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**IN THE HIGH COURT OF SOUTH AFRICA  
WESTERN CAPE DIVISION, CAPE TOWN**

Case Number: 7472/13  
12199/13

In the matter between:

**M[...] A[...] H[...]**

First Plaintiff

**A[...] H[...] H[...]**

Second Plaintiff

and

**THE MINISTER OF CORRECTIONAL SERVICES**

First Defendant

**THE MINISTER OF ARTS AND CULTURE**

Second Defendant

**THE MINISTER OF PUBLIC WORKS**

Third Defendant

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## JUDGMENT

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### MAGARDIE AJ

#### *Introduction*

1. The Drakenstein Correctional Centre, previously known as the Victor Verster Prison, is located midway between Paarl and Franschoek in the rolling hills and valleys of the Cape Winelands. Adjacent to and some distance from the high walls and gates of the prison complex, lies a three-bedroom house.
2. The house is shaded in the front by some fir trees, with a garden and a swimming pool in the back yard. The house is internationally famous. It was here that that our late former President Nelson Mandela spent the last 14 months of his 27 years of imprisonment. On 11 February 1990 he walked through the prison gates to freedom.
3. On the afternoon of 13 August 2010, the tranquil surrounds of the Mandela House were shattered. The house became the scene of a tragedy. H[...] H[...], a toddler who was then 18 months old, fell into the swimming pool in the back yard of the Mandela House. He drowned.
4. The plaintiffs in this action are H[...]’s parents. They claim damages for serious chronic major depressive mood disorder and severe post-traumatic stress disorder which they claim to have suffered as a result of the drowning of their son at the Mandela House. The plaintiffs seek to hold the defendants liable for what they allege to be the wrongful and negligent failure of their employees to take reasonable steps to prevent H[...]’s drowning.

5. The plaintiffs claim that the defendants' employees were negligent in that they failed to lock and secure the Mandela House premises and failed to lock and secure the gates leading to the swimming pool. They further allege that the defendant's employees failed to take steps to ensure that the swimming pool was covered with appropriate covering to prevent young children from falling into the swimming pool and drowning.
6. The plaintiffs' instituted two separate actions against the defendants. The actions were later consolidated. At the commencement of the trial, the plaintiffs withdrew their claims against the second defendant and the third defendant. The claims proceeded only against the first defendant ("the Minister"). The parties agreed that the issues for determination would be limited to the questions of negligence and wrongfulness.
7. The issue of whether the incident had caused certain injuries to the plaintiffs would stand over for later adjudication together with the issues of quantum, should the plaintiffs be successful on the merits. An order by agreement was granted separating the issue of the merits and quantum in terms of Rule 33(4).
8. On 3 June 2024 an inspection in loco was held at the premises where the incident occurred. The trial then proceeded solely on the merits.

#### *The pleadings*

9. It is common cause that on the day of the incident on 13 August 2010, the control and possession of the Mandela House premises and the swimming pool itself, vested in the Department of Correctional Services, ("the Department"). The Department resorts under the Minister.
10. The Minister initially raised a defence that the premises and swimming pool were in the possession and under the control of an independent building contractor,

Nolitha (Pty) Ltd (“Nolitha”). He pleaded that at on the day of the incident Nolitha was conducting renovations and repairs to the swimming pool. Nolitha had thus assumed liability for any injury, loss or damage caused whilst the premises and the swimming pool were in its possession and control. The Minister did not persist with the Nolitha defence at the trial.

11. The plaintiffs claim in their amended particulars of claim, that at all material times, the premises and the swimming pool at the Mandela House were unlocked, unsecured and open to members of the public. The first defendant alternatively the second and third defendants, according to the plaintiffs, owed the public at the premises a legal duty to take reasonable steps against the occurrence of events such as the one that resulted in the drowning of their son.
12. These reasonable steps, as pleaded in the plaintiffs’ amended particulars of claim, entailed inter-alia ensuring that the premises were locked and secured, that the gate to the swimming pool was locked and secured and that the swimming pool was covered with appropriate covering so as to prohibit young children from falling into the swimming pool. The plaintiffs plead that the defendants’ legal duty entailed that young children were prohibited from entering the premises and getting access to the swimming pool. They claim that the incident was caused by the sole negligence and/or wrongful omission of the defendants’ employees, who wrongfully failed to take one or more of these reasonable steps which required by their legal duty to the public at the premises.
13. The plaintiffs plead that a reasonable person in the position of the defendants, could or should have foreseen the reasonable possibility that failure to take reasonable steps to guard against the occurrence of the incident, could cause a member of the public at the premises to fall into the swimming pool, causing such member of the public to drown. Both plaintiffs, according to their particulars of claim, have suffered damages in the form of past and estimated future hospital, medical and expenses, past and future loss of earnings and earning capacity and

general damages for loss of amenities of life and pain and suffering. The sequelae of the injuries claimed by the plaintiffs their nature, effects and duration and whether the incident had caused them to suffer these injuries, did not however feature in the trial, given the formal separation of the issues of liability and quantum.

14. The defendants deny each element of delictual liability asserted by the plaintiffs. Firstly, the defendants deny that the premises including the swimming pool were open to members of the public and were unlocked and unsecured. Members of the public who wished to have access to the premises, according to the defendants, were required to seek and obtain authorization from the Area Commissioner or his delegate. The plaintiffs did not obtain such authorization and their son, so the defendants plead, had no authority to enter the premises, which includes the swimming pool.
15. The existence of the legal duty to the public alleged by the plaintiffs is denied. So too are the plaintiffs' allegations relating to wrongful omissions and negligence on the part of the defendants.
16. With regard to negligence, the defendants plead that the incident was caused by the sole negligence of the first plaintiff in that he inter-alia failed to seek and obtain permission to enter the premises including the swimming pool and accessed the premises without having obtained authorization to do so. The defendants plead that after having left the premises including the swimming pool, the first plaintiff left an entrance or entrances to the premises open and/or failed to secure that the entrance(s) to the premises were closed and secured. This enabled members of the public and his minor son to enter the premises. The first plaintiff, the defendants plead, failed to supervise his minor son and ensure that his minor son did not access the premises and the swimming pool.

17. I commence with an overview and description of the main features of the Mandela House and the areas surrounding it. At the commencement of the trial, the parties by agreement introduced a bundle of documents which was marked as “Exhibit A”. The parties agreed that the documents contained in Exhibit A would serve as evidence of what they purport to be without admitting the contents thereof. The status of these documents has also been recorded in an agreed pre-trial minute dated 29 August 2023.
18. The minute records that the parties had agreed that documents or copies of documents in the bundle to be used at the hearing of the trial, will without further proof, serve as evidence of what they purport to be. The documents contained in Exhibit A included a 2008 site layout plan of the Mandela House and an adjacent house thereto, various photographs of the premises, witness affidavits and records from the inquest proceedings held subsequent to the incident.
19. The parties’ witnesses were largely testifying about events which had occurred on 13 August 2010, some 14 years ago. This understandably created some difficulties in the accuracy of their recollections of certain events. In addition, it became clear from the evidence that various physical aspects of the Mandela House, for example the location of gates on the premises, had changed since the incident on 13 August 2010. The documentary evidence in Exhibit A as well as the oral evidence does however give some indication of the situation which pertained at the Mandela House on 13 August 2010.
20. The Mandela House and its immediate surrounds lie off a winding gravel road which is reached from the main Schuurmansfontein Road across the road from the prison complex. There is a nearby farm, referred to as “Kellerman Plaas”, situated in an area off Schuurmansfontein Road and across the road from the area where the Mandela House is located.

21. According to the 2008 site layout plan, the Mandela House at that stage comprised of three bedrooms, a bathroom, study, dining room, kitchen and a family room. The swimming pool where the incident occurred is situated at the back of the house. It is not enclosed by a fence. The external features of the Mandela House as depicted in the layout plan, include a double garage and a brick wall extending along the front of the house. There is a further house adjacent to the Mandela House. This house was referred to in the evidence as “the Botha House” due to its occupation by Mr. Eben Botha, a Correctional Services employee, and his family.
22. The 2008 site layout plan depicts two pedestrian gates in the front area of the Mandela House. The first pedestrian gate is located on the southern and left hand side of the Mandela house. This gate is a metal gate with a latch and attached to two metal poles and a wire fence in front of the Mandela House. It was referred to in the evidence as “Gate 4”. Gate 4 is the pedestrian gate which provides an entrance to the Mandela House from the gravel road in front of the house.
23. The second pedestrian gate is depicted in the 2008 site layout plan as being located on the northern side of the Mandela House. This gate is a large oval shaped double metal gate. It was referred to in the evidence as “the Freedom Gate”. The 2008 site layout plan depicts a further gate on the southern and left-hand side of the Mandela House. This gate was referred as “Gate 2”.
24. Gate 2 is depicted in the photographic evidence as a large solid black metal gate attached to the side wall of the Botha House. It is depicted in the 2008 site layout plan as being part of an “existing 1 800m vib wall”. The reference to “vib” refers to Vibracrete is a precast concrete product made from a mixture of sand, cement and stone. It is commonly in slabs for boundary walls. The 2008 site layout plan depicts Gate 2 as being part of an existing vibracrete wall which served as the border between the Mandela House and the Botha House. It appears that the Botha House was at some stage occupied by an individual who prepared President Mandela’s meals during his incarceration at Drakenstein. Hence it is referred to in

the 2008 site layout plan as “the chef’s house.” As stated earlier, at the time of the incident the chef’s house was occupied by Mr. Eben Botha, a Correctional Services employee, and his wife.

25. The Botha House is depicted in the 2008 site layout plan as having an existing wire fence in the front with a small pedestrian gate (“Gate 1”) which provides the entrance to the front yard of the Botha House. A concrete or stone pathway lies on the other side of Gate 1 and leads to the front door of the living room of the Botha House.
26. The photographs depict a further gate at the back of the Botha House (“Gate 7”). This gate leads directly to the swimming pool area at the back of the Mandela House.
27. Lastly, and at the area close to the Schuurmansfontein Road, the property is bordered by wire fencing with a steel entrance gate. This gate is the entrance to the gravel road which leads to the Mandela House and the adjacent Botha House.

#### *Factual evidence*

##### *Mr V Colyn*

28. Mr Colyn was the plaintiffs’ first witness. He is a forensic investigator by profession and has practised as such for the last 40 years. He was instructed by the plaintiffs attorneys to take photographs of the Mandela House premises and its surrounds, including the gates at the Mandela House and the Botha House. He was also instructed to locate witnesses such as children and adults who had made use of the swimming pool at the Mandela House.
29. Mr. Colyn testified that he attended at the Mandela House on 17 April 2024 and took various photographs of the premises. His colleague, Mr. Rudi Raaths, had



previously attended at the premises during 2011. Mr. Raaths took photographs of certain aspects of the house, which were pointed out by Mr. H[...]. Mr. Colyn identified the wphotographs he had taken and those which had been taken by Mr. Raaths.

30. In relation to the vibracrete wall referred to as “existing vib wall” in the 2008 site layout plan, Mr. Colyn confirmed that this vibacrete wall was depicted in a photograph taken by Mr. Raaths during 2011. Gate 2 and the vibracrete wall bordering the Mandela House, were both present when he attended at the premises during April 2024.
31. He took various measurements depicted in a photograph in Exhibit A. These distances were taken with a measuring wheel. Mr. Colyn testified that there was another metal gate situated 22 metres from Gate 2 which leads to the swimming pool at the back of the Mandela House. This gate was referred to as “Gate 3”. Gate 3 is depicted in the photographs as a small black metal swing gate fitted with a metal sliding bolt gate latch, with the metal bolt sliding into a hole drilled into the wall supporting Gate 3. The swimming pool is situated 10 metres away from Gate 3.
32. The total distance from Gate 2, next to the Botha House, to the swimming pool is 32 metres. According to Mr. Colyn, Gate 3 was open when he attended at the premises during April 2024. With regard to Gate 4, the pedestrian gate at the entrance to the Mandela House, Mr. Colyn testified that according to his photographs of this gate, the latch of this gate was not aligned to its metal support pole.
33. Mr Colyn identified a photograph in Exhibit A taken by Mr. Raaths during 2011. The photograph depicts Mr. H[...] pointing to the swimming pool being covered by a safety net over the water surface. The photograph depicts the safety net secured in place by fittings on the side of the wall of the swimming pool. He identified a

further photograph he had taken on 17 April 2024. This photograph depicts the swimming pool without the safety net over the water surface.

34. According to Mr. Colyn, he had to make prior arrangements for access to the Mandela House premises when he attended there in April 2024. On a previous occasion he had not been allowed access to the premises. The entrance gate at the road to the premises was closed at the time. There were security personnel at the entrance gate. He testified that all of the gates i.e. Gate 1, Gate 2, Gate 3, Gate 4, Gate 5 and Gate 6, were open. The Freedom Gate was however closed.
35. Mr. Colyn conceded that when he attended at the premises in mid- April 2024, the Botha House was no longer occupied and that security guards were present at the Botha House. He was extensively questioned regarding why he had not mentioned the presence of the security guards at the Botha House in his evidence in chief.
36. He said that he had not been asked about the presence of security guards in April 2024. He has however stated in his evidence in chief that he had to make prior arrangements for his visit to the premises and that there was security at the entrance gate. Mr Colyn had testified that the locking mechanism for Gate No.2 was not aligned and the other gates were in a worn state. Counsel for the Minister put it to him that the Mandela House was a historical building and that it would defeat its purpose and detracts from its ambience for renovations to be done to the extent that the house was unrecognizable. Mr. Colyn did not dispute this.
37. He confirmed that most of the gates opened from the Mandela House side not the Botha House side. With regard to Gate No 3, he accepted that the locking mechanism for this gate was at the bottom of the gate on the side which directly faces the swimming pool. He also accepted that one would have to be quite tall to lean over and open this gate from the other side of the gate to which its locking mechanism was attached.

*Ms Luane Miriscia September*

38. Ms. Luane September was the plaintiff's second witness. She is 25 years old. She grew up on and previously lived a nearby farm in the Schuurmansfontein Road, which was opposite the area where the Mandela House is located. There were approximately 10 to 12 houses on the farm occupied by farm workers and their families. There were about 12 other children on the farm
39. She knew the Mandela House because when she was around 9 or 10 years old, she and her friends had as children often swam in the swimming pool at the Mandela House. Some of the other children who swam at the pool, were younger than her. She testified that they swam at the Mandela House pool because although there was a nearby public swimming pool, it would cost them R5.00 each as entrance fees. She and the other children gained access to the Mandela House area by climbing through a hole or opening in the fence surrounding the premises.
40. They would walk from their homes on the farm to the fence surrounding the premises and to a point in the fence where there was an opening. She called this a "gaaitjie". After climbing through this opening, they walked on the gravel road to the Botha House and entered through the pedestrian gate, Gate 1, in front of the Botha House. From there they proceeded to Gate 2, the large black gate in the border wall between the Mandela House and the Botha House. She said that Gate 2 was very rusty ("*baie stram*"). It could actually not close properly. She said that because of this, Gate 2 had always been open because once it was closed, the gate could not easily be opened again.
41. From Gate 2, she and the other children, normally a group of 3 to 5 children, would walk along the pathway on the side of the Mandela House and to the back yard area where the swimming pool was located. They entered to the swimming pool area through Gate 3. Gate 3, she said, could easily be opened as it was half-open. According to her, Gate 3 had never been locked with lock at the time when she

and the other children swam in the Mandela House swimming pool. The gate was either half open or pushed closed.

42. They were easily able to push this gate open to go through to the swimming pool. There were however times when Gate 3 was pushed closed. She said that this could have been done by persons cleaning the swimming pool. When the gate was closed, her older nephew would reach over and open the gate from the bottom sliding bolt mechanism fitted on Gate 3. She was not aware of the gate behind Mr. Botha's house.
43. She stated that there were three occasions when she and the other children swam in the Mandela House swimming pool. At all of these times, there was never a safety net or a safety cover over the swimming pool. She was referred to a photograph taken after the incident depicting a safety net over the swimming pool. She did not know when this safety net had been installed but she was sure that it was after H[...] had drowned in the pool.
44. She and her friends had never been stopped by anyone when they were on their way to the Mandela House from the Schuurmansfontein Road area or at the Botha House. She stated that her grand-father and Mr. Eben Botha often braaied together and that Mr. Botha was aware that she and the other children were going to the Mandela House and swimming in the swimming pool. Mr. Botha, she said, had never stopped them from doing so. She testified that Mr. Botha was at times at home when she and the other children would walk past his house on their way to the swimming pool.
45. Her evidence was that at no stage before the incident had she and her friends ever been chased away from the pool by any Correctional Services staff. She and the other farm children swam in the Mandela House swimming pool often during the summer months and on most occasions after they returned from school. She said that there that was no-one at the Mandela House monitoring or guarding the

house and no-one from the Department of Correctional Services performing this function.

46. Ms. September testified that after the drowning incident, the farm children were forbidden to do anything at the Mandela House premises. She said that a strict security guard was then attending at the premises. During cross-examination, Ms. September was asked whether she knew that the Mandela House was being kept as "...a type of museum". Her answer was yes. It was also repeatedly put to Ms. September whether she knew that the Mandela House was private property and that she was committing the crime of trespass. She agreed.
47. She was questioned about whether she had ever informed her mother or father of the swimming at the Mandela House. She said that her mother had not been living with her and that her father was dead. She stated that her grandfather, Mr. Johannes September, was however aware of her swimming at the Mandela House. She testified that there was an occasion when she had received a hiding from her grandfather because of the Mandela House swimming but there were other reasons for the hiding as well. She said that it was also because she had been playing in the bushes.
48. With regard to the gates at the Mandela House, she stated that there had previously been a further pedestrian gate in the front of the house but that her and her friends had not used these gates to reach the swimming pool. This was because it was easier for them to go through the gates at the Botha house. In relation to Gate 2, she confirmed that the locking mechanism for this gate was on the Mandela House side and that this gate was rusty and could not open easily. She stated that Gate 2 was always open on the days that she and her friends went swimming at the Mandela House.
49. Regarding Gate 3, she agreed that if this gate was closed, a tall person would need to lean over and open it from the slide bolt locking mechanism on the other

side and at the bottom of the gate. She stated that her nephew would do this but the children were also able to simply climb over the Gate 3 itself. She further stated that she had not used the Freedom Gate to enter the Mandela House premises or the other gates in the front of the Mandela House, as these gates had been closed.

50. It was put to Ms. September that that Mrs. Botha was looking after a young child and that because of this the Botha's were very careful to make sure that Gate 2 was always closed. She was not aware of this and had never seen a child at the Botha's house. It was put to her that Mr. Botha would testify that Gate 2 was always kept closed because of the small child that Mrs. Botha was looking after. It was also put to her that Mr. Botha himself did not know that children were accessing and swimming in the pool at the Mandela House.
51. She was questioned as to how she and her friends would know when there would be people at the Botha house before they would go to the swimming pool. Her answer was that on the occasions when she went with her grandfather to visit Mr. Botha, she would eavesdrop on the adults conversations in order to hear who was working or out of the house on certain days. She would then know that these days would be "safe" to go swimming at the Mandela House.
52. In re-examination, she reiterated that Mr. Botha was aware of the children swimming at the Mandela House as he and her grandfather had often braaied together and he had been present when the children were swimming in the pool. She further testified that her and her friends had swam at the Mandela House pool on 5 occasions and on weekends.

*Mr Johannes Jacobus September\*

53. Mr. Johannes Jacobus September is Ms. Luane September's grandfather. He previously lived at on the Schuurmans farm opposite the Drakenstein Prison for

some 40 years. He testified that he knew the Mandela House and the adjacent house occupied by Mr. Botha, who he often used to visit at his home. He was able to easily reach the Botha House by climbing over the nearby fence and regularly used this as a route to reach the Botha House.

54. Mr. September testified that he was aware of the swimming pool at the Mandela house because the children from the farm used to regularly swim there during the summer months. There were also occasions when he was present while the children were swimming but on other occasions, he was not present. The children would access the swimming pool by going through the gate at the Botha House and then to the swimming pool at the back of the Mandela House. His evidence was that when he accompanied the children to the swimming pool, the black metal gate next to the Botha House, Gate 2, was never closed and the front gate at the Botha House was always open.
55. As his grand-daughter Luane stated in her evidence, he also testified that Gate 2 was consistently open because it was always very rusty (“baie stram”). With regard to Gate 3, he testified that this gate was not originally there at the times he used to visit Mr. Botha and that instead of Gate 3, there was a type of flat gates (“plat hekkies”) of a different type to that depicted in the witness bundle as Gate 3.
56. At the times that he visited Mr. Botha, no-one had informed him that he should not be there. He testified that there was however a Mr. Burger, whom he stated was a Correctional Services security manager, who would arrive and when he did, the children who were swimming at the pool would run away. He testified that Mr. Botha was aware of the children accessing and using the swimming pool at the Mandela House and had never stopped them from doing so. He stated that after H[...]’s drowning, a number of gates had been installed at the Mandela House but that the children from the farm were still able to easily access and use the swimming pool.

57. He confirmed that there had never been a safety net over the swimming pool at any time before H[...]’s drowning.
58. Mr. September accepted under cross-examination that he had no personal knowledge of the events on 13 August 2010 which resulted in H[...]’s drowning. He was cross-examined extensively on his evidence regarding the absence of Gate 3. He conceded that he was somewhat unsure and a bit confused about the photos depicting Gate 3. He said that he had poor eyesight as a result of diabetes.
59. It was put to Mr. September that he had omitted to mention his poor eyesight in his evidence in chief. He responded that he had not been asked anything about his eyesight. He re-iterated that Mr. Botha was aware of the children accessing and swimming at the pool at the Mandela House. He accepted however that he did not have permission from the Area Commissioner to be at the Mandela House and the swimming pool. Mr. September stated that everyone from the Department in the area however knew him and that he regularly had met them at the prison “kroeg”, this being the staff bar apparently used by the Department’s officials at Drakenstein. He agreed that when Mr. Burger arrived and the children ran away from the swimming pool area, this was because the children did not have permission to be swimming in the pool at the Mandela House. It was put to Mr. September that Mr. Botha did not give permission for the children to swim in the pool at the Mandela House and he could not give such permission. Mr. September said that he could not argue with this.

*A[...] H[...] K[...] (nee H[...])*

60. Mrs. A[...] K[...] is the second plaintiff and the former spouse of Mr. H[...]. At the time of the incident, she, Mr. H[...] and their three sons lived in a house provided by the Department as employee housing, at 2[...] K[...], Mandela Street. This was about 500 meters down the road from the Mandela House. There were approximately 6 families on the street and about 50 houses on the prison property.



The houses were all occupied by families of employees of the Department who were worked at the Drakenstein Prison.

61. She was aware of the Mandela House as she would drive past and sometimes walk past the house on her way to church on Sundays. Her route to church would include walking past the Mandela House and the Botha House to a nearby broken fence on the outskirts of the prison property. She would climb through the fence, cross the main road and then walk the remaining distance to church. She would take this route to church on 3 Sundays a month and on other occasions for choir practice.
62. She had lived on the property for 8 years between 2004 and 2012 and had regularly taken this route to reach her church. She testified that anyone could move freely through the fence and that she had never observed any security or security post at the fence area bordering the prison property on which the Mandela House is situated.
63. With regard to the gates at the Botha House, her evidence was that Gate 1, the front gate at the Botha House, was open most of the time. In respect of Gate 2, the black gate in the vibacrete wall bordering the Mandela House, she stated that this gate was not there at the time of H[...]’s drowning and had only been installed after the incident. Gate 3, according to Mrs. K[...], was also not there either at the time of the incident. She stated that this gate was not present when she was at the Mandela House with journalists from the Paarl Post on 17 August 2010. The same applied to Gate 4, which she maintained was installed after her son’s drowning on 13 August 2010.
64. On the afternoon of 13 August 2010, she was asleep at home. A vehicle suddenly drove up to the house at a high speed. Mr. H[...], her two other sons and the second plaintiff’s brother, Mr. C[...] H[...], were in the car. Her son Leroy ran inside

the house and shouting, "H[...] has drowned!". She went outside the house and saw H[...] lying on the ground outside the house on the grass.

65. He was soaking wet and not conscious. She tried cardio-pulmonary resuscitation ("CPR") on him but he was just lying there, lifeless.
66. A number of people and neighbors rushed over to the house. H[...] was taken to hospital in Paarl. When she arrived at the Paarl Medi-clinic, she was told by a doctor that H[...] had not made it and had died.
67. She was asked during her evidence in chief about Mr. H[...]’s condition at the time when he arrived outside the house with H[...]. She said that he was also extremely distressed and disturbed at the time and was running up and down in a very distressed and agitated state. She stated that her whole life changed after the drowning of her son on 13 August 2010. She suffered severely psychologically and was diagnosed with depression. Her marriage suffered terribly as Mr. H[...] was always drinking after the incident and there was constant blaming and fighting in their relationship.
68. During cross-examination she was asked whether Mr. H[...] was up early on the day of the incident. She said that he was up early and that his brother Mr. C[...] H[...], arrived at their home at about 6.15 am. After he arrived, he and Mr. H[...] left and came back around an hour later. She said that when they came back, she saw that Mr. H[...] had with him a bottle of Olaf Berg brandy. She was annoyed by this as the plan was that they were going to town to do the monthly shopping that day. According to her, Mr. H[...] said that he was only having a "klein doppie". She said that he poured himself a small amount of the brandy in a glass with some Coke and ice.
69. Mrs. K[...] was extensively cross-examined on these events, which had not been mentioned in her evidence in chief. She said that Mr. H[...] was sober when he

came back with his brother at around 7.30. The bottle of Olaf Berg brandy, she said, was not full. It only had about 3cm of liquid in it. She was asked whether she knew what had happened to the rest of the brandy. She said that Mr. H[...] had in the past had a “skuld boekie” at the prison staff bar. She had previously complained about this to the official in charge of the bar, a certain Mr. Daniels.

70. She however insisted that Mr. H[...] was clearly sober when he came back with his brother at around 8.30am. She knows him very well. To her, there were no signs that he was inebriated and had been drinking between the time that he left and when he arrived back home at around 8.30am.
71. Mrs. K[...] was cross-examined extensively on a statement which she had made to Melissa Melnick, a clinical psychologist, who interviewed her and conducted an assessment on 14 August 2014. Ms. Melnick had prepared a medico-legal psychological assessment report. In the report Ms. Melnick records that on 14 August 2014, Mrs. K[...] reported to her that on morning of 13 August 2010, Mr. H[...] and his brother had “...went to a guy to buy wine. That guy opened the bar to have him buy wine. He was drinking, then we went to town and when we got to town he wanted to buy a cellphone from someone on the street.”
72. She responded that what she had told Ms. Melnick was many years after the incident. During that time, she was in very bad psychological state, had attempted suicide and had been admitted to hospital with depression. She stated that what was recorded in Ms. Melnick’s report regarding Mr. H[...] having gone to buy wine, was not accurate. She herself had Mr. H[...]’s bank cards and he would not have had money to buy alcohol without his bank card. She insisted that Mr. H[...] was not drunk or under the influence of alcohol when he returned with his brother.
73. Mrs. K[...] was further questioned about an affidavit which she had deposed to as the SAPS: Paarl station on 10 September 2013. In that affidavit, she stated inter-alia that when Mr. H[...] later came back home with his brother, H[...] and the other

children after the tragic events at the Mandela House, "...ek kon sien dat hy onder die invloed van drank was. Ek ken hom goed en volgens my was hy ooglopend dronk."

74. She confirmed having made this affidavit to the police. She however stated she could see that he did have something to drink but according to her, he was not drunk. She also stated that she had not written affidavit herself. It had been written out by a SAPS official and she had signed it.
75. She was questioned further on an additional part of her affidavit where she stated that "...Ek het toe vir M[...] gesoebat om vir H[...] na die hospitaal te neem. Hy wou nie ry nie en gesê dat die polisie hom gaan kry en sal toesluit vir dronk ry". Her response was that she would never have asked Mr. H[...] to drive if she thought that he was drunk. Further cross-examination of Mrs H[...] related to an affidavit by a certain Jolene De Beer dated 17 August 2010. In her affidavit, Ms De Beer stated inter-alia that when she arrived at the H[...] home, Mr H[...] "...was baie oproerig en het na alkohol geruik." Ms. De Beer was however not called as a witness.
76. Mrs. K[...] stated that on the day of the incident, it was clear to her that Mr. H[...] was in an extremely confused, distressed and panicked state. This she said was worse because Mr. H[...] had previously been diagnosed with bi-polar disorder. She stated that he was "in heel in 'n ander wêreld". While H[...] was being taken to hospital, he had even gone to a shop to buy H[...] some toys. This, she said, demonstrated his confused and irrational mental state at the time.
77. She was repeatedly questioned again on why, as recorded in her affidavit of 10 September 2013, she had pleaded with Mr. H[...] to drive H[...] to hospital when she knew that Mr. H[...] did not have a licence and according to her affidavit, she could that he was "ooglopend dronk". Mrs. K[...]’s response to this was "...want ek wil hé my kind se lewe moet gered word! Ek wil hé my kind moet gespaar word!

Dis die rede. Ek wou net hom help.” At this point, Mrs H[...] became extremely emotional. She broke down in the witness box and could not continue. The hearing of her evidence was adjourned for a short period.

78. On resumption of the proceedings, she was cross-examined regarding the various gates at the Mandela House. She stated that again that Gate 3 was not there on the date of the incident and had been installed by the prison authorities on 18 August 2010 after the incident. A prisoner by the name of “Gaddafi” had come to her house after the incident and informed her that gates were being installed at the Mandela House. She had complained about this to the Area Commissioner and asked why gates were only being installed after the drowning of her son. Her complaints were not entertained and she was sent away.
79. She stated that safety was never a priority at the Mandela House and there was never any security or guards to keep people away from the Mandela House. She was questioned in cross-examination regarding why she had not mentioned the installation of security gates after her son’s drowning in any of her affidavits. She stated that she had only been interviewed regarding the incident itself and had only explained the events that took place on that particular day.

*Mr M[...] H[...]*

80. Mr. M[...] H[...] is the first plaintiff. He was employed by the Department as a prison warden for 18 years before resigning in August 2014. He is presently unemployed.
81. Mr. H[...] testified that he became sick with major depression after H[...]’s death on 13 August 2010 and was diagnosed with post-traumatic stress disorder. He suffered memory loss and would sometimes have fits at night. He had already been under psychiatric treatment for bipolar disorder before H[...]’s death and his symptoms became worse after that. The last occasion he had received treatment was at Worcester Hospital about 5 or 6 years ago.

82. Mr. H[...] testified at the time of the incident, he had been living with his family in staff accommodation at the Drakenstein Correctional Facility since 2006.
83. He met Mr. Botha at Drakenstein and knew him through his brother, who was also from Worcester.
84. He was familiar with the Mandela House as he had often walked past the house when on his way to church on the nearby farm. He testified that in all the years that he had walked past the Mandela House, everything at the house was dead quiet and he had never seen anyone at the Mandela House. He had also never observed any security guards at the house and according to him, nothing was ever happening at the house.
85. He stated that in the years that he had walked past the Mandela House, the Freedom Gate was sometimes closed and sometimes left open. He did not know who had left this gate open. On one occasion he was on his way to church and saw children from the local farm playing in the swimming pool at the Mandela House. He saw them through the Freedom Gate, which was open at the time. He did not see any adults with the children at the time.
86. He visited Mr Botha at his house on various occasions. They would socialise, and watch rugby. He would generally just go to his house and would not make arrangements to visit beforehand.
87. As to the gates at the Mandela House, he testified that Gate 2, the gate adjacent and on the wall border of the Mandela House, was closed when he was at Mr. Botha's house. He had never seen people going through Gate 2.
88. Mr. H[...] testified that in the day of the incident, he was at home that morning and heard a knock at the door. He went to see who it was. It was his brother, C[...]

H[...]. That day was pay day. He asked C[...] if they could all go to town with C[...]’s vehicle and do their monthly shopping. C[...] agreed. They all left at around 9am and drove to town in Paarl. He drove the car. They first went to the Shoprite in Paarl. While they were at Shoprite, he and his wife had an argument over money. She left and went home. She left H[...] with him. At around 1pm, he and C[...] drove to pick up his two other sons, L[...] (then aged 7) and W[...] (then aged 6), from school. He had been paid and wanted to take his children out for a treat.

89. After collecting L[...] and W[...] from school, they all drove to Mr. Botha’s house. He drove past Mr. Botha’s house from the right hand side of the road, if one is observing the road from the Botha House. He drove past and made a U-turn at the trees in front of the Mandela House. He then drove a short distance back to park outside Mr. Botha’s house. He parked in front of Gate 1. He said that he made the U-turn first in order for them to easily drive the vehicle straight off when they left Mr. Botha’s house after the visit. After parking the vehicle, they exited the vehicle and went up to Mr. Botha’s house along the pathway leading from the gate at the fence surrounding the house. He stated that at the time he had in his hand a “dumpe” of beer, which he had opened and taken two sips of before going through to Mr. Botha’s house.
90. When he arrived at the house, Mr. Botha was there, as was his wife and a certain Angela. They were sitting in the lounge. Mr. Botha was seated on a couch and watching television at the time. He greeted Mr. Botha and wanted to talk to him. He said that Mr. Botha was his friend and that he intended confiding in him about things not being good at home at the time. He had planned to take the children home and then returning later to Mr. Botha’s house with C[...]. He testified that he was talking to Mr. Botha and his wife and that he was at the time standing just inside the house next to the front door.

91. The children were playing outside on a cement patch close to the house. He testified that the children were within his eyesight at the time. He saw that Gate 2 was closed. His brother C[...] was standing outside.
92. A short while later a certain Mr. Meerai, who was a fish vendor, drove past. He went to him to buy some fish and avacodos for his brother. The children were still playing outside the Botha house. He gave the fish and avacado to C[...], who then went and sat down to eat at the stairs on the other side of the Botha House. He went back to the lounge area where he had been standing on the side of the door talking to Mrs Botha.
93. He testified that at that point, he was approached by his son Leroy who came to him and said that he wanted some cooldrink. He told Leroy that he could fetch the cooldrinks which were in the boot of the car. He testified that L[...] then went together with H[...] to the car and he saw them walking down the pathway leading to the gate, where the car was parked. Mr. H[...] then carried on talking to Mr. Botha. He testified that at a certain point while talking to Mr. Botha, he needed to relieve himself and use the toilet. He proceeded to the bathroom inside the Botha house and was in the toilet for about 2 or 3 minutes. He washed his hands and then went back to continue his conversation with Mr. Botha.
94. As he entered the lounge, he saw L[...] walking up towards the house with a cooldrink in his hands. He asked him where was H[...]. L[...] said that H[...] was just with him at the car. He testified that he immediately started looking and calling out for H[...].
95. He looked all around the Botha House, in the area where the gate was and calling and shouting H[...]’s name throughout. He could not see H[...] anywhere. He started panicking and ran down towards the gates outside the Mandela House. He ran towards and pushed open Gate 4, the pedestrian gate outside the Mandela House, which he stated was open at the time. This gate was not locked.



96. He then ran up along the cement path in the Mandela House garden and to the backyard of the house where the swimming pool was located. It was here that He found H[...], floating in the swimming pool. He jumped into the swimming pool fully clothed and grabbed H[...] in his arms. Panic stricken and in shock, he ran back to the Botha house with H[...] in his arms, crying and shouting “kyk, my seun is dood, my seun is dood!”
97. When he got to the Botha house, Mr. Botha attempted CPR on the child. His brother C[...] was just standing there in shock. He took H[...] into his arms again and he, the other two boys and C[...] then ran to the car and drove off.
98. He was driving the car at the time. When they all arrived at his home, he put H[...] on the grass outside and started shouting out for help. A neighbour, Mr Piet Visagie and his wife heard his shouts and attempted CPR on H[...]. Later that day and after H[...] was taken to Paarl Hospital, a doctor came to him and said that H[...] had been declared deceased.
99. Mr. H[...] was asked about photographs depicting a safety net over the swimming pool at the Mandela House. He stated that the safety net had only been installed a week after H[...] was buried. He said that before H[...]’s drowning, there had never been any safety measures at the pool such as a safety net, there were no warning signs stating that people were forbidden to be at the Mandela House and that there were never any security guards around the house to keep people away.
100. Mr. H[...] was cross-examined extensively regarding Mrs. K[...]’s evidence relating to his consumption of alcohol on the morning of the incident. He denied that he and his brother had left home early to go out and buy alcohol. He stated that he did not have money to do so and in any event, there was no bar that would possibly be open so early in the morning. It was put to him that Mrs. K[...] had testified that early on the morning of 13 August 2010, he had wanted to go and buy

alcohol and the person in charge of the prison employees bar, Mr. Daniels, had opened up the bar in order for him to do so.

101. Mr. H[...] vehemently denied this. He stated that something like that was expressly prohibited by prison procedures. From around 7am in the morning, prison staff would be busy with food service for prisoners. He stated that under no circumstances could the prison staff bar be opened at that time by Mr. Daniels without the permission of the Area Commissioner. He asked if Mr. Daniels could be brought to court to confirm this.
102. Mr. H[...] was then questioned regarding the evidence by Mrs. K[...] that she had observed that he was under the influence of alcohol when he brought H[...] back home after the drowning incident at the Mandela House. He denied that he was drunk or under the influence of alcohol. He also denied that Mrs. K[...] had pleaded with him to take H[...] to hospital and that he had refused to do so because he was scared of being arrested by the police for drunk driving. He stated that this evidence was completely untrue and that he had asked his friends to take H[...] to hospital.
103. He was questioned about why he had stopped Mr. Botha from continuing with CPR. He answered that he could see that the CPR was not having any effect on H[...]. He could see that his child was dead and he wanted to go home and find H[...]’s mother. As to an affidavit by Jolene De Beer who stated that she had also performed CPR on H[...] and that Mr. H[...] was being unruly, he stated that the incident had happened 14 years ago. He could not recall if she had performed CPR on H[...].
104. He said that he was traumatised, hysterical and extremely confused and distressed at the time. He gave a similar answer when questioned as to why he had not driven H[...] to hospital himself. He stated that his son had just drowned

and that his mental state at the time was such he was in no condition to drive to the hospital in Paarl.

105. It was put to Mr. H[...] that Mr. Botha had seen the car in which C[...], the children and Mr. H[...] were in, drive past and that the car had stopped at the Mandela House. It was put to him that according to Mr. Botha, they had all exited the car and gone into the Mandela House property. A short while later, they all came to Mr. Botha's house. Mr. H[...] denied this.
106. Regarding his evidence in chief that he had gone to the toilet at the Botha house for about 2 or 3 minutes, Mr. H[...] was questioned as to why he had not asked the Botha's or his brother C[...] to watch the children while he went to the toilet. His answer was that he had gone quickly to the toilet and that at the time the children were outside playing.
107. He was then questioned regarding why he allowed H[...] to go to the car with his brother who was also very young. Mr. H[...] responded that he was watching both children and could see them walking to the car. He denied having fabricated a story about his son asking to go to the car to get a cooldrink.
108. He further denied that he had at any point talked to the children about the Mandela House swimming pool, as stated in an affidavit by his brother C[...] H[...]. It was put to Mr. H[...] that he had taken his brother to the Mandela House to show him the place and that he was now scared to admit this. Mr. H[...] denied that this was the case. Regarding the gates at the Mandela House, he stated that Gate 3 was not there on the day of the incident. He stated that Mr. Botha had informed him that this gate was installed after the incident.

*Hylton Jumaats*

109. At the time of the incident, Mr. Jumaats was employed by the Department in the position of Area Co-ordinator: Development & Care. He started working at Drakenstein in February 2010. He is responsible for co-ordination of rehabilitation and education programmes. He has also chaired disciplinary hearings. He was requested by the then Area Commissioner, Mr. Jeremy Matthysen to conduct a preliminary investigation into what had transpired at the Mandela House on 13 August 2010. He stated that his mandate was to only look at the issue of access to the Mandela House. According to him, he was not at liberty to deal with whether anyone was at fault.
110. On 14 August 2010, he went to the Mandela House. He first observed the area and the external features of the house, these being the areas that provide access to the swimming pool. He stated that the Mandela House itself was locked and he did not go inside. He observed that Gate 2 was present when he visited the scene on the morning of 14 August 2010. This gate was closed at the time.
111. He then walked to the swimming pool by entering through Gate 4 then through Gate 3. Both these gates were closed at the time. He also observed that the Freedom Gate was closed. He stated that the locking mechanism for the Freedom Gate was on the inside of the gate.
112. After his observations at the Mandela House, he proceeded to meet Mr Botha at his house. He had a discussion with Mr. Botha who completed and signed an affidavit which he then commissioned. He stated that that this affidavit, which he commissioned on 14 August 2010, was written out by Mr. Botha himself. He commissioned an additional affidavit by Mr. Botha on 17 August 2010. He stated that this affidavit was a confirmation by Mr. Botha that he had seen Mr. H[...], his brother and the children going into the Mandela House. He stated that this "...didn't come out clearly" in Mr. Botha's first affidavit. He therefore he had to do "...an additional confirmation in respect thereof". He had also obtained other affidavits in the course of his investigation.

113. Mr. Jumaats stated that access to the Mandela House was not open to the public. Anyone seeking to visit the house was required to apply in writing to the Area Commissioner or his delegate. Mr. Manfred Jacobs would be assigned to deal with the application. Visits to the Mandela House by individuals were generally not allowed but group visits could be accommodated. He stated that such visits were in the interests of the broader public given the history of the house. He stated that the swimming pool at the Mandela House however was merely "...something to observe and not the essence of visits to the house." According to Mr. Jumaats, all Correctional Services officials at Drakenstein were aware that the Mandela House was off limits for casual visits.
114. With regard to the house occupied by Mr. Botha, Mr. Jumaats explained that Mr. Botha and his family lived there due to a shortage of staff accommodation at the prison facility. He stated that Mr. Botha did not however have any particular role with regard to the Mandela House. For example, he was not for example responsible for security or guarding the Mandela House.
115. Following the completion of his investigation, Mr. Jumaats reported his findings to the Area Commissioner. He did so after visiting witnesses and obtaining affidavits, which included attempts to engage with Mr. and Mrs. H[...], however they refused to engage with him.
116. His conclusion was that the H[...] family had no authorisation to enter the Mandela House. He had further concluded that in his observation, the only way in which a young child such as H[...] would have been able to reach the swimming pool was through the pedestrian Gate 1 at the front of the Botha House, then through Gate 4 in front of the Mandela House, around the house and then through Gate 3 adjacent to the swimming pool. He had sketched this route in pencil on a copy of the 2008 site layout plan. He considered that this route was the only possible way that a

child as young as H[...] could reach the swimming pool, if these gates had not been closed shut.

117. Mr. Jumaats was asked why he did not consider Gate 2 as the route which had been taken by H[...] to the swimming pool. He stated that Mr. Botha had told him that they had a small child in the house and that for this reason Gate 2 was always kept closed. He also stated that this gate was a heavy metal gate and that he did not consider that it was possible for a toddler of H[...]’s age to open this gate.
118. Mr. Jumaats was questioned during cross-examination regarding exactly what his position at Drakenstein entailed. He stated that he was responsible for the management of all education programmes for offenders, rehabilitation, and offender agricultural work. He was also responsible for managing staff.
119. He was an educator by profession. He was asked why he he had been assigned the responsibility for the investigation requested by the Area Commissioner. He stated that he had a history of involvement and experience in labour matters. The Area Commissioner had identified him as the person with the skills for the job. \
120. He was asked whether he had ever really been involved in criminal matters, active investigations relating to deaths and whether this was the first time he had conducted such an investigation. His response was that he had been involved before in cases of domestic violence.
121. He conceded that it was his first time investigating a matter such as the death of a child on the premises of the Department. He stated that his role was merely to gather the facts, to forward his observations to the Area Commissioner and that the SAPS was responsible for criminal investigations. He confirmed that he had not been required to produce a written report of his investigation.

122. He accepted that he himself did not have anything to do with the Mandela House. His visit on 14 August 2010 might have been only the second time that he had actually ever been there. He had however conducted a staff team-building exercise at the Mandela House. The staff told him that the experience was amazing.
123. He had no actual knowledge of any comings and goings of people at the Mandela House before he started working at the Department. He was asked if he had any knowledge of security arrangements at the Mandela House at the time of the incident. He stated that that there was no security arrangements or security guards in place at the Mandela house.
124. Mr. Jumaats was referred to various photographs depicting a safety net overing the water surface of the swimming pool at the Mandela House. He confirmed that when he visited the Mandela House on 14 August 2010, the day after H[...] drowned, there was no safety net over the pool. He stated that this net had only been installed afterwards.
125. Mr. Jumaats stated that Gate 3 was in place when he visited the scene. He was asked whether he knew whether any of the gates at the Mandela House could be locked shut with a lock. He stated that he was not going to speculate. He was asked whether he knew whether the gates at the Mandela House were locked shut with a lock at the time of the incident.
126. He said that he did not know and that Mr. Manfred Jacobs was the only person that could confirm this. It was put to Mr. Jumaats by the plaintiffs' counsel, that none of the gates at the Mandela House were actually locked shut with a lock. He was asked to comment on this. He said that he was unable to really comment..
127. Mr. Jumaats stated that that the idea of the Mandela House was that it had to be kept in the same position as it was and not changed. There had however been

repairs carried out to the swimming pool. He stated that in 2009 there had been a Government Gazette Notice that the Department of Arts and Culture was responsible for maintenance of the Mandela House and the appointment of service providers to keep the swimming pool clean. He stated that that the swimming pool was being kept clean on a regular basis. Repairs to the swimming pool had been carried out about 3 weeks before the incident.

128. Mr Jumaats was asked whether he was aware of local farm children going through to the Mandela House and swimming in the pool. He stated that this was never reported to him.
129. He was then questioned regarding the affidavits by Mr. Botha which he had commissioned. He repeated that it was Mr. Botha who himself wrote out his first affidavit. He stated that this because the Department promotes the idea of people writing out their own statements. He could not recall whether he obtained any other statements from people on 14 August 2010, apart from Mr. Botha.
130. He stated that the second affidavit which he commissioned on 17 August 2010 and which had been signed by Mr. Botha, was written in his (Mr. Joemats) handwriting. He had gone back to Mr. Botha himself and that Mr. Botha had not contacted him regarding a second statement. He was asked why he had gone back to Mr. Botha. His answer was that when statements are written, there are always questions.
131. He wanted to get some clarity from Mr. Botha in respect of the matter. This is normal because the Department does an assessment and asks questions. It was his duty to go back to Mr. Botha, he said.
132. Counsel for the plaintiffs pressed him further on this. Mr Jumaats stated that the reason why he had gone back to Mr. Botha was because Mr. Botha had not explained or indicated in his affidavit what had happened to Mr. H[...] and his entourage when they parked in front of his house. Mr Jumaats stated that he



wanted clarity on whether Mr. Botha saw them moving towards his house or whether they had gone anywhere else. He could not recall exactly why he himself had decided to write out the second affidavit by Mr. Botha. He said that it was maybe because the environment was not conducive. He had commissioned both affidavits at Mr. Botha's house.

*Mr Eben Botha*

133. Mr Eben Botha He has been employed by the Department since 1988. At the time of the incident he and his wife resided in the house adjacent to the Mandela House.
134. He testified that the day of the incident, 13 August 2010, was a Friday, which is normally the day that employees of the Department are paid their salaries if the 15<sup>th</sup> falls on a weekend. He had been paid his salary. He made arrangements with his wife to go to Paarl to do their monthly grocery shopping. They returned from Paarl at around mid-day. It was his day off and he had hired some films to watch. While he sitting down in the living room watching a film on his television, he observed a red vehicle driving past on the gravel road in front of his house and the Mandela House.
135. He was able to see the vehicle as the front door of his house was open at the time and he was sitting in the living room. He stated that he stood up from his chair to have a look and was standing at the front door of the living room at this time, as he wanted to make sure who were the people in the vehicle He saw the red vehicle drive past and park just next to the Mandela House.
136. He stated that he saw that it was Mr. H[...] and observed him, another male person who he was later introduced to as Mr. C[...] H[...] and three children, getting out of the vehicle and opening the front gate of the Mandela House. He saw them all moving in towards the area around the Mandela House. He could not see exactly

what they were doing but because he knew Mr. H[...], he turned around and went back to sit down and continue watching his films. After about three to five minutes, Mr. H[...], his brother C[...] and the children came back into the yard of the house where he was sitting in the living room. Mr. Botha testified that as they were approaching and coming up the pathway to his house, he saw that Mr. H[...] and his brother each had a single “dumpie” of beer in their hands.

137. He said that he was also enjoying some alcohol at the time. He was relaxing and it was his day off. He did not say what alcohol he was enjoying.
138. Mr. Botha testified that Mr. H[...] walked up to the house where he was sitting in the living room, watching his films. Mr. H[...] introduced him to his brother C[...]. Mr. C[...] H[...] was standing outside while Mr. H[...] was standing by the side of the front door, talking to Mr. Botha’s wife.
139. Mr Botha stated that Mr. H[...] was standing at the door in order for him to keep sight of the children, who at the time were playing outside the house. He stated that after about 10 minutes, one of Mr. H[...]’s children came inside the house and said something to Mr. H[...]. He did not hear what the child said.
140. He stated that Mr. H[...] then immediately turned around and left from where he was standing by the door. He said that he was not really noticing all of this because he was busy watching his films. He testified that a short while later, Mr H[...] rushed back carrying H[...] in his arms and shouting “...kyk, my kind is dood, my kind is dood!”. Everyone inside the house was shocked. He took the child from Mr. H[...] and began to give him mouth to mouth resuscitation. While he was doing so, the child twice spewed some water from his mouth. He turned the child over on his side.
141. While he was doing so, Mr. H[...] came over and picked up H[...] in his arms. All of them, Mr. H[...], his brother and the children then rushed towards the car, which

was parked in front of his gate, got inside the car and sped off at a very high speed.

142. The following day, Mr. Jumaats came to see him to obtain an affidavit, which he provided. He was shown a number of the photographs in exhibit A during his evidence in chief. He identified Gate 3 as being the gate between his house and the Mandela House. He identified Gate 4, the pedestrian gate in front of the Mandela House, as having been present on the day of the incident. He stated that at the time there was also another gate present, which was a double gate allowing for a vehicle to go through and park on the side of the Mandela House.
143. He stated that Gate 3, the gate leading to the swimming pool, was also present on the day of the incident. He no longer lives in the house he occupied next to the Mandela House. He had continued living in the house for about two years after the incident.
144. During cross-examination, Mr Botha confirmed that although he lived next to the Mandela House, he was not responsible for any security or oversight functions in relation to the Mandela House. He was asked about security at the Mandela House. He stated that there were no security guards or personnel around the Mandela House that were responsible for oversight of the house or performing guarding or security functions at the house.
145. Mr. Botha was then questioned extensively regarding the vibacrete wall forming the border between the Botha House and the Mandela House. He stated that the vibracrete wall was not there on the date of the incident. This answer, unsurprisingly, led to a series of questions being put to Mr. Botha by the plaintiffs counsel. It was put to Mr. Botha that he was the first person who had testified that the vibacrete was not present on the day and that Mr. Jumaats had himself testified that the vibacrete wall was present on the day of his inspection on 14 August 2010.

146. It was put to Mr Botha that according to the 2008 site layout plan, the vibracrete walls runs down the whole length of the property and between the Mandela House and the Botha House. Mr. Botha insisted that the wall was not there on the day of the incident.
147. Mr. Botha stated that on the day in question, he was seated in his the living room facing his television set which was on the other side of the room. He conceded that seated inside in this position, his line of sight outside could only see small areas of what was outside. He was questioned further regarding vehicles which would drive past his house and whether, when viewed from his house and looking at the road, they would drive past from the left-hand side or the right-hand side. He stated that looking out from his house, the vehicles would come from the right-hand side, drive past and then make a U-turn to go back out.
148. He stated that he could not say whether Mr. H[...] had done a U-turn in the vehicle on the day in question. He was also uncertain where exactly he had seen Mr. H[...] park the car in front of the Mandela House. He stated that when they all left with H[...], the vehicle sped off. Mr. Botha was asked whether the Mandela house looked abandoned as there was no one living there, there were no locks and nobody was keeping watch over the house. He agreed that that this was how it appeared around the house itself, but not inside the house. He further agreed that although the swimming pool was cleaned every now and again, the grass around the house was cut, but that apart from this there was not much else that was going on around the Mandela House itself.
149. Mr Botha was further asked whether it was correct that there were no locks on any of the gates at the Mandela House. He agreed that this was correct. He confirmed that various people were able to move around the prison property where his house and the Mandela House were located and that they did so along the gravel road in

front of the two houses. He agreed that these people were not just employees of the Department.

150. He conceded that these people included people living on the nearby farm, children taking short cuts to school and informal sellers of goods and food (“smouse”). He conceded that there was no actual control over who could come in and out of the areas of the property where his house and the Mandela House were located.
151. With regard to the evidence of Ms September relating to her and her friends accessing the swimming pool through the gate at the Botha House, Mr. Botha confirmed that he was aware of this. He stated that that it was “baie maklik” for them to get on to the Mandela House premises.
152. Mr. Botha was then cross-examined extensively on the various affidavits he had deposed to and which were commissioned by Mr. Jumaats. Mr. Jumaats had testified that although he had commissioned the first affidavit of Mr. Botha dated 14 August 2010, the affidavit itself had been written out by Mr. Botha himself.
153. When questioned as to whose handwriting appeared in the 14 August 2010 affidavit, Mr. Botha stated the handwriting in the affidavit was not his handwriting. He said that the affidavit was in Mr. Jumaats handwriting but that it was his signature at the end of the affidavit. He stated that he had only initialed and signed the first affidavit and that the handwriting in the body of the affidavit was not his but that of Mr. Jumaats. With regard to the second affidavit which was commissioned by Mr. Jumaats on 17 August 2010 and deposed to by Mr. Botha, Mr Botha confirmed that the handwriting in that affidavit was not his and that he had also only signed and initialled this affidavit.
154. He stated that he could not recall why he had deposed to two affidavits. Mr. Botha was cross-examined as to the contents of his first affidavit. It was put to him that aspects thereof were inconsistent with his oral evidence. He was asked why his

very first affidavit did not include any reference to him standing up after seeing the red car drive past and looking out to see who was in the car. He stated that it was a traumatic event on the day in question.

155. In his second affidavit, Mr Botha stated that he saw Mr. H[...], his guest and children climbing out the car, moving to the Mandela House and opening the gate and going to the back of the Mandela House. He was questioned as to why this aspect was not included in his first affidavit or in his affidavit to the police in the inquest proceedings. He answered that the events on 13 August 2010 were traumatic for him.
156. It was put to Mr. Botha that if he was standing at the front door of his living room, as stated in his second affidavit and in his evidence in chief, he could not possibly have seen anyone opening gates at the Mandela House, due to the presence of the vibacrete wall. In other words, it would have been impossible for him to see through the vibacrete wall and see what was happening at the front of the Mandela House. Mr. Botha responded that the vibracrete wall was not there at the time. He conceded that if the vibacrete wall was in fact there at the time of the incident, it would not have been possible for him to observe, by standing at the front door of his living room, anything happening in front of the Mandela House.
157. Mr. Botha was questioned as to what Gate 2 was attached to if there was no vibacrete wall. He said that that it was attached to a pillar. At this stage, counsel for the defendant interjected that that Mr. Botha had testified that Gate 2 was attached to a fence. Counsel for the plaintiffs disagreed. I shall deal later with this dispute in the evidence. Mr. Botha confirmed that Mr. H[...] was clearly not himself at the time of the drowning incident. He further confirmed that he knows him well and according to him, Mr. H[...] was not drunk at the time of the incident.

#### *Requirements for delictual liability*

158. A plaintiff seeking to establish delictual liability is required to establish five conceptually separate elements or requirements in order to succeed. These are (a) conduct in the form of the commission or omission of an act; (b) which is wrongful or unlawful; (c) that was committed negligently or with particular intent; (d) which causes or results in harm and (d) that such harm, injury or loss has been suffered by the plaintiff. For present purposes, elements (a), (b) and (c) are in issue.

*Omissions by the first defendant's employees*

159. The plaintiffs' claims are founded on conduct in the form of allegedly wrongful and negligent omissions by the first defendant's employees to take reasonable steps to guard against the occurrence of the incident. The plaintiffs are required to establish these omissions or harm causing conduct on a balance of probabilities. The omissions, as pleaded in the plaintiffs' amended particulars of claim are alleged to be failure by the Minister's employees to take reasonable steps in one or more of the following respects:

159.1 they failed to lock and secure the premises;

159.2 they failed to prohibit young children from entering the premises;

159.3 they failed to secure and lock the gate to the pool;

159.4 they failed to cover the pool with appropriate covering so as to prohibit young children from falling into the pool.

160. The defendants in their plea denied any wrongful omissions on their part in the respects alleged above or at all. Each of the alleged omissions set out above are therefore disputed. In what follows I address the evidence in respect of the alleged omissions underpinning the plaintiffs cause of action

*Failure to lock and secure the premises and gates to the pool*

161. Mr. Jumaats was asked if he knew whether any of the gates at the premises could be locked shut with a lock. His answer was that he was not going to speculate. As to whether he knew whether the gates were locked shut with a lock at the time of the incident, he stated that he did not know. He said that Mr. Manfred Jacobs was the only person that could confirm this. It was put to Mr. Jumaats that none of the gates at the Mandela House were actually locked shut with a lock. He was hesitant to concede this and stated that he was unable to really comment.
162. I find Mr. Jumaats' hesitance in this regard difficult to understand. His mandate from the Area Commissioner and the express purpose of his visit on 14 August 2010 was to observe and inspect the premises and the gates providing access to the swimming pool. Whether he observed that there were locks present on the gates on the day that he visited the scene, is a question of fact. Either he observed on 14 August 2010 that the gates were locked shut with locks or he did not. It is not an interpretive exercise requiring him to speculate.
163. It does not assist Mr. Jumaats to answer a question about what he had personally observed, by saying that Mr. Manfred Jacobs was the only person that could answer that question. Mr. Manfred Jacobs was in any event not called as a witness by the first defendant. Mr. Jumaats's prevarication, rather, is in my view suggestive of hesitance on his part to admit objective facts.
164. It bears mentioning that in his evidence in chief, Mr. Jumaats was at pains to emphasize that when he visited the Mandela House, all the gates surrounding the premises were closed. However, he at no point suggested that these gates in addition to being closed, were locked shut with a lock or some other secure locking mechanism. Mr. Jumaats also testified that he had walked to the swimming pool by entering through Gate 4 in the front of the Mandela House and



that he had then proceeded to Gate 3, the small metal gate providing access to the swimming pool area.

165. He stated that both these gates were closed at the time and that he could also see that the Freedom Gate was also closed. He did not indicate that when he passed through Gate 4 and Gate 3, he or Mr. Jacobs had to unlock any locks on these gates or that the Freedom Gate was not just closed, but securely locked shut with a lock.
166. With regard to the Freedom Gate, it was submitted on behalf of the Minister that Mr. Jumaats had confirmed that on his visit on 14 August 2010, the Freedom Gate was locked. This is not correct. Mr. Jumaats stated in his evidence in chief that the Freedom Gate was closed. He did not state that the Freedom Gate was locked.
167. In my view, the probabilities are that when he attended at the premises on 14 August 2010, Mr. Jumaats did not observe any locks securely locking shut the gates at the Mandela House premises.
168. Mr. Colyn conceded during cross-examination that the locking mechanism for Gate 3 was at the bottom of the gate facing the swimming pool. Counsel for the defendants did not put to him that Gate 3 had at any stage been securely locked shut with a lock as opposed to merely being closed. The photographic evidence also makes it clear that Gate 3 is fitted with a metal sliding bolt gate latch which would allow for the use of a lock to be fitted on this gate to securely close and lock the gate shut.
169. It was not put to Mr. Colyn or any of the plaintiffs' witnesses that this gate or any particular gate at the premises, was designed in such a way that they were not capable of being securely locked shut with a lock..

170. Counsel for the Minister relied on aspects of Ms. September's evidence that she and the other children did not access the Mandela premises through the front gates. This, so the argument went, is indicative that those gates must have been more secure and did not permit access. I do not consider this to be a correct interpretation of Ms. September's evidence, viewed in its totality.
171. I am also not persuaded by the inference sought to be drawn that Ms. September's failure to use the front gates at the Mandela House to access the premises, is indicative of these gates having been more secure and not permitting access. Ms. September testified during cross-examination that they had not used the Freedom Gate to enter the Mandela House premises or the other gates in the front of the Mandela House, as these gates were closed. She stated that they did not do so because it was easier for them to gain access to the swimming pool by entering through the front gate at the Botha House (Gate 1), then through Gate 2, which she stated was generally always open because it was rusty and then finally, to Gate 3, the gate adjacent to the swimming pool.
172. It is correct that Ms. September conceded that she could not get access from the front gates of the Mandela House. She did not however state that she saw any locks on these gates. It was also not put to her that she had not used these gates because they were not only closed, but securely locked shut with a lock.
173. Even if Gate 4 and the Freedom Gate had not permitted access to the Mandela House at the time when Ms. September and the children swam there, the swimming pool was in any event easily accessible to the children through Gate 2 and Gate 3. Ms. September's evidence was emphatic that she and the other children accessed the swimming pool by proceeding through Gate 2, which she stated was generally always open because it was rusty.
174. They then went through Gate 3, which had no lock on it and could easily be opened even when it had been pushed closed. Insofar as Gate 2 is concerned,

Ms. September testified that it was correct that the bolt locking mechanism for this gate was on the Mandela House side. She agreed with counsel for the Minister that notwithstanding this, Gate 2 could be opened by a person pushing their hand through the gate and opening the gate by sliding open the bolt mechanism on the other side of the gate.

175. It is clear from this that even on occasions when Gate 2 could have been closed, it could be opened by a person merely reaching their hand through the gate and opening the bolt locking mechanism on the Mandela House side of the gate. There is no evidence that Gate 2 had ever been securely locked shut with a lock attached to its bolt locking mechanism on the Mandela House side of the gate.
176. I deal next with whether it is probable that Gate 4 was securely locked shut with a lock on the day of the incident. Mr. H[...] testified that when he started panicking after looking for H[...] outside the Botha House, he started running outside and ran to Gate 4, the pedestrian gate in front of the Mandela House. He ran through this gate which he stated was open. During cross-examination, he stated that he had pushed this gate open.
177. Counsel for the first defendant criticized Mr. H[...]’s evidence in this regard and submitted that he had adjusted his version regarding the manner of his entry through Gate 4. But irrespective of whether Mr. H[...] was able to run through Gate 4 because it was open or whether he had just pushed it open, I consider it improbable that he would have been able to do so easily and then run through Gate 4 if that gate had been securely locked shut at the time with a lock or some other secure locking mechanism. If Gate 4 had been securely locked shut with a lock at the time, Mr. H[...] would either have had to jump over the gate itself or somehow and with great force pull or yank the locked gate open. Or he would have to find another means or gate to go through to reach the swimming pool in the back yard of the Mandela House.

178. That however was not Mr. H[...]’s evidence. His evidence was that Gate 4 was the only gate in the front of the Mandela House that he ran through to reach the swimming pool in the backyard of the Mandela House. The first defendant sought to argue that Gate 4 was probably open and that it was likely that this was because Mr. H[...] had forgotten to properly close this gate on their way out from the Mandela House.
179. The probabilities of that having occurred, is a different issue. I will address it later when addressing the issue of negligence. I consider that the probabilities are that Gate 4 was not securely locked shut with lock on the day of the incident.
180. Lastly, there is the evidence of Mr. Botha. He resided next door to Mandela House for years. He would have been familiar with the gates on the premises. Indeed, he was specifically led in his evidence in chief, on his knowledge of the gates at the Mandela House. Mr. Botha confirmed during cross-examination that it was very easy to gain entry to the Mandela House premises. He said that there no locks on any of the gates at the Mandela House.
181. The evidence conclusively establishes that none of the gates surrounding the exterior of the Mandela House were securely locked shut with locks. The plaintiffs have in my view established that on the day of the incident, the Minister’s s employees had failed to take steps to lock and secure the Mandela House premises and the gates on the premises which provided access to the swimming pool.

*Failure to prohibit young children from entering the premises*

182. Ms. September testified that she and her friends had at no stage been stopped by anyone employed by the Department when they were on the prison property and on their way to the swimming pool at the Mandela House from the farm near Schuurmansfontein Road. She stated that at no stage before the incident had she

or her young friends ever been chased away from the pool by any Correctional Services staff.

183. She further stated that there was no-one at the Mandela House monitoring or guarding the house and no-one from the Department of Correctional Services performing this function. The evidence of Ms. September in this regard was not seriously disputed.
184. Mr. Botha confirmed that there was never any security guards present at the Mandela House while he lived next door or on the date of the incident. He stated that various people, including children taking short cuts to school, were able to freely move around the area and that it was very easy to gain access to the Mandela House premises.
185. Ms. September's grandfather, Mr. September, testified that there was a Mr. Burger, an employee of the Department who was a security manager, who would arrive and that when he did, the children who were swimming at the pool would run away. Mr. Burger was not called as a witness on behalf of the first defendant. No evidence was led on behalf of the first defendant regarding any specific steps it had taken to prohibit members of the public and young children from gaining access to the Mandela House premises. There is no evidence of any warning or no-entry signs put up by the Department which were present anywhere on the premises.
186. Mr. Jumaats made a laconic statement that all Correctional Services officials at Drakenstein were aware that the Mandela House was off limits for casual visits. He did not provide any further detail, for example, how, when or in what manner this had been communicated to Correctional Services officials or anyone else for that matter. Mr. Jumaats did not suggest that the Department had taken any steps to ensure that members of the public visiting Departmental staff on the property or

passing through the property, would be aware that access to the Mandela House premises was strictly prohibited.

187. Mr. Manfred Jacobs, the delegate of the Area Commissioner was responsible for considering written applications for access to the Mandela House. He was not called as a witness with regard to any steps taken by the Department to prohibit members of the public or young children from entering the Mandela House premises.
188. Ms September's evidence was challenged on the basis that she knew that when she and her friends swam at the pool, they were committing a criminal offence and trespassing on the property. In my view, it can hardly be argued that young children who were able to easily access the swimming pool and did so repeatedly without being stopped by any adults or persons in authority, would have been deterred from doing so because they knew that trespassing was a crime. To my mind, this would amount to putting an old head on young shoulders.
189. Ms. September was about 9 or 10 years old when she and her friends swam at the pool at the Mandela House. Some of the other children were younger than her. It has long been the experience of our law that "...although children may be able to distinguish between right and wrong, they will often not be able to act in accordance with that appreciation; they became so engrossed in their play that they become oblivious of other considerations and acted impulsively."<sup>1</sup>
190. The evidence, in my view, demonstrates that at the date of and preceding the incident, measures by the Department to effectively control entry and egress to the area surrounding the Mandela House and the house itself, were manifestly absent. Members of the public including young children were freely able to walk on and through the property from the nearby road and through holes in the fencing surrounding the property.

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<sup>1</sup> Weber v Santam Versekeringsmaatskappy Bpk 1983 (1) SA 381 (A) at 400B-E.

191. Gaining access to the Mandela House premises was very easy, as Mr. Botha himself testified. The evidence by the plaintiffs' witnesses that there was no security guards present anywhere on the Mandela House premises or at the fence near the road leading to the Mandela House, was uncontroverted. There is no evidence of warning or prohibition signs having been put up at the premises and no evidence of locks on the gates of the Mandela House premises securely locking the gates shut.

192. The plaintiffs have in my view established that the first defendant's employees failed to take steps to prohibit young children from entering the Mandela House premises.

*Failure to take steps to cover the pool with appropriate covering*

193. Ms. September testified that there was at no stage a pool safety net cover on the pool when she and her friends, some younger than 9 years old, swam at the pool. Her evidence in this regard was not challenged.

194. Mr. H[...]’s evidence was that on 13 August 2010, there was no safety net over the swimming pool when he found H[...] floating in the pool, lifeless. He stated that the Department installed a safety net over the swimming pool after H[...]’s burial. This evidence was not disputed.

195. Mr. Jumaats confirmed that when he inspected the premises on 14 August 2010, there was no safety net over the swimming pool.

196. Exhibit A contains photographs of the scene of the incident taken by the SAPS on 19 August 2010, just under a week after H[...]’s death. These photographs depict a safety net cover installed over the swimming pool. This is consistent with Mr. H[...] and Mr. Jumaats’ evidence.

197. The first defendant's employees had failed to take steps, prior to and at the date of the incident, to cover the swimming pool with appropriate covering such as a safety net or safety cover in order to prevent young children from falling into the pool. They only did so after H[...] had drowned in the swimming pool. The evidence of this is essentially uncontested.

#### *Conclusions regarding omissions by Minister's employees*

198. I am satisfied that the plaintiffs have established on the facts each of the omissions by the first defendant's employees pleaded in their amended particulars of claim.

199. Were these omissions however negligent? I consider this issue next.

#### *Negligence*

200. The test for negligence as an element of delictual liability is well-known and has been applied in countless cases. The test was formulated by Holmes JA in *Kruger* as follows:

"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.”<sup>2</sup>

201. Assessing the issue of negligence in various stages is however only a guideline. The true criterion for determining negligence is whether in the particular circumstances the conduct complained of, fell short of the standard of the reasonable person.<sup>3</sup> The SCA has in this regard and with apparent approval, referred to academic writings where the learned authors J C Van Der Walt and J R Midgley in LAWSA, make the following observations:

“In assessing negligence, *the focus appears to have shifted from the foreseeability and preventability formulation of the test to the actual standard: conduct associated with a reasonable person.* The *Kruger v Coetzee* test, or any modification thereof, has been relegated to a formula or guide that does not require strict adherence. It is merely a method for determining the reasonable person standard, which is why courts are free to assume foreseeability and focus on whether the defendant took the appropriate steps that were expected of him or her.”<sup>4</sup> (own emphasis)

202. The question of whether a reasonable person in the position of the defendant would take guarding steps and what steps would be reasonable, is a fact specific enquiry. The test for negligence articulated in *Kruger* “...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.”<sup>5</sup> As to the issue of what is reasonable foreseeable, it is recognised that while the precise or exact manner in which the

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<sup>2</sup> *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E-F.

<sup>3</sup> *Sea Harvest Corporation (Pty) Ltd and Another v Duncan Dock Cold Storage (Pty) Ltd and Another* 2000 (1) SA 827 (SCA); [2000] 1 All SA 128 (A) para 21 (‘Sea Harvest’).

<sup>4</sup> *Pick 'n Pay Retailers (Pty) Ltd v Pillay* (900/2020) [2021] ZASCA 125 (29 September 2021) at para 15.

<sup>5</sup> *Minister of Safety and Security v Van Duivenboden* (209/2001) [2002] ZASCA 79; [2002] 3 All SA 741 (SCA); 2002 (6) SA 431 (SCA) (22 August 2002) at para 23 (‘Van Duivenboden’).

harm occurs need not be foreseeable, the general manner of its occurrence must be reasonably foreseeable.<sup>6</sup>

203. The standard of a reasonable person, however, applies in the context of the delictual liability of private persons. Different considerations apply, as they do in this case, as what is reasonable in the context of an organ of state. The Department of Correctional Services is a department of state in the national sphere of government. The first defendant is a functionary in the national sphere of government exercising power or performing a function in terms of the Constitution. They are both organs of state as defined in section 239(a) and section 239(b)(i) of the Constitution.<sup>7</sup>

204. The Constitutional Court has in *Mashongwa* determined test for negligence in respect of an organ of state to be the following:

“The real issue on this aspect of the case is not whether the posting of a single guard, or three guards, could have prevented the attack. It is whether the steps taken by PRASA could reasonably have averted the assault.

*Crucial to this inquiry is the reasonableness of the steps taken. However, it must be emphasised that owing to the fact that PRASA is an organ of state, the standard is not that of a reasonable person but a reasonable organ of state.*

*Organs of state are in a position that is markedly different from that of an individual. Therefore, it does not follow that what is seen to be reasonable from an individual’s point of view must also be reasonable in the context of*

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<sup>6</sup> Sea Harvest at para 21 - 22

<sup>7</sup> Section 239 of the Constitution defines “organ of state” as (a) any department of state or administration in the national, provincial or local sphere of government; or (b) any other functionary or institution - (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or (ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer”.

*organs of state. That approach would be overlooking the fundamental differences between the state and an individual. It would also be losing sight of the fact that the standard of a reasonable person was developed in the context of private persons.*

The standard of a reasonable organ of state is sourced from the Constitution. The Constitution is replete with the phrase that the state must take reasonable measures to advance the realisation of rights in the Bill of Rights. In the context of socio-economic rights the availability of resources plays a major part in an enquiry whether reasonable steps have been taken. I can think of no reason in principle or logic why that standard is inappropriate for present purposes. Here, as in the case of socio-economic rights, the choice of steps taken depends mainly on the available resources. *That is why an organ of state must present information to the court to enable it to assess the reasonableness of the steps taken.*<sup>8</sup> (own emphasis).

205. I have concluded earlier that the plaintiffs have established, on the facts, that the first defendant's employees at the Drakenstein Correctional Centre failed to lock and secure the Mandela House premises, failed to prohibit young children from entering the premises and failed to secure and lock the gate to the pool. They also failed to cover the pool with appropriate covering so as to prohibit young children from falling into the pool.

206. It bears mentioning that at the time of the incident on 13 August 2010, the control of the Mandela House premises and the swimming pool itself, vested in the Department. The Department not only was in control and possession of the swimming pool, but it was also aware that the swimming pool was being continually maintained and repaired by external contractors.

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<sup>8</sup> Mashongwa v Passenger Rail Agency of South Africa [2015] ZACC 36; 2016 (3) SA 528 (CC); 2016 (2) BCLR 204 (CC) at paras 40-41 ('Mashongwa').

207. This is apparent from the evidence of Mr. Jumaats and the first defendant's abandoned Nolitha defence which it initially pleaded. The swimming pool was however not being maintained for the use of an occupant of the Mandela House, as had been the case when President Mandela lived at the house. It is common cause that nobody was residing in or had occupied the Mandela House for years. This is also not a case of a public authority such as a municipality who has constructed and made available a swimming pool to the public as a public amenity. Mr. Jumaats testified that the swimming pool at the Mandela House was merely "...something to observe and not the essence of visits to the house." That being the case, I find it difficult to understand what rational purpose was being served by the Department maintaining control of a swimming pool filled with water which, on the Department's version, was not a public pool, which nobody was allowed to swim in and which was off-limits to Departmental staff for casual visits.
208. It was not suggested or argued by the Minister that swimming in the pool was allowed for formally approved persons or groups visiting the Mandela House. Mr. Jumaats, for example, did not suggest that the Departmental officials who attended his team-building workshop at the Mandela House, were also allowed to go for a swim in the pool.
209. The evidence makes it clear that the first defendant's employees failed to take preventative measures to prevent young children from gaining access to the swimming pool. The plain absence of effective measures to control entry and egress to the area surrounding the Mandela House is in my view plainly relevant to the question of foreseeability of harm. The evidence demonstrates that children from the local farm were able to easily climb through a hole on the fence on the outskirts of the prison property. They were very easily able to access the swimming pool at the Mandela House, as Mr. Botha testified. Members of the public including vendors and children from the nearby farm taking short cuts to school, were able to freely move about the Mandela House surrounds on the gravel road in front of the house.

210. There were no security guards or Departmental employees present at the Mandela House to prevent or deter access on the day of the incident or on any of the occasions when Ms. September and the other children were able to access the swimming pool. The evidence indicates that Department's official, Mr. Burger, was aware of the children swimming at the pool at the Mandela House. He was not called as a witness to explain or elucidate on any measures taken by the Department to prevent young children from gaining access to the pool. The evidence also demonstrates that Mr. Botha was aware of young children gaining unauthorized access to and swimming in the pool at the Mandela House.

211. A reasonable employee of the Department would have in my view have foreseen the possibility of a child drowning or being injured in a swimming pool:

211.1 which was located at a house which appeared from the outside to be abandoned, was unoccupied and was being used for no other purpose other than as a type of museum;

211.2 which was completely unfenced and surrounded by gates which could simply be opened and had no actual locks;

211.3 to which children, to the knowledge of officials such as Mr. Burger, were gaining regular access to and;

211.4 which had no safety cover or safety net over the swimming pool.

212. I am of the view that there were a number of practical preventative measures available to the first defendant's employees which would most likely have prevented young children such as H[...] from falling into the swimming pool and drowning. Gate 3, the gate immediately adjacent to the swimming pool, was fitted with a sliding bolt mechanism allowing for the attachment of a detachable lock

which could securely lock this gate shut. Such a lock could easily be attached to Gate 3 allowing it be securely closed shut.

213. The uncontested evidence of Ms. September was that Gate 3 gate had never been securely shut with a lock. It was open on occasions and when it was closed, it had simply been pushed closed and could be opened by reaching over and sliding the bolt open from the other side.

214. The issue of absence of secure locks on the gates at the Mandela House premises, such as Gate 3, Gate 4 the front pedestrian gate and Gate 2, the gate attached to the Botha house, was raised repeatedly with witnesses at the trial. It was not put by the Minister's counsel or any of these witnesses, such as Mr. Colyn, the plaintiff's and Ms. September, that because of their design, these gates could not be fitted with secure locks which enabled them to be securely shut closed instead of just pushed closed or closed with a bolt slide without an actual lock.

215. It was argued by the first defendant that the gates at the Mandela House were fitted with bolts and that it was not a requirement for the gates to be fitted with locks. I disagree. As Ms. September testified, even the gates with bolts such as Gate 3 and Gate 2 could simply be opened if they were not securely locked shut with a lock. If the purpose of a gate is to securely prevent entry through that gate, it is difficult to see how that that purpose can realistically be achieved if the gate is merely closed and not securely locked shut with a lock.

216. One need not be a locksmith to know that the purpose of a securely locked gate is to prevent and deter unauthorized entry through that gate. A householder who, for example, closes his house doors and gates at night and does not lock them or even have locks fitted on the doors and gates, runs an obvious risk. If his house is burgled and insured possessions stolen, he is unlikely to receive shrift which is

anything other than short if he informs his insurers that closing the doors shut and not locking them securely shut, was sufficient.

217. An obvious preventative measure would be the installation of a safety covering net over the swimming pool. No steps were taken by the Department to do so until a week after H[...] had already drowned in the pool. The fact that such a pool safety covering net was eventually installed by the Department, is to my mind a recognition on its part of the inherent risks of a swimming pool and the need for a preventative measure to guard against the risk of people falling into the pool and drowning. After all, why otherwise install a swimming pool safety covering net after a child has already drowned in the pool?
218. It was however put to certain of the plaintiff's witnesses such as Mr. Colyn and Ms. September, that the Mandela House was being kept as a type of museum or historical building. Mr. Colyn had testified that when he visited the premises, the gates were worn and the gate alignment of Gate 4 was in a state of disrepair. It was put to Mr. Colyn that for renovations to be done to the extent that the ambiance and historical features of the building were unrecognizable, would defeat the historical purpose of the Mandela House.
219. The argument is untenable. The installation of effective locks on gates at the Mandela House, especially in respect of gates which provide access to parts of the house which present a risk to children, such as the swimming pool, can hardly be equated to renovations which detract from the historical character of the house. Nor for that matter can it sensibly be suggested that the installation of a pool safety net on the swimming pool of a heritage protected house, is consonant with alteration or destruction of the heritage value of the house. The Department in any event installed just such a pool safety cover net, albeit after H[...] had already drowned in the pool.

220. The Minister led no evidence about the extent of any financial or administrative burden the Department would have to bear in relation to preventive measures such as access control at the premises, secure locks on all the gates and a covering net over the swimming pool. There was no evidence advanced on its behalf that such measures were even considered prior to H[...]’s death, let alone implemented.
221. The Minister was under a constitutional obligation to present information to the court to enable it to assess the reasonableness of the steps the Department has taken or considered to prevent children, who his officials knew were gaining access to the swimming pool at the Mandela House, from falling into the pool and drowning.<sup>9</sup> I do not consider that the expense of a few secure padlocks on gates surrounding the Mandela House and leading to the pool, would have been financially prohibitive for the Department.
222. I hasten to add that the Department in control of the premises at issue in this case, is the Department of Correctional Services. It is the Department whose *very business* is safeguarding prison complexes, their surrounds and the public from unauthorized access to its facilities and ensuring that persons and property under its control, are secured effectively under lock and key.
223. The omissions by the Department’s employees as set out above were unreasonable. Prophetic foresight was not required from a reasonable organ of state and its employees to see that the situation at the Mandela House swimming pool was an accident waiting to happen. Practical preventative steps, such as locking the gates surrounding the pool shut with a padlock<sup>10</sup> and installing a pool net, were required to avert harm to children who may gain entry to the swimming pool. Not taking such steps was in my view, unreasonable.

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<sup>9</sup> Mashongwa at para 41,

<sup>10</sup> The term ‘lock’ is a generic term which may refer to any type of locking mechanisms. A padlock, on the other hand is a specific type of portable and detachable lock which is generally opened or closed with keys.



224. Instead, the Department continued maintaining the swimming pool and kept it filled with water at a house which was unoccupied, appeared abandoned and lacked effective measures preventing access thereto by members of the public and young children. The Department expended public funds on repairs to the pool when the same funds could have been spent on low-cost practical preventative measures such as a pool safety net and effective locks for the gates surrounding the pool.

225. This in circumstances where the swimming pool itself served no real purpose other than its apparent aesthetic value. And an aesthetic value at that, which was in my view entirely purposeless, because actually swimming in the pool, that being the very function of a swimming pool, was forbidden to the public and off limits to Departmental staff. Mr. Jumaat's statement that the swimming pool was not the essence of the Mandela House and merely something to observe, rings true. One may then rhetorically ask, what rational purpose was being served by the continued operation, maintenance and keeping filled with water a swimming pool, which on the Department's own version, no-one was allowed to swim in, and which was merely something to observe?

226. I am of the view that the Department and its employees' failure to take preventative measures to guard against the risk of children drowning in the swimming pool at the Mandela House, was unreasonable and negligent.

#### *Negligence of the first plaintiff*

227. I turn now to consider the first central plank of the first defendant's defence on the merits. It is the defence that the incident was caused by the sole negligence of Mr. H[...].

228. The first defendant pleads that Mr. H[...] failed to seek and obtain permission to enter the premises including the swimming pool and accessed the premises

without having obtained authorization to do so. It is further pleaded that after having left the premises including the swimming pool, Mr. H[...] left an entrance or entrances to the premises open and/or failed to secure that the entrance(s) to the premises were closed and secured. This, according to the first defendant, enabled members of the public and H[...] to enter the premises. The first defendant in addition pleads that Mr. H[...], failed to supervise his minor son H[...] and ensure that H[...] did not access the premises and the swimming pool.

229. In addition to the defence pleaded above, a significant part of the cross-examination of Mrs. K[...] in particular, was directed at ostensibly demonstrating that Mr. H[...] was intoxicated on the day of the incident. It is important to note that the Minister's plea on any reading does not raise a defence alleging that Mr. H[...] was intoxicated on the day in question and failed to keep H[...] under proper supervision as a result.

230. No such allegations were made in the Minister's plea notwithstanding the defendants being in possession of the very affidavits by Mrs K[...] and Ms Jolene De Beer, on the basis of which the issue of the alleged intoxication of Mr. H[...] was raised. I will nonetheless consider this issue after addressing the evidence relating to Mr. H[...] allegedly entering the Mandela House and leaving entrances open at the premises.

231. The Minister's defence in relation to Mr. H[...]’s negligence being the sole cause of the incident, in my view rests entirely on the evidence of Mr. Botha and the credibility thereof, with regard to the probabilities. In order to determine this aspect, it is necessary to rehearse Mr. Botha's evidence regarding Mr. H[...] entering the Mandela House premises on the day in question.

232. It will be recalled that in his evidence in chief, Mr. Botha testified that on the day in question, he had observed a red vehicle driving past on the gravel road in front of his house and the Mandela House. He stated that was able to see the vehicle as

the front door of his house was open at the time and he was sitting in the living room. He stood up, went to the front door and the red vehicle drive past and park just next to the Mandela House. He testified that he saw that it was Mr. H[...]. He stated that he observed him, Mr. C[...] H[...] and the three children, getting out of the vehicle and opening the front gate of the Mandela House.

233. He stated that he saw them all moving in towards the area around the Mandela House. He could not see exactly what they were doing but because he knew Mr. H[...], he then turned around and went back to sit down and continue watching his films.

234. He testified that after about three to five minutes, Mr. H[...], his brother C[...] and the children came back into the yard of the house where he was sitting in the living room.

235. Mr. Botha was questioned at length regarding the vibracrete wall forming the border between the Botha House and the Mandela House. He stated that the vibracrete wall was *not* there on the date of the incident. It was put to Mr. Botha that he was the first person who had testified that the vibracrete was not present on the day and that Mr. Jumaats had himself testified that the vibracrete wall was present on the day of his inspection on 14 August 2010.

236. The evidence of Mr. Jumaats with regard to the presence of Gate 2 and the vibracrete wall on 14 August 2010, is important. In his evidence in chief, Mr Jumaats was in the first place referred by the Minister's counsel, to photographs of Gate 2 which appeared at page 13 of exhibit A. These photographs were taken by Mr. Raaths during 2011. The photographs clearly depict a vibracrete wall adjacent to Gate 2. The following exchange ensued:

'Adv Jacobs: "now the first photograph on page 13, it says the heading 'H[...] H[...] – building plan with gates and it says there pedestrian gate 2 – entrance

Eben Botha's House (Chef's House) and the Mandela House, now at the back there is a number 2 with a circle and next to that there is a black gate, can you comment on that for us?

Mr. Joemats: "*the gate was there on the time of the incident.* The morning when I visited the Mandela House as well as Mr. Botha, that gate was closed and not open as it is in the picture."

Adv Jacobs: "so, just so that we get a clear understanding, that particular gate that we see on that photograph, where is it located in relation to the Mandela House and Mr. Eben Botha's house?"

Mr Joemats: "*The hinges, if I may say, its attached to Mr. Botha's house. So it is the gate that is adjacent to the Mandela House, counsel.*"

Adv Jacobs: "So, if we look at the photograph for example, *that particular gate, the black gate if I may call it that, is on the border between the Mandela House and Mr. Botha's house?*"

Mr Joemats: "*That's correct.*" (own emphasis).

237. As is evident from the above exchange, Mr. Jumaats had been shown photographs of Gate 2 which depict the gate and the vibracrete wall adjacent to it. Mr. Jumaats confirmed that this gate was present on the day that he visited the scene. He at no point indicated or suggested in his evidence that the vibracrete wall depicted in the photographs of Gate 2, was not present when he attended at the Mandela House and the Botha House on 14 August 2010.

238. Mr. Jumaats was specifically questioned in cross-examination regarding the presence of Gate 2 and the vibracrete wall bordering the Mandela House and the Botha House. He confirmed that both Gate 2 and the vibracrete wall were there

when he attended at the scene on 14 August 2010. His evidence was the following:

Adv Du Toit: "...Let's quickly look at the gate situation. I am going to take you first to that. If you look at that bundle in front of you, We understand now if you look at page 8, you testified that you were the one that drew this pencil line in to indicate what you thought in your mind happened. *Ok, clearly the vibracrete wall between Botha's house and the Mandela House was there at the time... You must just please say yes.*"

Mr Joemats: "Yes"

Adv Du Toit: "Thank you."

239. In my view, Mr. Botha was unable to proffer a coherent explanation for why all the other witnesses including Mr. Jumaats would have made a mistake regarding the presence of the vibracrete wall on the day of the incident. The following exchange ensued during his cross-examination:

Adv Du Toit: "So u se daar was nie 'n muur nie. Maar u sal met my saamstem indien die muur wel daar was, dan is u getuienis met betrekking tot wat u kon sien, wat se hekke oopgemaak, *dit kan mos nie wees nie want jy kan nie deur daardie vibracrete muur kan sien nie ?*"

Mr. Botha : "Soos ek se, wat ek gesien het daar so."

Adv Du Toit: "Ja, ek gaan net vir u se. Ek hoor wat u vir my se, maar ek se vir u. As die vibracrete muur nie daar was nie. *Dis mos voor die hand liggend, u gaan nie kan sien wat gebeur agter die groot vibracrete muur. Is dit korrek?*"

Mr. Botha: "As hy nou daar gewees het?"

Adv Du Toit: “*As hy daar was. Soos wat die ander mense getuig het.*”

Mr. Botha: “*Ja.*”

Adv Du Toit: “*Dan kan jy nie gesien het nie.* Ok, kom ons los dit net daar, ek sal later terug kom daar toe.”

240. As is evident from the above, it was put to Mr. Botha that due to the presence of the vibacrete wall, it would not be possible for him to observe, as he claimed, Mr. H[...] and the children entering the Mandela House area. The line of sight from where he claimed he was standing and the presence of the vibracrete wall itself, would make that impossible. After some hesitation, he conceded that if the vibacrete wall was in fact there at the time of the incident i.e. 13 August 2010, it would not have been possible for him to observe, by standing at the front door of his living room, anything happening in front of the Mandela House.
241. This concession by Mr. Botha was rightly made. In my view it puts paid to the credibility of his evidence insofar as it relates to him allegedly observing, from his front door, Mr. H[...], the children and C[...] H[...] opening the gate at the front of the Mandela House and entering the premises. Unless vested with super-human powers to see through concrete, he simply would not been able to make that observation when his line of sight was obscured by an approximately 6ft high existing vibracrete walling running the full length of the border between the Botha House and the Mandela House.
242. Mr Botha was also, unsurprisingly, questioned as to what Gate 2 was attached to if there was no vibacrete wall. He said that that it was attached to a pillar. He then in re-examination, stated that there was a wire fence attached to Gate 2 and there was no vibracrete wall at the time of the incident.

243. Mr. Botha however did not say anything about a wire fence in his evidence in chief. That aside, his oral testimony regarding the vibracrete wall in any event runs counter to the objective documentary evidence.
244. The 2008 site layout plan refers to an “existing” vibracrete wall on the border between the two houses. Photographs taken in 2011 by Mr Raaths and in 2024 by Mr. Colyn depict a vibracrete wall adjacent to Gate 2. Mr Jumaat’s evidence confirmed that the vibracrete wall was present on 13 August 2010. If Mr. Botha’s evidence is to be believed, it would mean that a vibracrete wall was depicted on 2008 architectural layout plans as “existing” at that time, was present again on the premises in 2011, somehow disappeared in 2013 and then re-appears again in 2024.
245. Mr Botha, having testified and stated in his second affidavit that he observed Mr. H[...] enter the Mandela House premises, was then confronted with the inconvenient fact of the presence of the vibracrete wall which would such an observation physically impossible. Unable to explain this, he was driven to irrelevancies, denying the existence of the vibracrete wall and then resorting to stating that there was wire fence attached to Gate 2 in 2013. Unfortunately, his evidence in this regard flies in the face of the objective evidence depicted in the photographs of the vibracrete wall.
246. It was submitted on behalf of the Minister that the evidence by Mr. Botha that Mr. H[...], his brother and the children, did not immediately come to him until the elapse of about 2 to 3 minutes, was crucial. It was contended that this supports Mr Botha’s evidence that Mr H[...] and his brother C[...] as well as the children had first gone to view the Mandela House premises. The submission is unavailing. As anyone who would have had anything to do with parenting and young children would know, securing the alighting from a small vehicle of three young children including an 18-month-old, is not the quickest form of movement.

247. I fail to see how a 2 or 3 minute delay in Mr. H[...] reaching Mr. Botha's house after walking up a pathway with 2 young children and a toddler, supports an inference that during that time, they instead must have been at the Mandela House premises.
248. In the result, I am not satisfied with the credibility of Mr. Botha's evidence regarding his observations of Mr. H[...] entering the Mandela House property on 13 August 2010, either in its content or the manner in which he gave it. I reject his version regarding the absence of a vibracrete wall at the premises on 13 August 2010 as well as his evidence that he saw Mr. H[...] and his family entering the Mandela House premises, as being wholly improbable.
249. This conclusion strictly speaking makes it unnecessary for me to deal in detail the challenge to Mr. Botha's evidence on the basis that the allegations in his second affidavit added details which he did not observe and which were not included in his first affidavit. I will nonetheless address the issue briefly as it bears on the credibility of Mr. Botha and Mr Jumaat's evidence in this regard.
250. I find it necessary to express my disquiet with the testimony of Mr. Jumaats and Mr. Botha with regard to the two affidavits which Mr. Jumaats procured from Mr. Botha. I gained the distinct impression from Mr. Jumaats's evidence that either he or his superiors, were not entirely pleased with Mr. Botha's first affidavit, which made no mention of the H[...] family entering the Mandela House. As stated earlier, Mr. Jumaats testified that when statements are written, there are always questions. The Department, he said, does an assessment and asks questions. Mr. Jumaats was not approached by Mr. Botha to do a second affidavit. He took it upon himself to obtain the second affidavit.
251. He testified that he went back to get a second affidavit from Mr. Botha because the entry of Mr. H[...] and his children to the Mandela House, "...didn't come out



clearly” in Mr. Botha’s first affidavit. He therefore he had to do “...an additional confirmation in respect thereof”.

252. Mr. Jumaat’s statement in cross-examination that the alleged entry to the Mandela House by Mr. H[...] “...didn’t come out clearly”, in Mr. Botha’s first affidavit, is revealing. Mr. Botha had not said anything in his first affidavit about Mr. H[...] entering the Mandela House premises. And that first affidavit, according to Mr. Botha, had not been written out by him but by Mr. Jumaats in his own handwriting, who presumably recorded exactly what Mr. Botha told him.
253. There is of course also Mr. Jumaat’s evidence that Mr. Botha’s first affidavit was written out by Mr. Botha because the Department encourages people to write out their own affidavits. Only for Mr. Botha, during cross-examination, to emphatically deny that it was his handwriting in that very affidavit.
254. Counsel for the plaintiffs submitted that Mr. Botha’s second affidavit, written out conveniently by Mr. Jumaats, was clearly deposed to absolve the Department and place any blame squarely on Mr. H[...]. The evidence and the testimony of Mr. Jumaats and Mr. Botha lends some force to this submission. I need not however decide the point conclusively. As I have concluded earlier, Mr. Botha’s evidence in this regard in any event falls to be rejected as being in direct conflict with the objective documentary evidence in the 2008 site layout plan and the photographs taken at the premises in 2011 and 2024.
255. In written argument, counsel for the Minister, wisely in my view, did not seek to rely on Mr. Botha’s evidence regarding the vibracrete wall. Rather, a different line of attack was posited based on the evidence of Mr. H[...] regarding his route to the swimming pool after he discovered H[...] was missing. It was submitted on behalf of the Minister that Mr. H[...] had given contradictory evidence regarding Gate 4, which he testified that he had entered through when going to look for H[...].

256. It was submitted that Mr. H[...] had amended his versions because, so it was argued, he had first testified in his evidence in chief that Gate 4 was open but then during cross-examination, he testified that he had opened the gate further.
257. These contradictions also formed the basis of the first defendant's argument that Mr. H[...] and his brother, C[...] H[...] could have left the gates to the Mandela House open when they went to Mr. Botha afterwards. Counsel for the Minister submitted that on the probabilities, it is more likely that Mr H[...] had shown C[...] H[...] the premises and that on their way out to Mr Botha, they had forgotten to properly close the gate to the Mandela House premises. It was argued that this would explain why this gate was open at the time when Mr H[...] became alarmed and went to look for H[...] and discovered the gate which gives access to the Mandela House premises, was open.
258. Mr. H[...], it was argued, had adjusted his version in order to avoid the implications of him, or someone else who he was with when he went to the Mandela House, having left the gate open. Counsel argued that Mr. H[...] had given three versions in this regard. First, it was argued, he testified that he found the front gate of the Mandela House premises open when he was looking for H[...]. Then, he adjusted his evidence in cross-examination to say that he pushed the gate further open. The third version, it was argued, was that Mr. H[...] had opened the gate.
259. I have carefully considered the evidence of Mr. H[...] in this regard. In my view, the criticism of his evidence on the basis set out above is overstated. I am furthermore not persuaded as to the inference sought to be drawn, that the apparent contradictions in Mr. H[...]’ evidence regarding Gate 4, are indicative of him having left the gate open after visiting the Mandela House.
260. In the first place, it must be remembered that Mr. H[...] was testifying about traumatic events which occurred some 14 years ago. He was testifying about a particular moment in time when he was running around the Botha House

premises, panic-stricken and frantically calling out for his missing 18-month-old child, who a few seconds later he found floating lifeless in a swimming pool.

261. In his evidence in chief, Mr. H[...] stated that when he could not find H[...], he started panicking and ran down towards the gates outside the Mandela House. He ran towards and through Gate 4, the pedestrian gate outside the Mandela House, which he stated was open at the time. This gate was not locked. In cross-examination, he stated with regard to Gate 4, “...ek het hom oopgestoot, daai hek, hy was oop, ek stoot hom verder oop.”

262. I do not consider there to be any significant contradictions in Mr. H[...]’s evidence regarding how he entered through Gate 4. To the extent that there are any, they are in my view immaterial. It needs no authority to state that it is not every contradiction in the evidence of a witness which renders his evidence untruthful. Mr. H[...]’ evidence regarding his entry through Gate 4 while searching for H[...], does not in my view support the inference that he had visited the Mandela House and left the gates open. The only eye-witness evidence proffered by the Minister in support of the allegations that Mr. H[...] entered the Mandela House, is the evidence of Mr. Botha. I have already concluded that Mr. Botha’s evidence in that regard is improbable and lacking in credibility, for the reason set out above.

263. I turn briefly to the contentions as pleaded that the incident occurred due to the sole negligence of Mr. H[...], in that he failed to exercise proper supervision of H[...].

264. It was put to Mr. H[...] that he had essentially fabricated a story about going to the toilet for a few minutes and that this was the only time that he did not have H[...] under his sight. Counsel argued that Mr. H[...] was unable to explain why the evidence relating to his visit to the toilet was never included in his affidavit that he had given to the police on 13 September 2010.

265. It was also argued that an affidavit by Mr. C[...] H[...], in which he stated that the two older children were playing next to the tractor tyre, suggested that Mr. H[...] did not have his eye on H[...] at all times. In addition, it was submitted that his version regarding the cooldrink requested by L[...], was an afterthought in order to deal with the fact that Mr H[...] did not keep H[...] under his supervision at all times.
266. I am not persuaded by the submission that the evidence establishes that the sole cause of H[...]’s drowning was due to negligence by Mr. H[...] in failing to keep H[...] under his supervision.
267. Firstly, the question here is not one of contributory negligence, which has not been pleaded. Secondly, and insofar as the negligence enquiry is concerned, I consider that while parental supervision of a child may notionally be relevant to the question of foreseeability by a defendant of harm to the child, it is not determinative of the question. The question and focus in the present case is on the conduct of the first defendant and whether it, not Mr. H[...], took the steps which were required of a reasonable organ of state to prevent harm to children gaining access to the swimming pool at the Mandela House.
268. Thirdly and as I shall explain later, the present facts are significantly different to those which pertained in *Stedall*<sup>11</sup>, where the SCA held that a homeowner can reasonably expect that a child will be supervised and guarded from harm by its supervising parent, and would not foresee that the parent would be distracted whilst caring for its child. In *Stedall*, the mother of a 30 month old child (‘C’) had left C to her own devices while visiting a friend and went to a parking lot behind the house in order to transfer a baby-seat from the car in which they had arrived to the motor vehicle that was to take them home. The exercise did not go smoothly and after a while, she became nervous and went back to the house to see what C was up to. C was found lying face down in a swimming pool. C sustained severe brain

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<sup>11</sup> *Stedall and Another v Aspelung and Another* (1326/2016) [2017] ZASCA 172; 2018 (2) SA 75 (SCA) (1 December 2017).

damage as a result. Notably, the SCA while upholding the appeal, noted that its findings did *not* imply that C's mother was negligent in the tragic affair.

269. I do not accept that organ of state wrongdoer, who is plainly negligent and which negligence results in harm to or death of a child, can be allowed to entirely escape liability by foisting sole negligence on to the parent, who for a split second or momentarily takes his eyes off the child and the child is harmed by the negligence of the wrongdoer. The responsibility of a parent to supervise a young child cannot, in my view, be used as impenetrable shield against liability of negligent organs of state who fail to take the most elementary reasonable and low-cost precautions to safeguard children from harm by the very risks which they have themselves created. Such as, in this case, the continued operation of a wholly unsecured swimming pool on premises which are unoccupied, and which do not have a single lock on the gates providing easy access to the swimming pool.

270. The Minister's defence that H[...] drowned because of the sole negligence of Mr. H[...], is without merit.

271. I lastly on this aspect of the negligence enquiry address the contentions by the first defendant relating to alleged intoxication of Mr. H[...].

272. Mr. Botha, the person who was with Mr. H[...] on the day of the incident and at the place where it occurred, testified that he knew Mr. H[...] well and that he was not intoxicated on the day in question.

273. Mrs. K[...], while admitting the statements that she had made in her affidavits regarding his consumption of alcohol, clearly stated that he was not intoxicated when they left that morning to do the shopping. Mr. H[...] expressly denied her allegations that he had consumed Olaf Berg brandy that morning and that he had obtained alcohol from the prison bar. He stated that he did not drink cheap brandy such as Olaf Berg. Brandy. Secondly, he stated that there was no possibility that

Mrs. K[...] would have allowed drinking by him and his brother at home that early in the morning.

274. He stated that if something such as that had happened on the day they were planning to go to town to buy groceries, "...sy sal skel, dan is my hele dag suur." Having observed Mrs. K[...] in the witness box, I am inclined to agree. I consider it improbable that Mrs. K[...] would have permitted consumption of strong drink by Mr. H[...] and his brother in her home that early in morning, while she was getting ready to go with Mr. H[...] to town in Paarl to do the monthly shopping at Shoprite. She herself stated "...ek gaan nie dorp toe nie met dronk mense nie."

275. Furthermore and had Mr. H[...] indeed obtained alcohol from Mr. Henry Daniels, who was in charge of the prison bar, the Minister would surely have called Mr. Daniels as a witness. He was not called as a witness. Nor did the first defendant call as a witness Ms Jolene De Beer, who in an affidavit dated 17 August 2010 alleged that when she arrived at the H[...] home, Mr H[...] had smelt of alcohol.

276. I find no basis to conclude that Mr. H[...]’s behaviour when he reached home with H[...], can fairly be equated with intoxication or drunkenness. Mr. H[...] had just jumped into a swimming pool and taken out his son who was floating there, lifeless. Mrs K[...]’s unchallenged evidence was that he was clearly not himself and was running up and down in a highly agitated, emotional confused and erratic state. In my view, understandably given the magnitude of the tragedy which had just befallen him.

277. It is so that a witness, whether expert or not, may say that he thought that a person was drunk.<sup>12</sup> However, a bare assertion to that effect does not carry much weight without a detailed description of the facts on which it is based.<sup>13</sup> There is no in my

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<sup>12</sup> R v Brorson 1949 (2) SA 819(T).

<sup>13</sup> S v Adams 1983 (2) 577 (A).

view no acceptable evidence that Mr. H[...] was intoxicated or inebriated on the day of the incident.

### *Conclusion on negligence*

278. I conclude that Minister's employees could reasonably have foreseen that there was a risk of young children gaining access to and drowning or being injured in the unsecured swimming pool at the Mandela House. The Minister's officials failed to take any reasonable preventative steps to this from happening and H[...] drowned in the swimming pool because of their negligent failure to do so.

279. The Minister has in my view not established that H[...]’s drowning was solely due to the negligence of the first plaintiff.

### *Wrongfulness*

280. Omissions to act, unlike positive conduct which causes harm, are not prima facie wrongful. As Brand JA explained in *Hawekwa*<sup>14</sup>:

“...Negligent conduct which manifests itself in the form of a positive act causing physical harm to the property or person of another is prima facie wrongful. By contrast, negligent conduct in the form of an omission is not regarded as prima facie wrongful. Its wrongfulness depends on the existence of a legal duty.

The imposition of this legal duty is a matter for judicial determination involving criteria of public and legal policy consistent with constitutional norms. In the result, a negligent omission causing loss will only be regarded as wrongful and therefore actionable if public or legal policy

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<sup>14</sup> *Hawekwa Youth Camp and Another v Byrne* (2010 (6) SA 83 (SCA) at para 22 ('Hawekwa').

considerations require that such omission, if negligent, should attract legal liability for the resulting damage.”

281. Wrongfulness is a self-standing and independent element of delictual liability which must be established in order for the plaintiff to succeed.

282. A court determining whether an omission is wrongful in essence asks the following question: assuming that all the other elements of delictual liability are present, is it reasonable to impose liability on a defendant for the damages flowing from specific conduct? In this regard, caution is required not to conflate the question of reasonableness in the wrongfulness assessment with the question of reasonableness in the negligence assessment.<sup>15</sup>

283. The purpose of concept of delictual wrongfulness in our constitutional era is thus effectively that of a safety valve against arbitrary and limitless extension of delictual liability. Khampepe J put it thus in *Country Cloud Trading*:<sup>16</sup>

“Wrongfulness is an element of delictual liability. It functions to determine whether the infliction of culpably caused harm demands the imposition of liability or, conversely, whether “the social, economic and others costs are just too high to justify the use of the law of delict for the resolution of the particular issue”. Wrongfulness typically acts as a brake on liability, particularly in areas of the law of delict where it is undesirable or overly burdensome to impose liability.”

284. Wrongfulness essentially arises from the fundamental duty to respect rights and not to cause harm.<sup>17</sup> Moral indignation with a defendant’s omission to act does not

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<sup>15</sup> *Za v Smith and Another* (20134/2014) [2015] ZASCA 75; 2015 (4) SA 574 (SCA); [2015] 3 All SA 288 (SCA) (27 May 2015) at para 19.

<sup>16</sup> *Country Cloud Trading CC v MEC Department of Infrastructure Development* [2014] ZACC 28; 2015 (1) SA 1 (CC) at paras 20-21 (‘Country Cloud’).

<sup>17</sup> *Loureiro v Imvula Quality Protection (Pty) Ltd* [2014] ZACC 4; 2014 (3) SA 394 (CC) at para 53 (‘Loureiro’).



in itself establish wrongfulness. Wrongfulness arises when the policy and legal convictions of the community, constitutionally understood, require that the omission be regarded as wrongful and that the plaintiff's loss be made good by the defendant. To put it differently and in a negative sense, an omission will *not* be regarded as wrongful if public or legal policy considerations determine that there should be no liability and that notwithstanding his or her fault, the potential defendant should not be subjected to a claim for damages.<sup>18</sup>

285. Whether a particular set of circumstances gives rise to a legal duty act positively to prevent harm to the plaintiff, therefore involves not only weighing competing norms and interests but the identification of those established norms or standards which can be balanced against each other.<sup>19</sup> The Bill of Rights is in my view the lodestar for the identification of these norms, standards and values. Societal norms and values, to be sure, are dynamic, fluid and perpetually change over time. The legal convictions of society and whether they demand that harm causing conduct be regarded as wrongful, are however by necessity underpinned and informed by the norms and values embodied in the Constitution.<sup>20</sup> One of these norms and values, enshrined in section 28(2) of the Constitution, is that a child's best interest is of paramount importance.

286. I consider the following factors to be significant on the question of wrongfulness. Firstly, the constitutional norm of the best interest of the child which must be taken into account in every matter concerning a child. Secondly, the continued presence and maintenance of a swimming pool at the Mandela House which created a potential risk of harm to children. Thirdly, the constitutional norm of accountability.

287. The determination of wrongfulness requires the balancing and consideration of a number of factors. The question then, as stated in *Country Cloud*<sup>21</sup>, is whether the

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<sup>18</sup> *Country Cloud* at para 20 – 21.

<sup>19</sup> *Minister of Safety & Security v Van Duivenboden* 2002 (6) SA 431 (SCA) at para 21.

<sup>20</sup> *Loureiro* at para 34.

<sup>21</sup> *Country Cloud* at para 20 – 21.

public and legal policy considerations, informed by constitutional norms and values, would *not* regard the omissions by the Minister's employees as attract liability for damages notwithstanding their negligence. Or to put it differently, public and legal policy considerations justify a conclusion that the Department acted as a reasonable organ of state should act and therefore should not be subjected to a claim for damages.

288. In considering reasonableness by an organ of state, context is important. The concept of reasonableness places context at the centre of the enquiry and permits an assessment of context to determine whether a government programme or conduct is indeed reasonable.<sup>22</sup> In *Loureiro* for example, the Constitutional Court considered the wrongfulness enquiry in the context of historical material and statistical crime data demonstrating a community plagued by high levels of violent crime.<sup>23</sup>

#### *Child mortality from preventable drownings*

289. The question of wrongfulness in this case arises in the context of society, both locally and globally, being afflicted by endemic levels of fatal drowning incidents, particularly amongst young children. A recent study by researchers from the National Sea Rescue Institute and the University of Cape Town records that 2755 fatal drowning incidents of children under 4 years of age occurred in South Africa between 2016 and 2021. The under 4 years age group was identified as being of the highest risk, with a cumulative drowning incidence of 2755 fatal drownings or one drowning per day.<sup>24</sup>

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<sup>22</sup> *Mazibuko and Others v City of Johannesburg and Others* (CCT 39/09) [2009] ZACC 28; 2010 (3) BCLR 239 (CC) ; 2010 (4) SA 1 (CC) (8 October 2009) at para 59.

<sup>23</sup> *Loureiro* at paras 2-4, 34.

<sup>24</sup> Fortuin, J, Karaganwa, I, Mahlelela, N, Robertson, C 'A South African Epidemiological Study of Fatal Drownings: 2016-2021' International Journal of Environmental Research and Public Health, available at <https://pmc.ncbi.nlm.nih.gov/articles/PMC9690020/>

290. Studies have also found that 70% of fatal drownings in children aged under 4 occur in or around the home in buckets, bathtubs and swimming pools. In respect of non-fatal drowning or immersion injuries, 60% of admissions of children at the Red Cross Children's War Memorial Hospital in Cape Town are reported to be for non-fatal drowning injuries of children under the age of 5.<sup>25</sup>
291. The World Health Organisation ("WHO") is a specialized United Nations agency established by the United Nations Economic and Social Council ("ECOSOC"). The WHO has recognized the global prevalence of fatal drownings as a major public health concern. The 2024 WHO global status report on drowning records that there were an estimated 300 000 drowning deaths in 2021, this being equivalent to more than 30 people losing their lives to drowning every hour of every day. The report records that globally, drowning is the fourth leading cause of death for children under 4 years of age and the third leading cause of death for children aged 5 to 14 years.<sup>26</sup>
292. The Constitutional Court has held that reference may be made to both binding and non-binding international law when interpreting the rights in the Bill of Rights. Non-binding international law includes resolutions adopted by the United Nations and guidelines adopted by international agencies such as the WHO.<sup>27</sup>
293. South Africa is a member state of the United Nations and the WHO. On 29 April 2021 the UN General Assembly adopted Resolution 75/273 on Global Drowning Prevention ("UNGA Res.75/273"). The resolution notes that drowning prevention represents an effective measure which contributes to the prevention of child deaths and can protect investment in child development. The resolution further

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<sup>25</sup> C Saunders, D Sewdath, N Naidoo 'Keeping our heads above water: A systematic review of fatal drowning in South Africa' South African Medical Journal, 2018 Vol 108 January 2018, available at [https://scielo.org.za/scielo.php?script=sci\\_arttext&pid=S0256-95742018000100017](https://scielo.org.za/scielo.php?script=sci_arttext&pid=S0256-95742018000100017)

<sup>26</sup> World Health Organisation 'Global Status Report on Drowning Prevention: 2024', available at <https://www.who.int/teams/social-determinants-of-health/safety-and-mobility/global-report-on-drowning-prevention>

<sup>27</sup> S v Makwanyane and Another (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391 at para 35.

affirms that previous WHO resolutions have recognized that drowning is a leading global cause of injury-related child deaths that requires preventive measures, including awareness-raising.<sup>28</sup>

*Best interests of children are paramount*

294. Organs of state are obliged to protect the best interests of children and their rights not to be subjected to harm. The duty of an owner of property on which a potential danger exists thus has a higher duty towards young children than towards adults. A reasonable organ of state would have regard to the vulnerability of the person likely to be brought in contact with a possible danger, when determining the amount of care to be exercised. As Mogoeng CJ stated in *Mashongwa*, the principle that wrongfulness in the case of positive conduct is prima facie wrongful, applies equally to negative conduct, where there is a pre-existing duty, such as the failure to protect a vulnerable person from harm.<sup>29</sup>

295. A sparkling swimming pool is an obvious attraction to young children. Its aesthetically pleasing appearance belies the clear danger that it presents to young children and adults who, unable to swim, are at risk of drowning. It is precisely for those reasons that the WHO called on UN member states to put in place mandatory legislative imposition of barriers and fencing requirements for public and private pools.<sup>30</sup>

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<sup>28</sup> UNGA Resolution 75/2023 'Global Drowning Prevention' adopted on 28 April 2021, available at [https://cdn.who.int/media/docs/default-source/documents/social-determinants-of-health/unga-resolution-75-273-global-drowning-prevention.pdf?sfvrsn=1c154b70\\_3](https://cdn.who.int/media/docs/default-source/documents/social-determinants-of-health/unga-resolution-75-273-global-drowning-prevention.pdf?sfvrsn=1c154b70_3)

<sup>29</sup> *Mashongwa* at para 19.

<sup>30</sup> World Health Organisation 'Global Status Report on Drowning Prevention: 2024' at p 47. In South Africa, safety at private swimming pools is regulated by the National Building Regulations Standards Act 103 of 1997. Regulation D4 of the Regulations published in terms of that Act in Government Notice R1081 of 10 June 1988, as amended by Government Notice R1726 of 26 August 1988, states "... (1) The owner of any site which contains a swimming pool shall ensure that access to such swimming pool is controlled and (2) Any owner who fails to comply with the requirement of sub-regulation (1) shall be guilty of an offence.'

296. By continuing to retain control of and maintaining a swimming pool at the Mandela House filled with water, the Department in my view created a potential risk of harm to others, in particular young children who were able to gain access to the swimming pool area at the back of the Mandela House. It was under a duty to prevent this risk from materializing.<sup>31</sup>

### *Accountability*

297. The constitutional norm of accountability is also relevant to the question of wrongfulness. Where there is no other effective remedy available to hold the state accountable other than a private law damages action, a legal duty should be recognized unless there are public policy imperatives not to do so. Nugent JA explained this as follows in *Van Duivenboden*:

“Where the conduct of the State, as represented by the persons who perform functions on its behalf, is in conflict when its constitutional duty to protect rights in the Bill of Rights, in my view, *the norm of accountability must necessarily assume an important role in determining whether a legal duty ought to be recognised in any particular case.*

The norm of accountability, however, need not always translate constitutional duties into private law duties enforceable by an action for damages, for there will be cases in which other appropriate remedies are available for holding the State to account. Where the conduct in issue relates to questions of the State policy, or where it affects a broad and indeterminate segment of society, constitutional accountability might at the time be appropriately secured through the political process

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<sup>31</sup> Van Vuuren v eThekweni Municipality (1308/2016) [2017] ZASCA 124; 2018 (1) SA 189 (SCA) (27 September 2017) at para 20.

or through one of the variety of other remedies that the courts are capable of granting

There are also cases in which non-judicial remedies, or remedies by way of review and mandamus or interdict, allow for accountability in an appropriate form and that might also provide further grounds upon which to deny an action for damages.

*However, where the State's failure occurs in circumstances that offer no effective remedy other than an action for damages the norm of accountability will, in my view, ordinarily demand the recognition of a legal duty unless there are other considerations affecting the public interest that outweigh that norm .*"<sup>32</sup>

298. In disputing that the element of wrongfulness has been established, the Minister relied extensively on the judgment of the Supreme Court of Appeal in *Stedall*. In this case, the SCA held that given the circumstances under which the accident had occurred, where the child had been in the care and under the supervision of its mother while visiting the appellants' home and had come to be injured mainly as a result of her mother having been distracted for a short period, it would be over-burdensome to impose liability upon the appellants, regard been had to public and legal policy consistent with constitutional norms.

299. The SCA further held that the appellants had not been negligent in that they were entitled to expect that the child would be looked after by her mother whilst at their home, and there had been nothing to alert either of them to the fact that the child had been left unattended by her mother for a brief period. The respondents having held to have failed to prove that the appellants conduct had either been wrongful

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<sup>32</sup> Minister of Safety and Security v Van Duivenboden (209/2001) [2002] ZASCA 79; [2002] 3 All SA 741 (SCA); 2002 (6) SA 431 (SCA) (22 August 2002) at para 21.

or negligent, the appeal was in the result upheld and the court a quo's order set aside.<sup>33</sup>

300. It was submitted on behalf of the Minister that the conclusion in *Stedall* was dispositive of the plaintiff's claim. The facts of the present matter, so it was argued, apply with equal force to the *ratio decidendi* in the *Stedall* matter. In my view, the view, the facts of the present case and those in *Stedall* are materially distinguishable. So too, in my respectful view, are a number of the legal principles which militated against the imposition of liability in *Stedall* on the basis that it would be overly burdensome to impose liability on a private home-owner for a near drowning accident in a private home.

301. Firstly, the swimming pool in the *Stedall* case was situated on a private residence to which C had been taken by her mother. In the present case, no persons resided in the Mandela House and house and swimming pool were under the control of the Department, an organ of state.

302. The SCA itself distinguished the facts before it from the situation in *Van Vuuren* where there had been public access to potentially dangerous places by children who might not be in the custody and care of a supervising adult.<sup>34</sup>

303. Secondly, there are significant factual differences between the premises at issue in *Stedall* and the Mandela House premises in the present case. The swimming pool in *Stedall* was fully fenced and in fact more secure than the swimming pool in the present case. In addition, unlike in *Stedall*, in the present case H[...] had without adult supervision had ventured onto an adjacent property with an unsecured swimming pool. The swimming pool in *Stedall* was on private property and not accessible to members of the public, such as young children who in the present case had repeatedly gained access to the Mandela House swimming pool.

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<sup>33</sup> *Stedall* at para 35 – 36.

<sup>34</sup> *Stedall* at para 26.

304. It was in this regard submitted on behalf of the Minister that the plaintiffs had sought to label the Mandela House swimming pool as a public swimming pool. The argument is without merit. The evidence was not that the swimming pool at the Mandela House was a public swimming pool. The evidence was that members of the public including children as young as 8 years old, had repeatedly and on numerous occasions gained access to the swimming pool at the Mandela House. They were able to do so due to the absence of reasonable measures by the Department, such as security guards, effective entry and egress control and securely locked gates, to prohibit and prevent unauthorized access to the swimming pool.

305. Thirdly, the SCA in *Stedall* evaluated the element of negligence from the perspective of a reasonable private homeowner who could not be expected to guard against all harm that might befall a young child who is brought to the private premises of the homeowner in the custody and supervision of her parent. In the present case, the standard applicable in the determination of negligence is not that of a reasonable person but that of a reasonable organ of state.

306. For these reasons, I am of the view that the decision in *Stedall* is distinguishable on the facts and the law.

307. The plaintiffs in my view have no other effective or equitable remedy available to them for the harm they have suffered. I am of the view that the constitutional norm of accountability demands that the Minister be held accountable for the conduct of his employees by way of a private law action for damages.

308. I do not consider that there any compelling public policy considerations that militate against a finding that it is reasonable for the Minister to be held liable in delict for the harm causing omissions of his employees in this case. Drownings of young children, as the WHO has emphasized, are one of the leading causes of



child mortality globally and are entirely preventable through low cost, practical and reasonable measures. I consider this to be an important public policy consideration.

309. No justification was advanced by Minister against the imposition of liability on the basis that it would result in unacceptably high social or economic costs. I see none.

310. The imposition of delictual liability is also a fact specific enquiry. The finding of wrongfulness in this case deals with and is particular to the unique acts and circumstances of this case and not any other cases. Such cases will any event have to establish the elements of delictual liability on their specific facts..

311. The evidence establishes that the Department of Correctional Services failed to take reasonable preventive measures to guard against the potential risk of young children drowning in the swimming pool at the Mandela House. I agree with Mr. *Du Toit*, counsel for the H[...]’s parents, that the Department in fact took no preventative measures whatsoever to prevent children from drowning in the swimming pool.

312. A set of padlocks and chains, equipment familiar to the Department of Correctional Services, would in all likelihood have secured the gates effectively and prevented unauthorized access to the swimming pool through the gates at the Mandela House. The Minister has not placed information before the Court regarding why such a simple preventive measure was not taken. The Department’s belated installation of a pool safety net after H[...]’s burial, was in my view and as the adage goes, too little, too late.

313. The Department’s failure to take any reasonable steps to guard against the risk of children drowning in the swimming pool at the Mandela House, in my view evokes moral indignation. The evidence establishes that the Department’s employees

were aware that young children were regularly able to access the unsecured swimming pool at the Mandela House. No steps were taken to control access to the swimming pool by securing the gates around the Mandela House to install a pool safety net over the pool.

314. The legal convictions of the community in my judgment demand that the Minister be held accountable by way of a private law action for damages by H[...]’s parents. The failure of the Department’s employees at the Drakenstein Correctional Centre to take reasonable measures to guard against the risk of children drowning in the swimming pool at the Mandela House, is serious, wrongful and in my view, actionable.

315. It is indeed ironic that these failures by an organ of state to comply with their constitutional duties to act in the best interests of children and to protect the rights of children to life and freedom from preventable harm, occurred at the very place where President Mandela began his own long walk to freedom.

### *Conclusion*

316. The plaintiffs succeed on the merits.

317. I hold that the Minister is liable for the agreed or proven damages suffered by the plaintiffs following the drowning of H[...] H[...] at the Drakenstein Correctional Centre on 13 August 2010.

318. The Minister sought a costs order against the plaintiffs arising from the withdrawal of their claims against the second and third defendants at the commencement of the trial. I agree with the submissions by the plaintiffs’ counsel that the question of which defendant was responsible for and in control of the Mandela House premises, was unclear and that the institution of actions against all three defendants was not unreasonable in the circumstances.

319. It lastly remains for me to express to the parties my regret for the delay in the delivery of this judgment. The parties and their legal representatives are thanked for their helpful submissions and forbearance in what was at times a difficult and emotionally charged trial.

*Order*

320. I make the following order:

320.1 The first defendant held liable for the agreed or proven damages suffered by the plaintiffs following the drowning of H[...] H[...] at the Drakenstein Correctional Centre on 13 August 2010.

320.2 The first defendant is ordered to pay the plaintiffs' costs including counsel's costs on scale C.

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**S G MAGARDIE**  
**Acting Judge of the High Court**  
**Western Cape Division**

**Appearances:**

For the plaintiffs: Adv A J Du Toit

Instructed by: Simpsons Attorneys

For the defendants: Adv D Jacobs SC

Instructed by: State Attorney (Cape Town)

Date of hearing: 3, 4 5, 18, 26 June 2024; 12 August 2024

Date of judgment: 26 May 2025