THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 523/11
Not reportable

In the matter between:

MEMBER OF THE EXECUTIVE COUNCIL FOR EDUCATION: MPUMALANGA	**APPELLANT**

and

ONICA SKHOSANA obo SOLOMON SKHOSANA	**RESPONDENT**

Neutral citation: *MEC for Education: Mpumalanga v Skhosana* (523/11) [2012] ZASCA 63 (17 May 2012)

Coram: Nugent, Heher, Cachalia JJA, McLaren and Petse AJJA

Heard: **3 May 2012**

Delivered: **17 May 2012**

Summary: **Negligence – child learner injured after device with protruding copper wires exploded in his hands – whether teacher ought to have foreseen harm.**

ORDER

On appeal from: North Gauteng High Court, Pretoria (Matojane J sitting as court of first instance):

The appeal is dismissed with costs of two counsel.

JUDGMENT

CACHALIA JA (NUGENT JA AND McLAREN AJA CONCURRING):

[1] This is an appeal from the North Gauteng High Court (Matojane J) holding the Mpumalanga Provincial Government vicariously liable for the injuries sustained by a twelve-year old Grade 5 school-learner, Solomon Skhosana, on 15 August 2007. The incident happened when a device that Solomon was playing with exploded causing injuries to his forearms, stomach and legs. His mother, Ms Onica Skhosana, acting in her own right and on behalf of her son, sued the Provincial Government, nominally represented by the MEC, for her damages. Her case was that Solomon's teacher could have prevented the incident, but had wrongfully and negligently failed to do so.

[2] At the commencement of the trial the learned judge separated the issues of liability and the quantum of damages. The trial then proceeded only on the matter of liability while the question of damages stood over for later determination. At the end of the plaintiff's case the defendant closed its case without leading any evidence. The court upheld the claim and refused the MEC

leave to appeal against its order. This court, however, granted the necessary leave.

[3] The essential facts in this case are not in dispute. They appear from the testimony of Solomon and his mother. His was the only evidence regarding the circumstances in which he was injured. He testified that before leaving for school on the morning of the incident, he asked his mother to give him a battery for a ship-building school project. She gave one to him; it was a small torch-battery. She considered his request to be neither dangerous nor unusual as learners were frequently requested to bring appliances to school for their projects.

[4] Solomon arrived at his school – the Tjhidelane Primary School in Mpumalanga. During a technology lesson that morning, one of his class-mates, Mbali, was playing with a device. Their teacher, Ms Pendile Mashiane, confiscated it and asked Mbali to accompany her to the staff room, which she did. After a while, Mbali returned to the classroom alone, and took her seat for the remaining lessons.

[5] The school-day ended at 13h30 in the ordinary course. Solomon and Mbali made their way to the school exit, where they were to wait for their transportation. She had in her possession a device described by Solomon as a ‘battery-like device with two wires’, which she gave to him. She told him to connect the device to the battery that he had for his ship-building project. But he did not do so immediately.

[6] At about 14h00 Mbali’s mother arrived in her car to collect her. They left, leaving Solomon alone outside the school-gate, where he waited for his transportation. He had Mbali’s device and his battery with him. He connected the wires protruding from Mbali’s device to his battery. This caused the device to explode, which injured the boy.

[7] The evidence is perfunctory on whether the device that exploded was of the same kind as the device that had been confiscated earlier. But in cross-examination it was put to Solomon that a teacher would testify that the confiscated device was 'a bunch of wires with at the end some copper things protruding from this bunch of wires'. Although the teacher was not called to testify, what was put to Solomon can be accepted as the defendant's version and is binding on the MEC.[1]

[8] From a comparison of the confiscated device, and the device that exploded later, it is probable that they were of the same kind. I did not understand Mr Nonyane, who appeared for the MEC, to put this in issue. And being of the same kind it follows that both would explode if an electrical current was passed through them. This too was common cause.

[9] Before us the only issue in dispute was whether the teacher who found the apparatus in the child's possession was negligent in failing to ensure that she did not come into possession of another. And it was accepted, correctly, that if negligence was established, the teacher's conduct was also wrongful.

[10] To determine negligence the courts employ the classic three-part test as formulated in *Kruger v Coetzee*:

(a) would a reasonable person, in the same circumstances as the defendant, have foreseen the possibility of harm to the plaintiff;

(b) would a reasonable person have taken steps to guard against that possibility;

(c) did the defendant fail to take steps which he or she should have taken to guard against it?[2]

If each part is confirmed, then the defendant is said to have failed to measure up to the standard of a reasonable person, and is consequently negligent.[3]

---

[1] *Nkuta v Santam Assuransie Maatskappy Bpk* 1975 (4) SA 848 (A) at 853G-H.
[2] *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430.

[11] Mr Nonyane submitted that the device that the teacher confiscated from Mbali appeared innocuous, and she could therefore not reasonably have foreseen its potential danger. Put another way, the object would not have alerted a reasonable person to the fact that it was explosive. On the other hand Mr Ströh, who appeared for Ms Skhosana, contended that a reasonable person in the teacher's position would have recognised that if an electrical current was passed through an unfamiliar battery-like object with wires attached to it, harm could possibly be caused.

[12] An electrical device is inherently capable of being harmful, albeit not necessarily by explosion. In my view, a reasonable teacher who discovers such a device – particularly one that is unusual – would be placed on enquiry to establish whether or not it is harmful by taking steps to discover what the device is. Needless to say, once having discovered it is, a reasonable teacher would take further steps to ensure that harm does not occur.

[13] I think it is clear that no such enquiry was made – indeed it was the MEC's case that no enquiry was called for – and in my view that omission was negligent. Had enquiry been made it would have been discovered that the confiscated device was an explosive. And having made this discovery, which I would think would have caused considerable alarm, a reasonable teacher would not merely have confiscated what had been found, but would also have taken further precautionary measures to establish the source of the device so as to ensure that no other such devices came into possession of the child – or indeed of any other child. That was correctly not placed in issue, nor was it placed in issue that had that been done Mbali would probably not have been in possession of the explosive, and the explosion would not have occurred.

---

[3] J Burchell *Principles of Delict* (1 ed) 1993 p 86.

[14] It follows that the teacher was indeed negligent in failing to establish what the device was, and her negligence caused the harm. In those circumstances the appeal must be dismissed. The following order is made:

The appeal is dismissed with costs of two counsel.

_____

A CACHALIA
JUDGE OF APPEAL

HEHER JA (PETSE AJA CONCURRING):

[15] While I have an understanding for the position of the child plaintiff in this case, sympathy cannot supplement a lack of evidence.

[16] The evidence, read together with the cross-examination by the defendant's counsel, suggests that a teacher, who may have been either Ms Aphane or Ms Mashiane initially confiscated what later proved to be an explosive device because it was proving a distraction during lessons. She apparently took both the child Mbali – who seems to have brought it to school – and the device to the staff room.

[17] The circumstances of its return to Mbali were completely unexplained. There is, for example, no evidence (nor any justifying an inference) that the same teacher was responsible for both confiscation and return.

[18] Assuming in favour of the plaintiff that the same person was involved, then the test for negligence on her part requires consideration of how a reasonable teacher in the same circumstances would have behaved. The

application of that test presupposes that the court is adequately apprised of the circumstances.

[19] On all relevant aspects of the matter I consider that the plaintiff's evidence was inadequate. I say this fully conscious of the fact that some aspects might have required the teacher to be called as a witness.

[20] The plaintiff's case is silent on the age, training, skills, experience and worldly knowledge of the teacher concerned. This might not matter as much in a more sophisticated context but here one does not even know whether the school environment was urban or rural.

[21] Was the device such as reasonably to convey to this teacher that it presented a possibility of harm to a child? In this regard the size, shape, get-up and construction of the object in question are relevant. Could it be opened? Were there any outward indications of potential hazard? All that the evidence tells us is a proposition put by counsel (apparently derived from Ms Aphane) that when she told Mbali to hand the device over it looked like 'a bunch of wires with some copper things protruding from the bunch' and she took it and put it in her pocket (which suggests a limited size). This description of itself was not sufficient to suggest a potential danger to a person uninformed as to the nature of explosives and how they might be detonated, for example, as the evidence suggests, by connecting the object to an ordinary small torch battery. (It is not suggested that the object was dangerous in its physical characteristics, such as having sharp edges.) One does not know whether the school was located in a mining area where the fact of explosives and their general use are matters of common experience. Nor was there evidence that the device in its general appearance resembled a detonator or something of that nature.

[22] Assuming that the object was sufficient to induce a suspicion of danger, there was no evidence of opportunity for enquiry and advice in the school

environment in question. In such circumstances, unless there were real grounds to fear resultant harm, there would have been no reason not to return the object with an appropriate warning.

[23] The plaintiff's case left the court with unanswered questions on all these material aspects. I do not consider that the onus was discharged. Absolution from the instance would have been the appropriate order.

_____

J A HEHER

JUDGE OF APPEAL

APPEARANCES

For Appellant:	P Nonyane
	Instructed by:
	The State Attorney, Pretoria
	The State Attorney, Bloemfontein
For Respondent:	J H Ströh SC (with him J A du Plessis)
	Instructed by:
	O Joubert Attorneys, Pretoria
	Bezuidenhouts Inc, Bloemfontein