IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, GRAHAMSTOWN)

CASE NO: CA51/2021
DATE HEARD: 15/11/2021
DATE HANDED DOWN: 23/11/2021

In the matter between:

PHUMLA SYLVIA MAGWEBU Appellant

and

THE MEMBER OF THE EXECUTIVE COUNCIL FOR EDUCATION, EASTERN CAPE PROVINCE 1ST Respondent

OLIVIA DAWN WINDVOGEL 2ND Respondent

FULL COURT APPEAL JUDGMENT

D VAN ZYL DJP:

[1] In August 2013, when he was a grade 2 learner at the Swartkops Primary school in Gqeberha, LM sustained a burn wound when hot water from a kettle spilled onto his arm. The incident occurred during school hours

whilst LM was under the supervision of the school and its teaching staff. The Second Respondent, LM's class teacher, was in the employ of the First Respondent at the time in question. The Appellant, who is the mother of LM, subsequently instituted a claim for damages against the two Respondents on his behalf.

[2] The Appellant's claim against the First Respondent was on the basis that he is vicariously liable for the wrongful and negligent conduct of the Second Respondent in causing the injury to LM's arm. The claim was premised on the allegation that in breach of a legal duty of care, the Respondents failed to take positive steps to prevent LM from sustaining physical harm while he was under their supervision, and that their failure to do so was negligent. The trial court was asked to determine the issue of liability only, and a separation of issues was directed in accordance with the provisions of Rule 33(4).

[3] How LM sustained the injury to his arm was in issue between the parties. The trial court, faced with two irreconcilable versions, accepted the Respondents' version of events. On that version, the Second Respondent, during the first school break on the day in question, and at a time after the learners had left the classroom, proceeded to make herself a cup of coffee.

The Second Respondent utilised an electric kettle, which was stored in a cupboard, to boil the water. She filled the kettle a quarter full and placed it on the classroom floor where a plug point was located. After she had switched the kettle on she proceeded to her desk to prepare her cup, at which point her back was turned to the classroom door. LM came running into the classroom, tripped over a schoolbag, and knocked the kettle over. As a consequence of the aforesaid, LM sustained a hot water burn injury to his arm.

[4] The trial court accepted the version of the Second Respondent as being more probable than that of the Appellant, and proceeded to consider whether on that version, the Respondents were negligent. The trial court ultimately found that the Appellant had failed to discharge the burden of proof in respect of the Second Respondent's negligence, and issued an order of absolution from the instance. The appeal lies against this decision with the leave of the Supreme Court of Appeal.

[5] Given the view adopted by me, I do not have to determine whether the trial court was correct in accepting the version of the Respondents on the probabilities. At the trial the Respondents accepted that they owed LM a duty of care, and that a negligent failure to protect him from harm would

have been unlawful in the circumstances of the matter. That the negligent conduct of the Second Respondent, if found to exist, was the cause of the injury sustained by LM, was similarly not challenged. The only issue to be determined in the appeal, is accordingly whether the Second Respondent was negligent.

[6] The test for negligence is whether the reasonable person in the position of a defendant in a matter would have foreseen the reasonable possibility of his conduct injuring another and causing him patrimonial loss, and if so, whether the reasonable person would have taken reasonable steps to guard against the occurrence of harm. The test was formulated as follows by Holmes JA in Kruger v Coetzee:[1]

For the purposes of liability culpa arises if –

(a) a diligens paterfamilias in the position of the defendant –

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[1] 1966 (2) SA 428 (A) at 430 E-G. Herschel v Mrupe 1954 (3) SA 464 (A) at 477 A-C; Kruger v Coetzee *supra* at 430 F-H.

(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.

[7] In argument the parties were *ad idem* that a reasonable person in the position of the Second Respondent would have foreseen the reasonable possibility that her conduct, in boiling water in a kettle placed on the classroom floor, may cause injury to a learner who was unaware of its presence. The question for determination is consequently confined to the second leg of the test for negligence, namely whether a reasonable person in the position of the Second Respondent would have taken steps to guard against such eventuality.

[8] What steps would be reasonable are dependent upon the facts and the circumstances of the case. In Ngubane v South African Transport Services, the court said:[2]

> *'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.'*

[9] In deciding whether the Second Respondent took reasonable steps to avoid the risk of harm, the trial court took into consideration that the Second Respondent had placed limited water into the kettle; that she had waited

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[2] 1991 (1) SA 756 (A) at 776 E-I. See also Pretoria City Council v De Jager 1997 (2) SA 46 (A) at 55I; and Avonmore Supermarket CC v Venter 2014 (5) SA 399 (SCA) at para [18].

until break time, when the learners were not in the classroom, prior to boiling the water; and that LM's return to the classroom was an unexpected event, as the learners were, as a rule, not allowed to return to the classroom until the school break was over. The court concluded that in those circumstances, the Second Respondent was not expected to maintain the constant type of vigilance that she would ordinarily have maintained, whilst the learners were in the classroom.

[10] Other than for her own enjoyment, the boiling of water for coffee served no purpose related to the Second Respondent's functions as a teacher. Further, the nature of the foreseeable harm and the risk of it resulting cannot in my view be said to be trivial or slight. The Second Respondent's conduct, by placing a kettle on the classroom floor and boiling water in it created a serious potential danger of injury to learners and other persons entering the classroom. She, accordingly, had an obligation to regulate her conduct in order to minimise or eliminate the risk of harm.[3] The precautions taken by the Second Respondent, having been mindful of the possibility of injury to a learner through the use of a kettle, which precautions were in turn considered by the trial court, did not, in my view, serve to eliminate or significantly decrease the risk of a learner falling and

[3] Avonmore Supermarket CC v Venter 2014 (5) SA 399 (SCA) at para [20].

injuring himself in the manner in which LM did in the present matter. It does not account for the fact that the classroom was small, and that space and movement was restricted to the extent that the learners had to place their school bags in the front of the classroom near the blackboard so as to enable the teacher to have sufficient room to move between the desks. The door was in the front of the classroom where the teacher's desk was placed, the same area where the learners were leaving their schoolbags, and where the Second Respondent chose to place the kettle to boil the water.

[11] Another important consideration, being the extent to which the Second Respondent was required to exercise vigilance, must be determined by the nature of the risk created by her conduct, coupled with the fact that the learners in the Second Respondent's class, who were the most likely persons to be exposed to the risk of injury, were 7-year-old children in grade 2. The reasonable educator could be expected to know that immature children of that age are inclined to act impulsively and irrationally. "**[I]t is known that the actions and movements of children are often spasmodic and unaccompanied by the reasonableness supported to be attendant upon those of adults.**" [4] The propensity for sudden, impulsive and heedless behaviour, which behaviour may be in conflict with existing school rules, is something

[4] Jones AJP in R v Press 1938 CPD 356 at 359 – 360. See also Knouwds v Administrateur, Kaap 1981 (1) SA 544 (C) at 553 D.

which a reasonable educator would anticipate and guard against. **"The propensity, however, of infants of seven years and three months to forget altogether what they have been taught was sensibly described by his schoolmistress. She made an observation that if a child of that age wants to get anywhere, he will forget all he has been taught. She said such children do not remember if something else is uppermost in their minds. She was only describing what I regard as the normal experience of children of the age of seven years and three months."**[5]

[12] The Second Respondent could not reasonably have accepted that one of her learners would not return to the classroom during the school break. That a learner of LM's age at the time may impulsively want to return to the classroom during break time for some or other reason, such as to fetch something from his desk or from his school bag, in breach of an existing school rule against such conduct, is not conduct that can be said to constitute unexpected behaviour, which could not reasonably be anticipated. On the contrary, the Second Respondent acknowledged in her evidence that while there were teachers on the school grounds during break times, she was aware that children may return to the classroom when there is an emergency or when they get hurt.

[5] Jones v Lawrence [1969] 3 All ER (Warwickshire Assizes) at 270 F – G.

[13] In the circumstances, and due regard being had to the layout of the classroom, coupled with the well-known, and accepted, conduct of young children, the Second Respondent failed to take reasonable steps to guard against the danger and the risk created by her conduct in placing a kettle on the classroom floor, and proceeding to boil water in it during school hours. She acknowledged in evidence that there was a kitchen facility available for teachers, and that there was no reason for her not to have used the kitchen to boil the water on the day in question.

[14] Besides using the staff kitchen to boil water for coffee, the Second Respondent could reasonably have guarded against the possibility of injury, by using another plug point that was safely positioned, or by taking precautions against a child or children entering the classroom at that time, such as restricting entry into the classroom for the time it took to boil the kettle by locking the classroom door or, at the very least, by keeping the open door under observation. None of these precautions can in my view be said to be of such a nature that it would have placed an undue burden on the Second Respondent to reduce, or altogether avoid, what was serious and foreseeable harm to a young child.

[15] I am accordingly satisfied that negligence had been established. For these reasons the appeal is upheld with costs, which costs are to include the costs of two counsel. The order of the trial court is set aside, and is substituted by the following order:

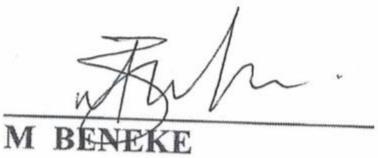
> "(a) **That the defendants are held liable for such damages as may be agreed upon or proved in consequence of the injury sustained by the minor child LM; and**
>
> (b) **That the defendants pay the plaintiff's costs in respect of the determination of the issue of liability."**

D VAN ZYL
DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

I agree:

S RUGUNANAN
JUDGE OF THE HIGH COURT

I agree:



M BENEKE
ACTING JUDGE OF THE HIGH COURT

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