IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, BHISHO)

CASE NO. 360/2019

Date heard:

Date delivered: 3/02/2020

In the matter between:

V[…] M[…] **First Plaintiff**

M[….] M[...] **Second Plaintiff**

and

MEMBER OF THE EXECUTIVE COUNCIL

FOR EDUCATION, EASTERN CAPE

PROVINCIAL GOVERNMENT **First Defendant**

THE SCHOOL GOVERNING BODY,

LUNA PRIMARY SCHOOL **Second Defendant**

THE PRINCIPAL,

LUNA PRIMARY SCHOOL **Third Defendant**

JUDGMENT

LAING AJ

[1] On 17 May 2019, the plaintiffs issued summons against the defendants for damages arising from the death of their child, L[…] M[…]. She had been a scholar at the Luna Primary School at Mbizana in the Eastern Cape when she drowned in a pit toilet. The defendants have raised an exception to the particulars of claim.

[2] At the outset, counsel for the defendants acknowledged that the underlying facts gave rise to an extraordinary tragedy. However, for the plaintiffs to succeed in their claim against the defendants it was necessary for their particulars to sustain an action in delict.

[3] To paraphrase the plaintiffs' particulars, they plead that: (a) L[…] was a learner at Luna Primary School;[1] (b) she attended school on 12 March 2018;[2] (c) her lifeless body was found inside a pit toilet on 13 March 2018, having drowned as a result of water inhalation;[3] (d) the defendants failed to uphold the law by not providing a safe and secure environment;[4] (e) the defendants owed a duty of care to the learners at Luna Primary School to ensure the provision of education services in a safe and secure environment, but negligently failed to provide or carry out such duty of care, which failure led to L[…]'s loss of life;[5] and (e) the

[1] Paragraph 7, particulars of claim, 13 May 2019
[2] Paragraph 8
[3] Paragraph 9
[4] Paragraph 11
[5] Paragraph 12

defendants failed to properly maintain the toilets at Luna Primary School and failed to ensure that the toilets did not cause danger to learners, when a reasonable administrator or employee or principal of the defendants would have foreseen that such failure would have led to a learner's falling in and drowning.[6]

[4] The basis for the defendants' exception is that the plaintiffs have not pleaded facts and circumstances or conclusions of law relevant to negligence or causation. Accordingly, the particulars lack the averments necessary to sustain an action in delict. This argument constitutes the set of issues to be decided by the court. The plaintiffs have not opposed the exception.

[5] A useful starting point in a discussion of the legal framework that applies in the present matter is the quite obvious but well-established principle that a litigant must plead the facts required to support his or her cause of action. The defendants' counsel drew attention to *Trope and others v South African Reserve Bank* 1993 (3) SA 264 (A), where Grosskopf JA observed, at 273 A-B, that:

> 'It is trite that a party has to plead- with sufficient clarity and particularity- the material facts upon which he relied for the conclusion of law he wishes the Court to draw from those facts… It is not sufficient, therefore, to plead a conclusion of law without pleading the material facts giving rise to it…'[7]

[6] A delictual cause of action must consist of those factual allegations necessary for a plaintiff to persuade a court that a delict has been committed. Academic writers have defined a delict as the act of a person that in a wrongful and culpable way causes harm to another.[8]

[6] Paragraph 13
[7] Case references have been omitted.
[8] See Neethling J and Potgieter JM, *Law of Delict* (Seventh Edition, LexisNexis 2015), at 4. See, too, Nienaber JA's definition in *HL & H Timber Products (Pty) Ltd v SAPPI Manufacturing (Pty) Ltd* 2001 (4) SA 814 (SCA), at [13].

All five elements must be present, i.e. an act, wrongfulness, fault, causation, and harm, before the conduct can be identified as a delict.[9]

[7] With regard to fault, two main forms are recognised: intention (*dolus*) and negligence (*culpa*). The writers state that:

> 'In the case of negligence, a person is blamed for an attitude or conduct of carelessness, thoughtlessness or imprudence because, by giving insufficient attention to his actions, he failed to adhere to the standard of care legally required of him. The criterion adopted by our law to establish whether a person has acted carelessly and thus negligently is the objective standard of the reasonable person, the bonus paterfamilias.'[10]

[8] In the present matter, the defendants argue that the plaintiffs have not made sufficient averments in relation to negligence or causation. The defendants' counsel mentioned the oft-quoted test for negligence set out in *Kruger v Coetzee* 1966 2 SA 428 (A), where Holmes JA remarked, at 430, that:

> 'For the purposes of liability culpa arises if –
>
> (a) a diligens paterfamilias in the position of the defendant –
>
> (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
>
> (ii) would take reasonable steps to guard against such occurrence; and
>
> (b) the defendant failed to take such steps.'
>
> This has been constantly stated by this Court for some 50 years. Requirement (a)(ii) is sometimes overlooked. Whether a diligens paterfamilias in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend on the particular circumstances of each case. No hard and fast basis can be laid down.'

[9] Neethling J and Potgieter JM, op cit, at 4.
[10] Op cit, at 137.

[9] The remarks of Holmes JA continue to serve as a yardstick against which to measure conduct against the requirements for negligence (*culpa*) as a form of fault. The test has also been stated more simply as whether the conduct in question falls short of the standard of the reasonable person, without reference to foreseeability or the preventability of damage.[11]

[10] Turning to the final element of a delict, a distinction must be made between factual causation and legal causation. In that regard, counsel referred to *Lee v Minister of Correctional Services* 2013 2 SA 144 (CC), where Nkabinde J held, at [38], that:

> 'The point of departure is to have clarity on what causation is. This element of liability gives rise to two distinct enquiries. The first is a factual enquiry into whether the negligent act or omission caused the harm giving rise to the claim. If it did not, then that is the end of the matter. If it did, the second enquiry, a juridical problem, arises. The question is then whether the negligent act or omission is linked to the harm sufficiently closely or directly for legal liability to ensue or whether the harm is too remote. This is termed legal causation.'

[11] The so-called *conditio sine qua non* test is used to determine factual causation. Simply put, the test for a causal link is merely to ascertain whether one fact follows from another.[12]

[12] For legal causation, it is generally accepted that there is no single test that can be applied. Rather, the courts are enjoined to adopt a flexible approach. In the present matter, the defendants' counsel mentioned *S v Mokgethi* 1990 1 SA 32 (A), where Van Heerden JA observed, at 40-1, that:

> 'The basic question is whether there is a close enough relationship between the wrongdoer's conduct and its consequence for such consequence to be imputed to the wrongdoer in view of policy considerations based on reasonableness, fairness and justice.'

[11] See the discussion in Neethling J and Potgieter JM, op cit, at 137-9, where mention is made of the adoption of a simpler test in *Minister of Safety and Security v Carmichele* 2004 3 SA 305 (SCA), *Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd* 2000 1 SA 827 (SCA), and *Jones NO v Santam Beperk* 1965 2 SA 542 (A).

[12] Neethling J and Potgieter JM, op cit, 184-97

[13] With the above in mind, it is now necessary to return to the plaintiffs' particulars and decide whether they contain the necessary averments to sustain an action in delict.

[14] Applying the test set out in *Kruger* with regard to negligence, the defendants argue that the plaintiffs failed to plead the facts and circumstances relevant to: (a) the foreseeability of a child's drowning in the pit toilet as a result of inadequate maintenance; (b) the reasonableness of the possibility of a child's drowning as a result of inadequate maintenance; and (c) the steps which the defendants ought to have taken to guard against the incident.

[15] In their particulars, the plaintiffs' first reference or allusion to negligence arises within the context of a duty of care allegedly owed by the defendants to the learners to ensure the provision of education services in a safe and secure environment.[13] The use of the term, 'duty of care', is unfortunate and not to be encouraged. In *Hawekwa Youth Camp and another v Byrne* [2009] JOL 24642 (SCA), Brand JA criticised the use of the term in the pleadings, remarking, at [21], that:

> 'As I see it, the quoted contentions are indicative of a confusion between the delictual elements of wrongfulness and negligence. This confusion in turn, so it seems, originated from a further confusion between the concept of "a legal duty", which is associated in our law with the element of wrongfulness, and the concept of "a duty of care" in English law, which is usually associated in that legal system with the element of negligence… Warnings against this confusion and the fact that it may lead the unwary astray had been sounded by this Court on more than one occasion. Nonetheless, it again occurred in this case.'[14]

[16] Accordingly, it is possible that the plaintiffs intended to refer to a general legal duty on the part of the defendants to provide a safe and secure learning environment. This is suggested by the plaintiffs' reference to the right to basic education under section 29 of the

[13] Paragraph 12, particulars of claim.

[14] See, too, the criticism levelled against the term in *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) at [14], and *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) at [11], both of which having been referred to by Brand JA in *Hawekwa*.

Constitution.[15] However, the pleadings rapidly deteriorate at this point and the allegation that the defendants 'negligently failed to provide or carry out the said duty of care'[16] simply does not make sense in terms of the principles of the South African law of delict. It would possibly have been preferable for the plaintiffs to have pleaded an alleged breach of a legal duty to establish wrongfulness before proceeding to make the factual allegations necessary to address the element of negligence. But that is something for the plaintiffs' legal representatives to decide. The reference or allusion to alleged negligent conduct, within the context of a 'duty of care' and without further averments, is plainly inadequate.

[17] The plaintiffs then go on to allege that the defendants failed to properly maintain the toilets and failed to ensure that they did not cause danger to learners, when a reasonable administrator or employee or principal in the position of the defendants would have foreseen that such failure would have led to a learner's falling in and drowning, and the consequent psychological damage suffered.[17] This is the nub of the matter.

[18] It would be difficult to contend that the plaintiffs have not gone some way towards dealing with the test for negligence, either in terms of the simple test of the standard of the reasonable person[18] or in terms of the more complex formulation set out in *Kruger*. However, the platform upon which the plaintiffs build their argument is unsound. It comprises merely the allegation that 'the defendants failed to properly maintain the toilets at the Luna Primary School and failed to ensure that the toilets did not cause a danger to the learners and in particular L[…].' On its own, the word, 'maintain', means 'keep (a building, machine, etc) in good condition by checking or repairing it regularly'.[19] Within the context of this matter, the word appears to be misplaced inasmuch as its ordinary meaning is associated with the working condition of the toilets as part of the school's sanitation arrangements. In a similar vein, the reference to danger is unsatisfactory; there may be different levels of danger in any given situation, not all leading to injury or patrimonial loss. The plaintiffs do not indicate how or why, *in these circumstances* (pertaining to this school, this toilet, this learner, and so

[15] Paragraph 10, particulars of claim
[16] Paragraph 12
[17] Paragraph 13
[18] See n 11.
[19] Pearsall J (ed) *The Concise Oxford Dictionary* (10th Edition Revised, OUP 2001), at 858

on), the failure to maintain the toilets and the failure to ensure that the toilets did not pose a danger would have led a *diligens paterfamilias* or reasonable person in the position of the defendants to have foreseen the reasonable possibility of L[…]'s drowning and the resultant psychological harm and other damages, as alleged. Similarly, it is far from clear, in these circumstances, what reasonable steps a *diligens paterfamilias* or reasonable person would have taken to guard against L[…]'s drowning. Such steps may well have entailed proper maintenance (or the replacement of pit toilets with flush toilets or more careful vigilance on the part of L[…]'s educators), but the extent to which the defendants failed to take such steps is not apparent.

[19] The factual allegations to support an argument for negligence are missing. Using the language of *Trope*, the plaintiffs have not pleaded the material facts upon which they wish the court to draw conclusions in the law of delict. The court (and the defendants) are left guessing as to what precisely constitutes the plaintiffs' case.

[20] With regard to causation, the defendants have argued that the plaintiffs have failed to clear the hurdle of establishing factual let alone legal causation, for reasons similar to those in relation to the plaintiffs' failure to establish negligence. The court agrees with the above argument. Quite simply, it is not clear how or why, in these circumstances, the defendants' alleged failure to maintain the toilets and the failure to ensure that the toilets did not pose a danger constituted the *conditio sine qua non* for L[…]'s death (and the resultant psychological harm and other damages). It is not implausible that the state or condition of the toilets may well have posed a danger but not one that was sufficient on its own to have resulted in the drowning of a learner. Moreover, with reference to the principles enunciated in *Lee*, it is not evident from the particulars that the alleged failure to maintain the toilets and the failure to ensure that the toilets did not pose a danger are linked sufficiently closely or directly to L[…]'s death for legal liability to ensue or whether her death was not too remote. There are not enough factual allegations upon which the plaintiffs can establish causation.

[21] In terms of sub-rule 18(4) of the Uniform Rules of Court:

> 'Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto.'

[22] That is not the situation here, the plaintiffs have failed to provide an adequate statement of the material facts necessary to sustain an action in delict. As tragic as the circumstances of this matter may be, the defendants are entitled to a set of particulars that enable them to plead their defence properly. There is merit in the defendants' exception.

[23] Accordingly, the following order is made:

(a.) the exception is upheld with costs and the plaintiffs' particulars of claim are set aside;

(b.) the plaintiffs are granted leave to file amended particulars of claim within 15 court days, if so advised.

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JGA LAING

ACTING JUDGE OF THE HIGH COURT

Appearances:

For the plaintiffs:	No appearance
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