

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

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**“IN THE HIGH COURT OF SOUTH AFRICA”
NORTH WEST DIVISION, MAHIKENG**

CASE NUMBER: 1639/2015

In the matter between:-

P L M

Plaintiff

And

MEC FOR EDUCATION

Defendant

JUDGMENT

GUTTA J.

A. INTRODUCTION

- [1] Plaintiff instituted an action against defendant vicariously for damages, *actio iniuriarum* in the amount of R3 000 000.00 (three million rand) for contumelia arising from insults and an assault on his son, M P (M) by an educator, Mr Leshage at the Golf View Combined School.
- [2] There was a separation of quantum and merits and the matter proceeded before me on merits only.

B. PLEADINGS

- [3] Plaintiff in his particulars of claim alleged that:

"[3] On or about 28 April 2015 and at Golf View School, Mafikeng, Plaintiff's son, namely, M P, a male born on [...] June 2001 was unlawfully and intentionally assaulted by one Mr Leshage, an educator in the employment of the Department of Education at the said school by:

- 3.1 Grabbing and ripping off a wrist band from M's arm,
- 3.2 Slapping him on his cheek;
- 3.3 Grabbing him with his pants;
- 3.4 Lifting him off the ground;
- 3.5 Taking him to the front of the classroom.

- [4] M was further humiliated in full public view of his classmates by being:

- 4.1 Chased out of the classroom;
- 4.2 Uttering degrading remarks about and concerning him and his parents".

[4] Defendant in its plea denied the assault and the insults.

C. COMMON CAUSE

[5] The following are common cause facts:

5.1 M was a 14 year old learner at Gold View Secondary School when the incident occurred.

5.2 The incident occurred during a learning period inside a class room.

5.3 There were a number of other learners, males and females in the classroom.

5.4 M was wearing a wrist-band on his left arm.

5.5 Mr Leshage ordered M to remove the wrist-band from his arm.

5.6 The wrist-band was torn.

5.7 Mr Leshage is employed by defendant at Golf View Secondary School.

D. EVIDENCE

[6] Four witnesses testified on behalf of plaintiff, namely; M who is presently 16 year old; L M, a 16 year old boy who is M's friend; B M, a 17 year old boy who is also a friend of M; and plaintiff, a 47 year old man who is M's father. Two witnesses testified on behalf of defendant, namely; Mr Leshage, a 51 year old class teacher who is alleged to have assaulted and insulted M, and Ms. Tshiamiso Maila (Ms Maila), a 26 year old student teacher who was present at the time of the alleged incident.

[7] The evidence of the witnesses is briefly summarised hereinbelow.

- [8] M testified that on 29 April 2015, his teacher was absent and he and class mates were in Mr Leshage's class. Mr Leshage approached him and asked him to remove a wrist band that he was wearing. While attempting to remove the wrist band, Mr Leshage forcefully removed it and it broke. Mr Leshage then made M stand up from his desk holding him by his trouser and pulled him to front of the class. As Mr Leshage was holding his trouser on the right side, his right leg was not touching the ground. Thereafter, Mr Leshage assaulted him with an open hand on his left temple, and told him to leave the classroom. Mr Leshage uttered the words that he is a spoilt brat who does not have manners and that he comes from a family that is not well mannered. M went to the toilet where he was crying and sent his mother and father a please call me message. After the bell rang, Mr Leshage sent another boy to call him back into the classroom. In the classroom, Mr Leshage continued to utter words that he will never be assaulted, that he is coming from a family without manners and that he is a spoilt brat.
- [9] The wrist band had the words inscribed "Colossians 3:20" which is verse 20 from the bible, that children love and respect your parents. He said he got the wrist band in Bloemfontein. It was for the breakthrough blessing and protection from evil spirits. He has been wearing the wrist band since July 2014.
- [10] M said he cried on the day of the incident because Mr Leshage embarrassed him in front of his classmates and assaulted him with an open hand. He has 37 classmates who are male and female. He consulted Dr Sibanda on the same day, who he gave him an injection and medication. He also saw a psychologist every week for 5 weeks. He left Golf View Secondary School in 2016 and went to Sol Plaatjie School as he feared that

Mr Leshage may be his teacher. He feared him and didn't feel free in his class.

- [11] In cross examination he said Mr Leshage was not his teacher and did not know him personally. He admitted that he wore the wrist band which was not part of his uniform and said he had made a prior arrangement with some of his teachers to wear the band. He denied that he refused to remove the wrist band when Mr Leshage told him to remove it. He further denied that the wrist band tore when Mr Leshage held the band and M forcefully moved his hand away.
- [12] In cross examination, M admitted that he attempted to slap Mr Leshage with an open hand. He said, "He smacked me with an open hand and I retaliated but did not hit him. He pulled me to the front and some of the children in the class were laughing. After he slapped me he ordered me out of the class". M demonstrated how Mr Leshage slapped him. He said Mr Leshage held him on the waist of his trouser with his left hand and with his right hand assaulted him on the left side of his temple. He also said that although Mr Leshage addressed the class about behaviour, he was looking at him.
- [13] The next witness for plaintiff was L M (L). He was a scholar at Golf View Middle School in April 2015 and is presently still a scholar there. He said that Mr Leshage took them into his classroom as their teacher was absent. Mr Leshage instructed them to take out their books and study. Mr Leshage noticed a wrist band on M and instructed him to remove it. M told him it is a church wrist bank. Mr Leshage asked him if he should come and personally remove it. He then approached him and told him to remove it. Thereafter Mr Leshage removed it and it was torn or cut off. Mr Leshage then took him to the front of the class and held him by the waist band and carried him up

and slapped him on his left cheek. After Mr Leshage slapped him, some learners laughed, others were hurt and shocked and surprised. M tried to retaliate and they held him back. Mr Leshage sent him out of the classroom and called M a spoilt brat. M walked to the toilet crying.

[14] On cross examination, he said Mr Leshage asked M twice to remove the wrist band and M said he cannot remove it as it's for church purposes. M did not try and remove the band. He was seated, two seats behind M. L also demonstrated how Mr Leshage lifted M by his pants and that his left foot was hanging and that he smacked him with open hands on his face. He admitted that he didn't see him crying outside and that it was his friend D who was seated inside who saw him crying as he was walking to the toilet.

[15] It was put to L that M testified that he did not refuse to take the band off. He replied that M gave an explanation that it was from the church and he didn't remove it. However he later said the following:

"Q He (M) said he attempted to remove it

A Yes he tried to remove it

Q So what's correct he tried to remove or gave an explanation?

A He held it saying it's a church band.

Q So he refused to take it off because it's for church?

A He didn't refuse. He didn't remove it. Mr Leshage pulled it or cut it.

Q M said he tried to remove it, Mr Leshage grabbed it, which is correct?

A M

Q So yours is incorrect,

A Both are correct.

- [16] In re-examination L said M did not by word of mouth refuse to remove the band that, he was holding it with the intention of removing it.
- [17] The next witness for plaintiff was B M (B) who is 17 years old and was a learner at the Golf View School during April 2015. He and M are friends. He said Mr Leshage had an argument with M. Mr Leshage told M to stand up and remove the wrist band. M said he was not able to remove it because it was a church band. He said M refused to remove the band. Mr Leshage then ripped it off and smacked M with an open hand. M wanted to retaliate and they stopped him. Mr Leshage told him to go out and M went to the toilet and called his parents. Mr Leshage said "what M did is because he is a spoilt brat from his home"
- [18] Under cross examination it was put to him that M testified that he didn't refuse to remove the wrist band, that he in fact tried to remove it and Mr Leshage grabbed it and it tore. He replied that he did not know. He later contradicted his evidence and said M did not refuse to remove the band, but kept quiet. When asked when did M give an explanation, he replied it was when Mr Leshage was approaching him.
- [19] He was asked to demonstrate the slap. He said after ripping the band, Mr Leshage slapped him. He demonstrated a light smack on the face. When questioned whether it was a light slap. He replied that he and the class heard the slap. When it was put to him that M said Mr Leshage took him to the front of the classroom, he said yes, he slapped him next to the door.
- [20] Plaintiff called M L P (Mr P), the plaintiff's father. He said on the 28 April 2015, he was on duty when he received missed calls from M. When he returned his

calls, M did not answer. He called his wife, who also said she received missed calls from M. When he returned home, he found M with his face swollen and he was crying. He told them that he was slapped with an open hand and carried up with his pants because he was wearing the wrist band which Mr Leshage tore. He called, Mr Phalatshe, the chairperson of the School Governing Body (SGB) and they met the next morning at the school, together with the principal, Mr Phalatshe and Mr Leshage. Mr Leshage said M was ill disciplined because he was wearing a wrist band. Mr Leshage talked about his anger management. The principal said he will make sure that M is taken care of.

- [21] They went to Dr Sibanda as M complained of pain in his head. Dr Sibanda gave M an injection and medication. He also referred him to Victoria Hospital for a scan. Dr Sibanda also referred M to Dr Mna, a Clinical Psychologist. He laid a charge of assault with the South Africa Police (SAP). He said plaintiff deteriorated after the assault. He was forgetful and did not want to stay alone at home. He refused to continue his studies at Golf View as he was afraid of Mr Leshage.
- [22] Under cross examination he said that at the meeting with the principal, Mr Leshage admitted that he slapped M and that he has anger management issues. He admitted that M did not tell him that he tried to retaliate and slap Mr Leshage. He believed that M was assaulted because he could see that the veins on the left side of his face was swollen.
- [23] Mr Olebile Analus Leshage (Mr Leshage) testified on behalf of defendant. In April 2015 he was a teacher at Golf View Middle School for 8 years. He did not know M prior to the incident and did not teach him. He said on the day, he observed children outside and they told him that their classroom was

locked and they had no teacher. He told them to enter his classroom and to study. After the children entered he explained the rules of the class which included compliance with the school uniform. He observed M wearing a wrist band on his arm. He asked him to remove it. It appeared that he did not hear him. He raised his voice and told him to remove what is on his arm while approaching him. When he reached him he told him to remove the band and touched the band. M warded off his hand and the band was torn. M appeared angry and expressed his displeasure. He told him that he need not express his anger in that fashion because in their custom if a young person does that, it shows utter disrespect. He tapped him on his cheek with the back of his fingers and told him to go out of the classroom. He couldn't remember which side of the cheek. M was angry. He then held M's left waist band of his pants and took him out of the classroom. He denied that M's foot was lifted off the ground.

- [24] He said when he asked M to remove the wrist band and it tore, M attempted to strike him with an open hand and he managed to ward off the assault. As educators, they are encouraged to handle situations in this manner and to send a child who is disruptive and disrespectful outside. After M went out of the classroom he went to the office and on his return to the classroom he sent for M. He then addressed the entire class and said that it is a shame that during this era there are children who behave in this fashion and do this in the presence of visitors. There were learner students at the school during this period. He also said that they are aware that students come from different families and come with their own frustration and that it is painful and shame that this behaviour is in the presence of student teachers and this type of conduct will affect them negatively so they don't proceed with their profession. There might be learners who are loved in their

respective homes and as teachers they treat them equally and don't have regard to their background. He said M probably heard the words spoilt brat but this is what he had in mind as he addressed everyone in general.

[25] The next morning he met in the SGB's office together with the principal and M's parents. At the meeting he was asked to explain what happened. He denied slapping M and explained what he said in Court. M was called into the office and they eventually forgave each other. M's mother was angry and said teachers need to be taught a lesson. M's father was reconciliatory and shook his hand. He said it was "a shame on my side that this happened and I asked for forgiveness if what I did or said will lead to no agreement between son, parents and myself. The meeting ended with all of us shaking hands as a sign that we forgave each other".

[26] Later that day, two police officers said they were in possession of a warrant for his arrest. They phoned Mr P who said they must apply the law. He went to the principal office. He was afraid that he was leaving the class unattended and that he was going to be arrested in full view of the students. The police allowed him to drive his vehicle to the police station. He was release on warning and instructed to attend Court the next day. This affected his health and he consulted with a doctor and was admitted at a psychiatric hospital. His case was eventually removed from the roll because there was insufficient evidence. Thereafter there was another warrant of arrest and he appeared on numerous occasions and the matter was finally withdrawn. When questioned whether he said he has anger issues and needed anger management, he replied that he did not remember uttering such words and denied having anger issues.

- [27] Under cross examination he denied that M said he got the wrist band from church and that he believes in it. He explained again how the band tore. He said he put one finger under the wrist band and said to M that he was referring to this and he should remove it. He did that not to remove it but to show him what he wanted removed. After the band was torn, M expressed his anger "NXA" and he was disrespectful. He wanted to hit Mr Leshage. He denied saying that M is a spoilt brat and comes from a family with no manners. He said words in general about ones background and that children come from different families. He said M was at school for the whole day and played with other children. He did not have any sign of injuries the next day.
- [28] It was put to him in cross examination that at the meeting with the SGB and the principal, he conceded that his conduct was a shame. He replied that every person in that position must show Ubuntu to show that he is shameful of what happened. This was after he was asked to reconcile. The SGB and the principal said he must forgive because they did not treat each other with respect as he had requested M to go outside of the class and had expressed his anger towards him.
- [29] The next witness for defendant was Seamiso Maila (Ms Maila). She is a 26 years old, student at the North West University. On the 28 April 2015 she was doing practicals as a teacher trainer at the Golf View School. She said the Grade 8 class were outside and Mr Leshage called them into his classroom as they were making a noise. Mr Leshage was talking about school uniforms. M was wearing a wrist band and Mr Leshage asked him to remove it and M refused. M moaned when Mr Leshage asked him to remove the band. He was shaking his head and growling. Mr Leshage walked up to him and

asked him to take it off. He touched M's hand and M shifted his hand and the band tore. M was seated in the front opposite desk and she was able to observe clearly what transpired.

- [30] Mr Leshage asked him to go outside and M moaned and refused. He told M to stand up and M was waving his hands. Mr Leshage told him again to go outside and he refused. He stood up and his books fell and he sat down again. Mr Leshage told him to stand up, he grabbed him by the pants and M tried to slap Mr Leshage on the face. She couldn't recall whether M slapped Mr Leshage but said M went outside the classroom and was told to stand outside the classroom. A few minutes later M was not there.
- [31] It was put to her that M said Mr Leshage slapped him. She replied that she did not recall Mr Leshage slapping him. She also didn't see M's legs lift off the ground when Mr Leshage grabbed him by the pants. She said at no stage were they in front of the class. Mr Leshage did not call him a spoilt brat and did not speak about his parents. He only spoke about behaviour and school uniform in general.
- [32] Under cross examination she said she was sitting behind M, about 60cm away and if M said he wore the band for religious purposes, she would have heard it. When questioned whether M hit Mr Leshage, she said M waved his arms and they were close to each other, they could have touched. She could not recall whether Mr Leshage touched M. She said he touched his shoulder when he took him out of the classroom.

C. EVALUATION

- [33] There are two conflicting and irreconcilable versions. With regard to irreconcilable versions, the approach is stated in the matter of *Stellenbosch Farmers Winery Group & Another v Martel & Others*¹. The Court summarized the technique generally employed to resolve factual disputes in order to come to a conclusion. The Court is required to make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities.
- [34] The approach to be adopted when dealing with the question of *onus* and the probabilities was also outlined by Eksteen JP in *National Employers' General v Jagers*² as follows:

"It seems to me, with respect that in any civil case, as in any criminal case, the *onus* can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless, where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfied the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him is satisfied that his evidence is true and that the defendant's version is false".

¹ 2003 (1) SCA 11 at 14I – 15E

²1984 (4) SA 437 (E) at 440D-G, Also see: The MEC for the Department of Health v Denise Franks [2011] ZASCA (2715/2011) Case no 329/10

[35] M did not impress me as a witness. He was soft spoken and often did not answer questions put to him in cross examination clearly. What was clear to the Court, is that M tailored his evidence and only presented a version that was favourable to his case. He was selective in his evidence and failed to disclose that:

- 1) Mr Leshage told him twice to remove the wrist band;
- 2) he refused to remove the wrist band when Mr Leshage instructed him to;
- 3) he didn't explain to Mr Leshage that he was wearing the band for religious reasons and
- 4) he attempted to hit Mr Leshage with an open hand.

[36] L was in my view not a credible witness. Initially he testified that when Mr Leshage asked M twice to remove the wrist band, M replied that he cannot because it was for church purposes but in cross examination when it was put to him that M testified that he attempted to remove it, his version changed that M tried to remove it and didn't refuse to take it off, and in re-examination attempted to explain further that M did not by word of mouth refuse to remove the band, that he was holding it and showed his intention of removing it. L attempted to cover up his earlier evidence that M said he cannot remove the band as it was for church purpose. Further there were several contradictions between L and M's evidence as stated fully hereinbelow.

[37] B's evidence was very skimpy and lacked detail. B testified that M refused to remove the wrist band. He said the following:

“Q Did plaintiff refuse to remove the wrist band?

A Yes he refused because it was a church wrist band.

Q Did he express any words or action to show that he is refusing?

A He gave Mr Leshage an explanation that it is a church wrist band".

[38] However, in cross examination B changed his version. When it was put to him that M testified that he didn't refuse to remove the wrist band, he first said, he did not know and later said M did not refuse to remove the band, he just kept quiet. This further contradicted his testimony that M explained that it was a church band. Also when he was asked to demonstrate how Mr Leshage slapped him, he demonstrated a light smack and when asked if it was a light smack, he said the whole class heard it. The contradictions between M's and B's evidence is highlighted hereinbelow. B was in my view not a credible witness.

[39] M's father, Mr P, testified that when he returned home he found M crying and that his face was swollen. He said he took M to Dr Sibanda who gave him medication and referred him for X-rays. Dr Sibanda was not called to testify to verify M's injury. Mr P in cross examination said he believed that M told him the truth. However he admitted that M did not tell him that he tried to slap Mr Leshage and that his friends intervened or that Mr Leshage called him a spoilt brat and spoke about his parents.

[40] Mr Leshage made a good impression on the Court. He answered all the questions put to him in examination in chief and cross examination clearly without contradicting himself. I am of the view that he is a credible witness. Mr Leshage admitted that he lightly tapped M's cheek with the back of his fingers. He did not deny contact with M's face or body.

[41] Ms Maila was an impressive witness who spoke confidentially and did not contradict her evidence. She was a teacher trainee and was seated directly behind M, approximately 60cm away and had a clear view of the events that transpired in the classroom. I am of the view that she is a credible witness.

[42] There were several contradictions in the evidence of M, L and B as set out fully hereinbelow.

[43] M said Mr Leshage approached him and asked him to remove the wrist band and while he was removing the band Mr Leshage removed it forcefully and it broke.

43.1 L who was seated two seats behind M contradicted M's version as he initially said Mr Leshage asked M twice to remove the wrist band and M refused saying that it was for church purposes. He also said M did not try and remove the band. M did not testify that Mr Leshage asked him twice to remove the band and that he refused and explained to Mr Leshage that he wore it for religious reasons.

43.2 B also contradicted M's version. B testified that Mr Leshage told M to stand up and remove the wrist band and M said he was not able to remove it because it is a church band and Mr Leshage then ripped it off. M did not testify that Mr Leshage told him to stand and remove the wrist band but that he was seated and only after the band was torn did Mr Leshage pull him up from his seat with his waist band.

43.3 Hence both L and B's version contradicts M's version that M was removing the band and did not refuse to remove the band. Further M did not testify that he explained to Mr Leshage that he wore the wrist band for religious reasons as L and B testified.

[44] M testified that after Mr Leshage tore the band, he made M stand up from his desk holding him by his trousers and pulled him to the front of the classroom. He said as Mr Leshage pulled him, his right leg was not touching the ground. Mr Leshage then hit him with an open hand on his left temple and told him to leave the classroom.

44.1 L testified that Mr Leshage took M to the front of the class and held him by the waist band and carried him up, that his left foot was hanging and Mr Leshage slapped him on the left cheek. M wanted to retaliate and they stopped him. B testified that after Mr Leshage tore the wrist band he smacked M with an open hand, M wanted to retaliate and they stopped him. Mr Leshage told him to go out of the class room.

44.2 L and B's version contradict M in that L said M's left foot was hanging while M said his right foot was not touching the ground. B initially testified that after Mr Leshage tore the wrist band he smacked M with an open hand and not that he pulled him from his seat by his waist band to the front of the class where he slapped him. This he only later said in cross examination when counsel for the defendant put M's version to him. Further when B was asked to demonstrate the slap, he demonstrated a light smack on the face and not on the temple as demonstrated by M. M said that the slap was on his left temple, B and

L said it was on his left cheek. B also didn't mention that M's leg was lifted off the ground. M in his evidence further contradicted both L and B's version as he did not testify that he retaliated and attempted to hit Mr Leshage and that his friends restrained him.

[45] Mr Leshage's evidence was largely corroborated by the evidence of Ms Maila, the teacher trainer in the following respects:

- 1) Mr Leshage requested the students to enter his classroom as they were unsupervised outside;
- 2) When they entered, Mr Leshage gave them a lecture on school uniforms;
- 3) M was wearing a wrist band and Mr Leshage asked him to remove it;
- 4) M didn't remove the wrist band;
- 5) Mr Leshage walked up to him and again requested M to remove the band while holding and pointing at the wrist band;
- 6) M quickly moved his hand away and the band tore;
- 7) M was disrespectful toward Mr Leshage and did not leave the class after he requested him to leave
- 8) Mr Leshage held M by the pants and took him out of the class;
- 9) Ms Maila did not see M lift off the ground when Mr Leshage pulled him by the pants;
- 10) M attempted to strike Mr Leshage on his face;
- 11) She did not recall Mr Leshage slapping M;
- 12) M did not profer any explanation that he wore the band for religious reasons;
- 13) At no stage was Mr Leshage and M in front of the class;

- 14) Mr Leshage did not call M a spoilt brat and did not speak about his parents;
- 15) Mr Leshage spoke generally to everyone about behaviour and school uniform.

[46] M's version that Mr Leshage approached him and requested him to remove the wrist band and while he was removing it, Mr Leshage forcefully removed it and broke it is in my view improbable. It begs the question why Mr Leshage would forcefully remove the band if M was in the process of removing it. The wrist band was worn by M on his arm. Ms Maila's and Mr Leshage's version is more probable that Mr Leshage asked him once when he was in front of the class and when M refused to remove it, Mr Leshage walked to him and while pointing and touching it, requested him for a second time to remove the band and M refused while pulling his hand away and the band tore.

[47] Mr Leshage denied assaulting M with an open arm or using force. He testified that after the wrist band tore M said "nxa" to him, which is an expression or word used to express anger and disrespect to a person. He said that he then used the back of his fingers and tapped lightly on M's cheek and told M not to say "nxa" to him because he is his teacher and older to him and that that expression is a sign of disrespect. Ms Maila corroborated Mr Leshage's version that M moaned and refused to go outside and that M was disrespectful.

[48] Mr Leshage denied lifting M by his trouser's waist and pulling him to the front of the classroom. He testified that he held the waist of M's trouser to merely assist him to move out of the classroom because M was defiant. He testified

that he did not have the power and energy to lift M by his trouser's waist and be able to lift one of his feet off the ground especially using his left hand which is not his dominant hand. Ms Maila corroborated Mr Leshage's version that Mr Leshage did not lift M off the ground or pull him to the front of the classroom. Although it is alleged in the particulars of claim that Mr Leshage lifted him off the ground, this was contrary to M's evidence. Initially in examination in chief he testified that Mr Leshage was holding his trouser on the right side and his right leg was not touching the ground. However in cross examination he said "I never said anything about that leg that was lifted up. I only referred to a trouser that was held on the waist". When considering the foregoing coupled with the fact that L referred to the left leg while M testified about the right leg and that B did not initially testify that Mr Leshage pulled M to the front of the classroom, then, the probabilities favour the defendant's version that Mr Leshage did not lift M off the ground nor did he pull him to the front of the classroom.

- [49] When M demonstrated how Mr Leshage allegedly slapped him, he first showed a sloppy slap on the cheek with an open arm, he then later showed a slap with an open arm on his left temple. Similarly B demonstrated a light slap on the cheek and only when asked if it was a light smack, he said that he and the class heard. Ms Maila did not see or hear Mr Leshage slap M. Had Mr Leshage slapped M so loud that the other learners could hear it, then the probabilities are that Ms Maila would have seen and heard the slap as she was seated right behind M, 60cm away. The fact that she did not see nor hear M being slapped lends support to the defendant's version that Mr Leshage did not slap M.

- [50] What can be gleaned from Ms Maila's evidence, which is corroborated by Mr Leshage is that M was defiant and disrespectful. M refused to remove the wrist band when Mr Leshage requested him to remove the band and was shaking his head and growling. After the wrist band tore M was complaining and waved his hands. He was disrespectful and Mr Leshage requested him to go outside. M defied Mr Leshage again as he stood up and sat down and refused to leave the classroom. When Mr Leshage pulled him by the pants to escort him outside, M attempted to slap Mr Leshage. Mr Leshage had also instructed M to wait outside the classroom and M did not listen and went to the toilet where he tried to call his parents.
- [51] During cross examination M said that he believed that Mr Leshage was referring to him when he used the words "spoilt brat" because he was looking at him. When it was put to him that Mr Leshage did not say that he, is a spoilt brat, and that Mr Leshage actually addressed the whole class about manners M did not agree or disagree with this statement but said that Mr Leshage was looking at him. Ms Maila confirmed that Mr Leshage addressed the class in general. Mr P also did not testify that M reported to him that Mr Leshage called him a spoilt brat or insulted his family. The probabilities are that Mr Leshage never referred to M as a "spoilt brat" or said anything about M's family.
- [52] From the evidence it is apparent that M, L and B who are friends, discussed this matter and gave evidence which was favourable to his case. I say this for the following reasons:- L initially testified that M walked to the toilet crying. Later in cross examination he admitted that he didn't see M cry and that one D saw him cry. M also testified that he cried in the toilet and not on the way to the toilet. B testified that M went to the toilet and called his parents.

B was not in the toilet when M called his parents. B said that M told him that he called his parents. L also testified that Mr Leshage slapped M on his left cheek with an open arm and the sound of the slap was heard by all the learners in the classroom. When asked during cross examination how he came to know that all the learners heard the sound of the slap on M's cheek, he said that because they had discussed it, but he could not explain why they discussed it. L further said that some learners were laughing, some were hurt, while some were shocked or surprised. When asked during cross examination how he could tell that some learners were shocked or surprised and some hurt, he said that it was because they were screaming.

- [53] This Court has exercised caution when considering the evidence of M, L and B because at the time of the incident M, L and B were only 14 and 15 years old respectively. In *Rex v Manda*³ it was held that:

“The imaginativeness and suggestibility of children are only two of a number of elements that require their evidence to be scrutinised with care amounting, perhaps, to suspicion ... The trial Court must fully appreciate the dangers inherent in the acceptance of such evidence and where there is reason to suppose that such appreciation was absent a Court of Appeal may hold that the conviction should not be sustained.”

- [54] The probabilities are that M exaggerated Mr Leshage's light tap with the back of his fingers on his cheek as he has shown the likelihood to generalise, suggest without fact, exaggerate and imagine things. For example M said he thought Mr Leshage wanted to cut his wrist band with a pair of scissors and that is why he did not want to remove it. There was no evidence to

³ 1951 (3) SA n158 (A)

suggest that Mr Leshage had a pair of scissors in his hand and wanted to cut the wrist band.

[55] Although Mr Leshage acknowledged that he touched M's cheek and pulled him out of the classroom by his trousers and further admitted that at the meeting of SGB, the principal and M's parents, he apologised for his conduct, this does not prove that Mr Leshage unlawfully and intentionally assaulted and insulted M.

[56] When considering the evidence in totality and the several contradictions between M, and his two school friends, namely L and B's version, and the evidence of Ms Maila which corroborated Mr Leshage's evidence, then the probabilities weigh in favour of the defendant's version. Accordingly, I am of the view that plaintiff failed to discharge the *onus* of proving on a balance of probabilities that Mr Leshage intentionally and unlawfully assaulted and humiliated M.

ORDER

[57] In the result, plaintiff's case is dismissed with costs.

N. GUTTA

JUDGE OF THE HIGH COURT

APPEARANCES

DATE OF HEARING : 08 MARCH 2018

DATE OF JUDGMENT : 04 MAY 2018

ADVOCATE FOR PLAINTIFF : MR GURA

ADVOCATE FOR DEFENDANT : ADV KELAOTSWE

ATTORNEYS FOR PLAINTIFF : GURA & TLAESLTI ATTORNEYS

ATTORNEYS FOR DEFENDANT : STATE ATTORNEY