** version of his movements from the moment he left Miss **Nelson's** classroom was to be preferred to that of Miss **Nelson**. **Burger SC** submitted that the preference for the latter's evidence was entirely correct and that Miss **Nelson's** evidence was unreliable in certain material respects. The court, however, did not expressly state its reasons for the preference and made no adverse findings in respect of the reliability, credibility or demeanour of Miss **Nelson**.

The aforementioned finding appears to be based upon an assessment of the probabilities as appears from the following passage in the judgment:

> ***"Had he left other pupils while he was already on his way to gate 5, more pupils would have seen him taking a different direction. So would Mrs Nelson. In any event, it would not have made sense to leave the queue and proceed to gate 4 once closer to gate 5. Furthermore, those pupil patrol [sic] on duty would have prevented him from doing so."***

The evidence does not necessarily support this conclusion. According to Miss **Nelson** she escorted her entire class towards a marshalling point near gate 5. From there pupils who did not leave via gate 5 were free to move towards the gates which they intended to use. It appears from other evidence that the pupils then rushed out in different directions. At this stage almost 900 pupils were moving through the schoolyard towards the three gates in use. In the circumstances, if the teachers or other pupils had seen **R.** moving in the direction of gate 6 they are likely to have thought nothing of it. Miss **Nelson** would not have seen **R.** take a different direction if she had already returned to her classroom. Miss **Nelson's** version that she escorted her class to gate 5 every day, and had been doing so for 9 years, is corroborated by the other teachers. It is more probable that the same routine was followed on that day. Furthermore, **R.** was 9 years old when the incident occurred and he suffered a

serious trauma on that day. His evidence was given some 11 years later. On the other hand, the evidence tendered by the appellants is that of senior teachers of many years standing.

Of lesser significance is the other discrepancy with regard to whether Miss **Nelson** sent **R.** to buy *"slap tjips"* (as it is referred to in Cape Town) on a roll. On Miss **Nelson's** version she sent him to buy potato crisps or sweets at a tuck shop on the school's premises. **R.'s** version is that Miss **Nelson** sent him two or three times a week to buy the chip rolls at a shop some distance away from the school. He had to climb over gate 4 and walk about 15 minutes to get to the shop. The court *a quo's* finding in this regard was the following:

> ***"The evidence reveals ... that he was his teacher's blue-eyed boy. He testified that she used to send him to the tuck shop during school hours. This she vehemently denied".***

The latter conclusion is inconsistent with the evidence. Miss **Nelson** admitted sending **R.** to the tuck shop but denied sending him outside the school to buy the chip rolls. I refer to this chip roll saga as it was one of the principal aspects relied upon by **Burger SC** to demonstrate the unreliability of Miss **Nelson** as a witness. He argued that her evidence in this regard was not supported by the caretaker who had no recollection of one of his assistants going to buy chip rolls for teachers. His inability to remember such details eleven years later is hardly surprising. It is also most unlikely that a Grade 3 teacher would allow a pupil two or three times a week to absent himself for over half an hour from class and return climbing over a 1,8m gate, carrying chip rolls. In any event, in my view this evidence takes the matter no further.

The issue not expressly addressed by the court *a quo* is the extent to which the respondent omitted to discharge the *onus* of proving that there were reasonable steps which the appellants should have taken to guard against the injury to **R.**, but failed to take. **Burger SC,** who appears to have been aware of this omission, argued that

there was "abundant" proof of an actual awareness of the real possibility that some pupils could and would climb over locked gates or over the fence and get hurt in the process. That, together with slack supervision of the pupils and a lack of discipline, created a danger of harm sufficiently serious and real to be guarded against. Reasonable steps, he argued, could have been taken by placing a teacher at *"potential danger points"*.

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

> ***"For the purposes of liability culpa arises if –***
>
> a) ***a diligens paterfamilias in the position of the defendant–***
>
> *(i)* ***would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and***
>
> *(ii)* ***would take reasonable steps to guard against such occurrence; and***
>
> *b)* ***the defendant failed to take such steps.***

This has been constantly stated by this Court for some 50 years. Requirement (a)(ii) is sometimes overlooked."

In a more recent judgment the court in ***Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431** applying ***Kruger v Coetzee*** *supra*, pertinently held that the answer to element (a)(ii) of the said case

> "will depend upon what can reasonably be expected in the circumstances of the particular case. That enquiry offers considerable scope for ensuring that undue demands are not placed upon public authorities and functionaries for the extent of their resources and the manner in which they have ordered their priorities will necessarily be taken into account in determining whether they acted reasonably" **(at 448F-G).**

It is apparent from the authorities referred to by counsel that where pupils are not kept under the constant supervision of teachers this is not in itself a breach of the duty of care owed to such pupils. The degree of supervision required depends on the risks to which the pupils are exposed.

The court *a quo* referred at length to ***Knouwds v Administrateur Kaap* 1981(1) SA 544 C.** In that case dangerous machinery was in use on a playing field where pupils were playing and running. The risk posed by the machinery was held to be such that the pupils ought to have been kept under constant supervision. The court found that the caretaker was exercising no supervision at the time at all and further there was no good reason for the dangerous machinery to have been in operation during school hours.

Applying the *dictum* in ***Ruser v The Jesuit Fathers* 1970(4) SA 537, Friedman J**, (as he then was) held

> ***"Dit is so dat dit onnodig is vir skoolpersoneel om kinders wat in hulle sorg is elke oomblik van die dag onder toesig te hou. Die mate van toesig wat van hulle verwag word hang natuurlik af van die risiko waaraan hulle blootgestel word."***

The facts in the **Knouwdes** case are quite clearly distinguishable from this case. The reasoning in the judgment also tends to support a different conclusion herein.

In the **Ruser** case a group of children between the ages of 7 and 10 were left unattended in the school grounds and engaged in a game using bows and arrows during which an 8 year old child sustained a serious injury to his eye, **Beck J** (as he then was), held (**at 539 F-H**) that:

> "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*"**

The House of Lords in ***Camarthenshire County Council v Lewis*** **1955 (1) All ER 565 (HL)** held that a failure to keep a school gate which led to a busy thoroughfare locked or effectively latched constituted negligence by the local education authority.

Unlike the ***Camarthenshire*** case in this matter gate 6 was permanently locked as it granted access to the busy, and possibly dangerous Eisleben Road. The perimeter fence and gates were safety measures. **R.** found himself in "normal and familiar" surroundings which were devoid of features that could be regarded as hazardous. The

appellants had not introduced hazards. In addition thereto, as previously indicated the pupils were regularly warned of the dangers of climbing over the school's gates and fences. Furthermore, there was a properly considered system of teacher, and even scholar patrol, supervision to manage the daily egress of approximately 900 pupils simultaneously from the three gates in use.

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.

In the result the appeal succeeds with costs, which costs are to include the costs of two counsel and the costs of the leave to appeal. The order of the court *a quo* is set aside and substituted with the following:

"The plaintiff's claim is dismissed with costs."

DesaiJ

I agree.

HJ ErasmusJ

I agree.

YekisoJ