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**IN THE NORTH WEST HIGH COURT, MAFIKENG**

CASE NO: 3210/2019

In the matter between:

R[...] L[...] D[...]  
obo O[...] D[...]

Plaintiff

and

**MEC FOR EDUCATION: NORTH WEST**

Defendant

**DATE OF HEARING** : 10 FEBRUARY 2023

**DATE OF JUDGMENT** : 28 APRIL 2023

**FOR THE PLAINTIFF** : ADV. STEYN

**FOR THE DEFENDANT** : ADV. MONGALE

**JUDGMENT**

**Delivered:** This judgment was handed down electronically by circulation to the parties' representatives via email. The date and time for hand-down is deemed to be 10h00 on 28 April 2023.

**ORDER**

**Resultantly, the following order is made:**

- (i) The plaintiff's claim with regard to liability (merits) is dismissed.**
- (ii) The plaintiff is ordered to pay the defendant's costs of suit on a party-and-party basis, to be taxed.**

## **JUDGMENT**

### **HENDRICKS JP**

[1] Ms. R[...] L[...] D[...] (plaintiff), in her representative capacity of being the mother of the minor child O[...] D[...], instituted an action for damages following an alleged incident where O[...] fell into a pit toilet on 03<sup>rd</sup> May 2016 at T[...] Primary school. Liability (merits) and quantum were separated in terms of Rule 33 (4) of the Uniform Rules of Court, and this Court ordered that the trial proceeded on merits only. In the particulars of claim the following essential averments were made with regard to the alleged liability of the defendant:

*“3. On 3 May 2016, and whilst on the premises of the School, O[...], who was a learner at the School, fell into an open pit latrine (“the incident”).*

*4. At all material times Defendant:*

*4.1 was the owner of the premises;*

*4.2 was responsible for the maintenance and safety of the premises;*

4.3 was aware that learners were present in the vicinity of the said latrine; and

4.4 was obliged to take reasonable steps to protect the safety of learners, such as O[...], by ensuring, *inter alia*, that the premises were safe.

5. In the premises, Defendant's employees owed a **duty of care** to learners at School on the premises, including O[...], that when present upon the premises they were not exposed to the risk of injury.
6. At all material times the employees of Defendant acted within the course and scope of their employment with Defendant, alternatively under Defendant's direction and control.
7. The incident referred to in paragraph 3 above was caused by the negligence and/or breach of the aforesaid duty of care of Defendant's employee(s), in that he/they:
  - 7.1 failed to ensure that the pit latrine was enclosed;
  - 7.2 failed to cordon off the area where the open latrine was located;
  - 7.3 failed to ensure that the premises were maintained in a safe condition so that learners such as O[...] were not exposed to the risk of injury;
  - 7.4 failed to warn learners present on the premises, such as O[...], of the danger posed by the open pit latrine;

- 7.5 *failed to prevent the incident when by the exercise of reasonable skill and care Defendant could and should have done so; and*
- 7.6 *failed to act with due care.*
8. *In and as a result of the said incident, Plaintiff suffered from:*
  - 8.1 *hydrocephalus;*
  - 8.2 *aspiration pneumonia; and*
  - 8.3 *cuts and abrasions.*
9. *The sequelae of the incident are and were the following:*
  - 9.1 *he received hospital and medical treatment;*
  - 9.2 *he suffers from cognitive difficulties;*
  - 9.3 *he suffers from epilepsy;*
  - 9.4 *he suffers from respiratory difficulties;*
  - 9.5 *he suffers from anxiety;*
  - 9.6 *he suffers from depression;*
  - 9.7 *he suffers from post-traumatic stress disorder;*
  - 9.8 *he incurred hospital and medical expenses and will in the future incur further such expenses;*

- 9.9 *he suffered shock, pain, suffering, discomfort and disability and will in the future suffer further pain, discomfort and disability;*
- 9.10 *he has in the past and will in the future suffer a loss of the amenities of life; and*
- 9.11 *he will suffer a loss of earnings in the future.”*

[2] In response thereto, the defendant raised the following plea as defence:

- “3.1 *The contents herein are denied. In amplification of her defence the defendant pleads that on the day of the alleged incident the toilets that the minor child is alleged to have fallen in were locked. These toilets were only used as a back-up system in instances where there was no water in the surrounding area which would affect the supply of water to the school.*
- 3.2 *Under normal circumstances when there is no water supply shortage, the school uses flushable toilets.*
- 3.3 *The norm at the school has been that if learners wanted to go to the toilets their teachers would accompany them so as to keep a safe learning and teaching environment.*
- 3.4 *A team of investigators was appointed to investigate this matter and it found that the toilets where the minor child allegedly fell in do not pose any threat to learners and are designed in such a way that it is not possible for a person and/or a child to fall in. The bucket system of the toilets where the minor child allegedly fell in is not a conventional*

*bucket, they are referred to as the VIP toilets. It is therefore denied that the minor child fell into an open pit toilet.*

4. *The contents of paragraph 3 herein above are incorporated herein and repeated as if specifically pleaded. In amplification of her defence the defendant further pleads that the premises were kept safe at all material times to ensure safety of the learners.*
5. *The contents herein are admitted.*
- 6.1 *The contents herein are denied. In amplification of her defence, the defendant pleads that on the day of the alleged incident the VIP toilets were not operational and therefore locked because there was water in the school premises, therefore the allegation that the defendant failed to ensure that the toilets were enclosed and marked accordingly does not arise.*
- 6.2 *The only toilets that were working and used on the day of the alleged incident and the entire week were the flushing toilets.*
- 6.3 *The defendant did not breach any of its duty towards the safety of the learners including the minor child.*
- 7.1 *The defendant denies that the condition that the minor child is allegedly suffering from is as a result of him allegedly falling inside the VIP toilet and/or open pit toilet. The defendant denies that the minor child fell into an open pit toilet. The defendant pleads that the minor child had a pre-existing condition and that he has been displaying the signs of a child with special needs. The plaintiff was called to the school on several occasions for the teachers to understand any*

*medical condition the minor child was suffering from but she never honoured the invite.*

*7.2 Any condition that the minor child suffers from is not as a result of the alleged fall into the VIP toilets and/or pit toilet but due to his pre-existing condition.”*

[3] There is however also a pre-trial minute of a meeting held on 23<sup>rd</sup> August 2022 in which it was admitted that O[...] fell at school on 03<sup>rd</sup> May 2016 and sustained injuries as a result thereof. More about this later on in this judgment.

The crisp issues therefore to be determined by this Court are:

- (i) Whether the child, O[...], in fact fell **into the pit toilet** and sustained injuries as a result thereof;  
and
- (ii) Whether there was any negligence on the part of the defendant.

[4] In the case for the plaintiff, who bore not only the onus to prove her case on a balance of probabilities but also the duty to begin, the mother of the child O[...], **Ms. R[...] L[...] D[...]** testified. Her evidence is to the effect that on the day of the alleged incident she received a phone call from an educator, Ms. Mokotedi, informing her that her child O[...] is lost and requested her to come to the school to discuss this incident and other things. She told Ms. Mokotedi that she cannot come to the school as she was far. She then received another call from the then principal, Ms. Phiri also requesting her to avail herself as soon as possible. She told Ms. Phiri that she is far and could not come to school at that instance. Ms. Phiri then responded by saying that it is fine. If R[...] want to, she can even come in January.

- [5] After speaking to Ms. Phiri, and since she was not home, she called her mother telling her that O[...] is missing. Her mother informed her that O[...] is at her sister's house. Upon her arrival at home, she found O[...] in his pyjamas lying in bed with her mother. He had a swollen face, a green patch on the face and he had bruises at the back of his head. The plaintiff testified that the school uniform was on the sofa. It was clean but the shoes were dirty and she could not make sense out of that. She testified that the smell that was coming out of O[...]’s mouth was that of faeces and when she enquired from O[...] about what happened, he could not speak and he was just crying. That evening O[...] slept with his grandmother and not with R[...].
- [6] She bathed O[...] the following morning, the 04<sup>th</sup> May 2016, and prepared him for school. When she touched his testicles, O[...] screamed saying it was painful and he was still swollen, bruises and in pain as the previous night. While O[...] was at school, she went to the shop and met the neighbour who asked about O[...]’s well-being. Other women from the neighbourhood confirmed that they knew about the incident. After speaking to the women, she went to the school. Upon her arrival at the school, she saw EPWP workers inside the yard and she greeted two (2) males. One of the males told her that “*yesterday was an eventful day*”. She then went to the principal’s office and she told Ms. Phiri that she came as she was summoned the previous day. Ms. Phiri explained that the subject has passed because she decided not to come as she was requested.
- [7] Ms. Phiri informed her that she wanted to talk to her about the fact that she brought a slow learner to her school. She testified that she was shocked by that statement as O[...] had always performed well. When she asked about the incident, Ms. Phiri told her that she did not want to talk about the incident and that she would conduct her own investigations. Besides speaking to the principal, she also spoke to a male person named Mr. Pilane, who was a cleaner at O[...]’s school. She had R200. She wanted to thank Mr. Pilane for saving her child’s life. She testified that she offered him R150 but he refused to take the money. After that, she went to O[...]’s class to fetch him and took him to the clinic.



- [8] On 04<sup>th</sup> May 2016, during the night, O[...] was restless whilst sleeping. He was scared and he kept on screaming for help. She testified that after about three (3) minutes, O[...] told her that he fell into the pit toilet. On 05<sup>th</sup> May 2016, she went to the police station with O[...], to open a case for violation of the child's rights, but the police refused to open the case and advised her to go and open a case with the Department of Education. She then proceeded to the Department of Education (department) and was assisted by Mr. Ndo. The said Mr. Ndo informed her that she should return on 09 May 2016, as they were busy.
- [9] She returned to the department on 09<sup>th</sup> May 2016 and she was assisted by Mr. Lelaka, who informed her that he cannot assist as the principal of the school is the one who should report the incident. She returned to the school on 13<sup>th</sup> or 14<sup>th</sup> May 2016, accompanied by councilor Victoria Makhawula (Victoria). She saw Ms. Phiri but did not talk to her, as it was Victoria who spoke to her. Ms. Phiri said that she had no comment as she was still conducting investigations.
- [10] The plaintiff further testified that she received an invitation to attend a meeting that was held during August 2016. The meeting was in connection with O[...]. In attendance were Victoria, Mr. Rathapedi, Ms. Phiri and some School Governing Body (SGB) members. She was asked where the child fell and she informed them that she could not tell, as she was not informed of the incident in the first place. They went to inspect the pit toilets where the incident allegedly took place at the initiative of Victoria. After seeing the pit toilets, they all went back into the meeting in the principal's office. She was asked what kind of assistance she needed. She responded by saying that she needed support and money for transportation for medical check-ups. They requested her to leave the meeting for a while to allow them to deliberate on the matter and was later called back into Ms. Phiri's office. Mr. Rathapedi informed her that they will not be able to assist her. She received no feedback from the department ever since.

- [11] During cross-examination the plaintiff admitted that O[...] attended A[...] Primary school before going to T[...] Primary school. He was three (3) years old when he started at A[...] Primary school and he was there for a week only. She admitted that before the incident, she changed O[...]’s transport but denied that she failed to inform the class teacher about her decision. She said that she called the class teacher to inform her that she changed O[...]’s transport. She admitted that she could not avail herself to attend at the school when she was summoned, claiming the distance to have been the cause of her failure to avail herself. She denied that prior to 03<sup>rd</sup> May 2016, she ever received any call summoning her to avail herself at the school concerning O[...].
- [12] According to her, the only call she received from Ms. Mokotedi was on 03<sup>rd</sup> May 2016 informing her that O[...] is not on the premises, and that she should assist looking for O[...]. After finding out that O[...] is at home, she did call Ms. Mokotedi to inform her that O[...] was at home. R[...] admitted that she did not inform Ms. Mokotedi about the state that O[...] was in at that point in time. She conceded that when she arrived home, she did not take any action after seeing the state in which O[...] was. She mentioned that the first thing she did was to look for O[...]’s clothes, rubbed him with medication and warm water and gave him panado, as she thought he had flu.
- [13] She conceded that she did not take O[...] to the clinic on the 03<sup>rd</sup> May 2016. The reason therefore was that the clinic closed at 16h00. Despite the alleged incident and alleged injuries, she let him go to school on 04<sup>th</sup> May 2016. She stated that the reason for this decision was to afford herself time to look for transport money to take O[...] to hospital.
- [14] She testified that there were pictures taken of O[...] whilst in that state but her phone containing the pictures is lost. She insisted that the toilets were not the way they were when Ms. Phiri retired as the principal. She indicated that Mr. Steenkamp who took over as the new principal, is the one who brought about all these changes. She admitted that she could not point out where the child fell, but claimed the reason for this is because Ms. Phiri did not inform her what had transpired in the first place. She indicated that she did not go and inspect the pit toilets because Ms. Phiri refused her to do so.

- [15] She admitted that she informed the class teacher and principal that O[...] is a sickly child and must always wear a jersey. She disputed that on 04<sup>th</sup> May 2016, the principal Ms. Phiri discuss O[...]’s health condition and testified that the principal only told her that she brought a slow learner to the school. She further testified that she was confused by this comment as O[...] obtained levels 4 and 5 on his progress report. She was shown O[...]’s progress report which stated that O[...] did not perform well and needs to be assisted at home. Despite this report, she still insisted that nothing was wrong with O[...]. She maintained that when she met the two (2) male persons at school, Godfrey said that he will go and call the man that saved her child, being Mr. Pilane. She admitted that she knows where Godfrey stay. He stays nearby her home. She admitted that she went to his house and requested him to tell the truth about the alleged incident. She denied that she promised him employment as she could not offer someone employment, whilst she herself was not working.
- [16] She admitted that she was represented at the meeting held in August 2016. She was represented by a lady called Mathapelo, instructed by Tsoga Attorneys and she does not know Mathapelo’s surname. She denied that Victoria is her friend but just a neighbour. She refused to ever been told that O[...] soiled himself. She also denied that she was told about the strange behaviour of O[...] and his hysterical cries as alleged by Ms. Mokotedi and Ms. Phiri. She mentioned that she had no knowledge that O[...] used to walk about in his classroom carrying his school bag. She mentioned that the reason to remove O[...] from this school was as a result of the alleged incident that took place.
- [17] She admitted that O[...] was admitted at the hospital and also admitted that she insisted that he be discharged from the hospital, which was against the doctor’s medical advice, which at first she denied. O[...] was diagnosed with pneumonia. She admitted such condition but, according to her O[...] was later given a clean bill of health. R[...] testified that something happened to O[...] in the school premises as O[...] had told her. She denied that she opened a criminal case against Mrs. Phiri and Mr. Pilane, but against

the school, as a child cannot go lost under their care. Regarding Mr. Pilane, she only told the police that he saved O[...], but did not open a case against him.

[18] In analyzing R[...]'s evidence, the following. O[...] was not called to testify despite the fact that the plaintiff mentioned during examination in chief and cross examination that O[...] personally told her that he fell into a pit toilet. This essential piece of evidence was in my view necessary and should have come from the child himself. No reason was proffered why O[...] was not called as a witness.

[19] The defendant's defence is that O[...] had a pre-existing condition and the medical records that the plaintiff was referred to during cross examination and the diagnosis of O[...] clearly shows O[...]'s condition. According to the plaintiff, as per her particulars of claim, the alleged incident had caused O[...] to suffer certain conditions, which are unfortunately the pre-existing condition that O[...] was diagnosed with. The plaintiff could not tell this Court how O[...] allegedly got injured on the school premises. The allegation that Ms. Phiri refused her to go and inspect the pit toilets is just a fabrication. She should have insisted, failure of which, she should have reported the incident to the District or Circuit office of the department. This was important, more so that she alleged that the principal did not report the incident to her as the mother of O[...].

[20] She is blaming the school for illnesses that her child was already suffering from. The grandmother who clearly saw the state O[...] was in, was also not called as a witness. She waited until R[...] came back home in the evening to see that O[...] was bruised. O[...] could have been taken to the clinic on the day of the alleged incident, but was not taken. There is also no medical report to show the doctor's findings on 04<sup>th</sup> May 2016. A reasonable mother could have at least took her child to the clinic the first thing the following morning, and not late in the afternoon, after people in the community started asking about her child's well-being. It is mind-boggling that a reasonable parent, especially a mother, would take her child to school in the state as described.

- [21] **Mrs. Victoria Makhuhula** (Victoria) by then the ward councillor, was approached by the plaintiff. She testified that she knows R[...] as they grew up together. She testified that she knew about this case. R[...] called her on 13<sup>th</sup> August 2016, when she was a ward councillor. She testified that she accompanied R[...] to school, as R[...] told her that O[...] fell into a pit toilet. When they arrived at school, they found Ms. Phiri at the parking area who refused to talk to them. Ms. Phiri agreed to see them the following day. The following day she went to school with the plaintiff (R[...]). Ms. Phiri and Ms. Mathibe and other people were in attendance. However, she does not know their names. Ms. Phiri was arrogant and gave them attitude.
- [22] Victoria testified that she requested that they should go out to the pit toilets and inspect them. Ms. Phiri and the school representatives wanted to direct them to the flushable toilets, and she said there is no way a child could fall into a flushable toilet. Victoria was referred to the pictures of the pit toilets and she testified that the cement at the back of the toilets was not there during 2016. According to her, it was just soil which was not even but slopping. Victoria testified that the toilet bowl was different as the lid was not there, and the toilet seat was a cement one with the conventional pit toilet bucket.
- [23] She informed Ms. Mathibe that the toilet area was dangerous and that it was easy for a child to fall in. Ms. Mathibe promised that they would correct their mistakes. The ventilation pipes that were at the back of the pit toilets were by then short. The gate was not there during 2016, which means that these toilets were not cordoned off. She testified that after inspecting the pit toilets they all went to the principal's office. She asked the principal how she could help the child, seeing that the child fell into the toilet and the mother of the child is unemployed. She did not remember whether minutes of this meeting were taken or not.
- [24] In analysing the evidence of Victoria, the following is apparent. Victoria insisted that the first time she went to school was on 14<sup>th</sup> August 2016, after receiving a call from R[...]. It was put to her that 14<sup>th</sup> August was a Saturday and she indicated that she must have made a mistake. She denied that when she went during the week, she was informed

that the matter was under investigation. She indicated that the meeting that was held during August 2016, was not a SGB meeting, because she is the one who initiated the meeting. When it was put to her that Ms. Phiri is the one who called the meeting, she insisted that she initiated the meeting. She testified that she does not remember Mathapelo forming part of the meeting and also that Mathapelo was not part of the people who went to inspect the pit toilets. She is the one that asked how R[...] can be assisted and not any other person. She was of the view that they wanted to misdirect them as she knew flushable toilets.

[25] Victoria stated that during August 2016 there were no tyres, slabs, pipes and a gate. On the slab between the tyres and the wall there were holes, the ventilation pipes were short and around the area there was soil. She admitted that the toilet's main structure was there during 2016, when the alleged incident took place. She was then shown the foundation of the pit toilets, with specific reference to a particular brick. It was put to her that the slab at the back of the pit toilet, had actually always been there and was part of the initial structure of the pit toilets. Her response was that she sees the brick but does not see its importance. It is important because it clearly shows that the foundation of these pit toilets extends to underneath the slab at the back. This is undoubtedly an indication that it was erected simultaneously. She insisted that Ms. Phiri was not there when they went to inspect the pit toilets as she refused to go with them. When it was however put to her that the plaintiff's testimony was that all the people who attended the meeting went to inspect the toilets, she could not provide an explanation for such contradiction.

[26] Victoria testified that there were about seven (7) people that attended the meeting of which she knows five (5), being herself, R [...], Rathapedi, Ms. Phiri and Ms. Mathibe. She emphasized that she was the one that initiated that they go and view the pit toilets. She further emphasized that she does not know of any investigations because if there is any incident at the school, the principal Ms. Phiri would have informed her of such. Victoria supposedly spoke to Ms. Mathibe who made a promise that these pit toilets will be fixed. The plaintiff denied that she was friends with Victoria and testified that she only

knew her as one of her neighbours. She concealed the fact that they grew up together, as it was mentioned by Victoria during examination in chief. Although Victoria mentioned that the alleged incident that happened at the school regarding O[...] was reported to her as the councillor, she failed to mention the person who reported the incident to her. One would have expected the plaintiff to call such a person as a witness.

[27] Victoria and the plaintiff tried to create the impression that Ms. Phiri had an attitude towards them and failed to handle this complaint with diligence. There are however contradictions in their testimonies of the fact that Ms. Phiri was one of the people who went to inspect the pit toilets during the SGB meeting. The allegation was that she refused the plaintiff the opportunity to go and inspect the pit toilets and that it was Victoria who initiated the SGB meeting.

[28] Master **Allanah Mongale**, (Allanah) who was a learner at the said primary school, testified. His evidence was to the effect that he is eleven (11) years old. He was in Grade 4 at T[...] school and repeating it. He does not remember when he met O[...]. He was in the same class as O[...] and sitting at the same desk. On 03<sup>rd</sup> May 2016, O[...] requested Ms Mokotedi to go to the toilet and he did not come back after some minutes. He then decided to go and look for him at the pit toilets.

[29] He heard O[...] screaming in the pit toilet. He testified that he found O[...] inside the pit toilet. He then called out for Mr. Pilane to come and help. Mr Pilane came, took out a rope from the toilet and removed O[...]. However, because Mr. Pilane chased him away, he did not see when O[...] was removed. He was hurt when he heard O[...] screaming, as O[...] is his friend. He called Mr. Pilane because he works at the toilet area. He testified that there are three (3) toiletblocks in the school yard, being, two flushable and one pit toilets. The pit toilets were different when he was in Grade R from the way they look today. At the back of the toilets there were no ventilation pipes, the tyres and the concrete slabs that appear were not there and it was just soil at the back of the pit toilets.

[30] During cross examination, Allanah indicated that he does not remember how old he was in 2016. He mentioned that M[...] M[...] is his brother. He testified that O[...]’s clothes were washed by Granny N[...]. He also mentioned that on 04<sup>th</sup> May 2016, Ms. Mathibe requested that they go to assembly and they were instructed not to talk about the incident. O[...] requested to go to the toilet before the school were out. He maintained that O[...] went to the toilet alone, and that they do not get accompanied when they go to the toilet. He testified that after he followed O[...] to the toilet, he found him screaming inside the toilet. Allanah denied that the pit toilets were locked, as school children used these pit toilets even when there was water. He insisted that Mr. Pilane chased him away before taking O[...] out of the pit toilet. Although he indicated that he did not see O[...] in the toilet, he at the same time mentioned that O[...] did not fall deep inside the toilet, as he held onto the iron rods. How he was able to see this is inexplicable. He saw the rope that was used to remove O[...], as he was not yet chased away when Mr. Pilane went to fetch the rope. He testified that the pit toilets at the time of the incident were not the way they are now. Ms. Mokotedi never bothered to go look for O[...]. He insisted that Mr. Pilane did remove O[...] from the pit toilets.

[31] The testimony of this witness needs to be analyzed with caution. He is a child witness. Allanah did not explain from whom he requested permission to go to the toilet to check on O[...]. His version is improbable that O[...] held onto iron rods and the rope at the same time and be pulled out. It was not clear how he could let go of the iron rods and cooperate with Mr. Pilane. He also did not mention where the iron rods were situated. He seemed to have a vivid memory of what happened during May 2016, but strangely he could not remember his age. There is no testimony of what happened after he allegedly returned to class. Did he inform his class teacher about what he witnessed or not? This is the crucial piece of evidence that the plaintiff deliberately decided to leave out, so it was submitted. If indeed such an incident took place, one would expect that Allanah would have informed his class teacher, or the person he requested permission from to go to the toilet, about what he witnessed at the pit toilets.



- [32] Master **M[...]** **M[...]** testified. He attends M[...] Secondary school doing Grade 10. For primary schooling, he attended T[...] Primary school. In May 2016, he was in Grade 4 and does not remember his class teacher by then. On 03<sup>rd</sup> May 2016, he was in class. He took his friend's pencil case and went back to his desk. He threw the pencil case back, looked through the window and saw a sport short and a shirt that hanged on the fence. The moment he saw the clothes he thought that maybe a child soiled him/herself. On 04<sup>th</sup> May 2016, on a Wednesday, one of the educators, Ms. Mathibe, called the learners to assembly. She said that everything that happens in the school premises, should remain within the school premises. He testified that assembly were usually on Mondays and Fridays only.
- [33] Mduduzi testified that the pit toilets were different during 2016 from what they appear in the pictures shown to him. Behind the pit toilets there was sand and small stones instead of the concrete slabs, as per the pictures shown to him. Some of the changes he noticed was that the ventilation pipes that are behind the pit toilets were short and a bit thin and attached to the wall, and there was no gate that separate the pit toilets from the other block of toilets. He testified that from the outside, it smelled like feases. These changes were brought about by Mr. Steenkamp in 2019. This is because he saw "Hope Hollard" personnel making changes. The workers were wearing blue shirts printed "Hope Hollard".
- [34] During cross-examination, Mduduzi did not remember what happened on 05<sup>th</sup> and 06<sup>th</sup> May 2016, which were the dates picked randomly to test the veracity of his testimony. He was however vividly able to remember what happened on 03<sup>rd</sup> and 04<sup>th</sup> May 2016. He maintained that Ms. Mathibe said that what happens in the school should stay in the school, but did not know what she was talking about. He only realised at a later stage what she was talking about. He indicated that they were bribed that if they keep quiet about O[...]’s issue they will pass. He could not explain why he did not volunteer this crucial piece of evidence during examination in chief, except to say that he was worried about the court's time. He could not tell whose clothes he saw being hanged on the fence. Although he admitted that assemblies were held only on Mondays and Fridays,

he insisted that Ms. Mathibe called this assembly on a Wednesday, to address the learners.

[35] It is strange that from the entire school only two brothers Allanah and Mduduzi are called to come and testify. A striking improbable version of the two of them is that Ms. Mathibe who had nothing to do with this alleged incident, called the assembly to address the learners. If indeed this special assembly was called, one would expect either the class teacher or the principal to call the assembly.

[36] In contrast to the evidence presented for and on behalf of the plaintiff, the defendant presented the evidence of **Ms. Motlatsi Phiri**, who was the school principal during the period; **Ms. Josephine Mokotedi**, the then class teacher of the child O[...]; **Mrs. Tumisang Monametsi**, who was a cleaner at the school; **Ms. Taukobona** who was a teacher before; **Merris. Andrew Pilane** and **Godfrey Kgosi**, the respective gardener and caretaker of the said school during the time of the alleged incident; and **Mr. Steenkamp**, the current school principal. An *exposé* of their evidence are as follows.

[37] **Ms. Phiri** testified that she was employed at T[...] Primary school as a teacher since 1995. She became the principal of the school in 2007. She knows O[...] as he was a registered learner at the school. O[...] did not start the school calendar with other learners. He only came ten (10) days later. She knows the plaintiff R[...] as the mother to O[...], but not on a personal basis. When R[...] came to enroll O[...], she also came to her office and instructed her that O[...] must always wear a jersey, even when it is hot and never take it off. O[...]’s class teacher at that time was Ms. Taukobong.

[38] Her second encounter with R[...] was on 04<sup>th</sup> May 2016. When she saw her, she initially thought that she came as she had been called the previous day, on 03<sup>rd</sup> May 2016. R[...] when called, indicated that she was busy and cannot just summon her randomly. The reason for such call was to explain the challenges they had with O[...], since they had a meeting where they discussed challenges and interventions for some of the learners. She got reminded to call R[...] because of the report she received from the

class teacher after school, that O[...] had left the school premises. When R[...] came to Ms. Phiri's office on 04<sup>th</sup> May 2016, she said to Ms. Phiri that "*you are calling me but you fail to tell me that O[...] fell into the toilet.*" R[...] further stated that she had a witness Godfrey, that Mr. Pilane was the one who rescued O[...]. R[...] enquired about the call she received on 03<sup>rd</sup> May 2016 and Ms. Phiri informed her that the teachers had been trying to get hold of her and informed her that they needed the history of the child to accommodate his special needs. Also because Ms. Mokotedi noticed that O[...] was not at school.

[39] Ms. Phiri further testified that R[...] reported to her that O[...] was born fine, but later started to see some changes in him. She thought that there was a need for a traditional ritual from his father's side that had to be conducted for him. After their conversation, R[...] requested to go to the class to fetch O[...]. She allowed her to go fetch him as it was near school out time. Ms. Phiri never refused to allow R[...] to go and inspect the pit toilets and there was never such a request to go and view the pit toilets. The third encounter with R[...] was the following week, which happened outside in the school yard. It was knock-off time. R[...] was with Victoria. During this encounter, R[...] didn't say anything, and it was Victoria who informed her that O[...] fell into the pit toilet. She responded by saying that she spoke to R[...] and will revert after her investigations. After Ms. Phiri was told that the District office was involved, she told them that since R[...] had escalated the matter, they should contact the District office.

[40] Regarding the SGB meeting, Ms. Phiri testified that when the meeting happened, the plaintiff had already exhausted other avenues. She testified that she received a call from the Sub-district office that a meeting should be convened, so that she can be able to speak to the SGB. She arranged the meeting and an invitation letter was sent to R[...]. She denied that the SGB meeting was initiated by Victoria. At the said meeting, she was requested to explain what happened to O[...]. Victoria, who was also part of that meeting, requested that the pit toilets should be inspected and they all went to inspect the pit toilets. When inspecting the pit toilets, R[...] went straight to the ones painted brown and white and they followed her. The third block was locked and she requested

Granny N[...], who was one of the cleaners, to unlock them. They inspected all the blocks of toilets.

- [41] Ms. Phiri confirmed that all the toilets were inspected, and not only the pit toilets. She confirmed that Ms. Mathibe was not part of the meeting, because she was not part of the teachers' representative management and of the SGB. She confirmed that the tyres were not there during 2016 but that the slabs behind the main structure were there, as they form part of the main structure of the pit toilets. The pit toilets were built between 2002 and 2003 by the department, and they were handed over to the school after their completion.
- [42] Ms. Phiri confirmed that the toilet bowls had always been there in the same form as depicted in the picture, and was never built with bricks and cement. After the inspection of the toilets, Rathapedi who was also one of the attendees of the SGB meeting, asked if it was possible for the child to fall into the toilet bowl. Victoria said yes, but the only way that could happen was if the child climbed onto the toilet seat or be pushed into the toilet. This matter was deliberated further and it was concluded that it was impossible for the child to fall into the pit toilet. This conclusion was reached in the presence of R[...].
- [43] Ms. Phiri further testified that Grade R learners are always accompanied by their teacher every time they go to the toilets. In May 2016, there were two teachers in Grade R being Rantho (assistant teacher) and Mokotedi (class teacher). She also knows Mduduzi and Allanah Mongale as they were also registered learners at the school. She confirmed that assembly is held on Mondays and Fridays. She testified that a teacher cannot call an assembly on their own accord without her permission, and denied that Ms. Mathibe called a special assembly. She testified that the pit toilets were always locked except when there was no water. The cleaners would inform her if there was no water. On the day of the alleged incident, there was water and the pit toilets were locked. She confirmed that a criminal charge of child neglect was opened against her and one of assault was opened against Mr. Pilane by the plaintiff, but she does not know what ultimately happened with these cases.

- [44] During cross-examination Ms. Phiri confirmed that on 04<sup>th</sup> May 2016, R[...] came to see her. She indicated that she did not call her to screen O[...], but inform her of the outcome of their meeting on the same day regarding some of the learners. She testified that R[...] did provide a clinic card as it was needed for registration, even though it did not inform them of the condition the class teachers observed in the classroom. They therefore needed specific documents so that they can arrange special needs. Ms. Phiri indicated that they needed further information as to whether R[...] does experience the same behavior with O[...] or not. She denied that she ever said to R[...] that what happened on 04<sup>th</sup> May 2016 has passed. She also denied that she refused to take R[...] to the pit toilets, as she only requested to go to the classroom and not to the pit toilets.
- [45] When the matter was taken to the District office, she had already started with her own investigations. She spoke to Mr. Pilane during her investigations. Ms. Phiri testified that she submitted all the documents that were requested from her to the District office. She testified that she never consulted O[...] about the incident, as she thought he was not on the school premises. She only became aware when R[...] asked for him. She indicated that she did not consult with Allanah, because she did not know that he was aware of the alleged incident. The first time she became aware that Allanah was aware of the alleged incident was during the course of this trial. She further confirmed that the investigations that she conducted, confirmed that O[...] did not fall into the pit toilet. She maintained that the pit toilet bowls are grey in color and not white, as it was suggested to her. She maintained that they have been there before 2016.
- [46] Ms. Phiri confirmed that there was a construction in 2019 by H.O.P.E and not HOPE HOLLARD as it was suggested to her. Such construction was to build a shelter for children to eat and not renovating the toilets. She disputed the description of the plaintiff's witnesses with regard to the state of the toilets during 2016, as compared to the pictures of the toilets taken in 2022. She however confirmed that what looks like bricks that surrounds the ventilation pipes on the 2022 pictures, do not appear on the photo that was taken in 2016. She maintained that the toilets were locked and they were

not used during that week and cannot comment on whether O[...]’s uniform was clean or not. She confirmed that assembly is only held on Mondays and Fridays. The purpose of the SGB August 2016 meeting, was to provide clarity about what allegedly happened to O[...]. At the time of the meeting, she had already spoken to Godfrey and Pilane in the course of her investigations, and the issue was at that point out of the hands of the school, since R[...] had escalated it. She could not speak to O[...] as R[...] informed her that she traumatizes O[...]. The last time O[...] attended school was when R[...] went to fetch him from school, a day after the alleged incident. From the evidence and cross examination of Ms. Phiri, it is evident that the changes that were allegedly brought about at the pit toilets, were not brought about by Ms. Phiri during her time as the principal.

[47] It was contended that although Ms. Phiri called R[...] on the day of the alleged incident, no negative inference could be inferred from it because Ms. Phiri did testify that on the same day, they had a meeting and the class teacher came to inform her about O[...] who had left the classroom and school premises. Therefore, so it was further contended, it could not have been strange that Ms. Phiri called R[...]. What is strange is the allegation by Allanah Mongale who failed to inform the class teacher on the same day about the incident that he allegedly witnessed at the toilets. Strangely, it lasted for years up until he came to testify before this Court, which was the first time Ms. Phiri found out that Allanah Mongale knew something about this alleged incident.

[48] **Ms. Josephine Mokotedi**, stated that she is employed at the school since 2016. She teaches Grade R since 2016. She confirmed that she was O[...]’s class teacher and that she also knows Allanah Mongale and R[...] as the mother to O[...]. The process of going to the toilets is that Grade R learners are accompanied to the toilets by all teachers including assistant teachers. The assistant teacher she had in 2016 was Ms. Rantho. Another routine is that early in the morning before school starts, the learners are taken to the toilets as a group and if a learner requests to go to the toilet when it is not routine time, such a learner will be accompanied. There are women stationed at the toilets being Tumi and Lorraine, who also keep an eye on the learners. With regard to O[...]’s behaviour, she testified that she noticed that O[...] was not able to sit for long and was

restless compared to other learners. He would just eat randomly and cry hysterically. After observing the behaviour, she called R[...] to discuss it with her. R[...] stated that she was busy and she never showed up.

[49] On 03<sup>rd</sup> May 2016 O[...] was fine all day. He suddenly peeped outside the window and said that his transport was outside. His transport was a mini bus and not the Quantum motor vehicle that he was pointing at. She was not aware that R[...] had changed O[...]’s transport, because R[...] did not inform her. A lady called Mapula came to fetch her children and it would seem that O[...] walked out with those learners. She realized just after a short while that he was not in class, and she immediately called R[...] and told her that O[...] was not in the classroom and said to her that he probably left with Mapula. R[...] told her that she would ask her mother and come back to her. After a short while, R[...] called and said O[...] was at home and he is safe. In the meantime, and whilst waiting, she went to Ms. Phiri to inform her that O[...] left and she suspected that he left with Mapula.

[50] Ms. Mokotedi disputed what Allanah said about O[...] going to the toilet alone and that Allanah followed him shortly. She testified that O[...] could not have gone alone to the toilets because one of the reasons to accompany them is to assist them to undress and dress themselves. Ms. Mokotedi confirmed that when she arrived at the school the pit toilets were there. The only difference is that the tyres that are at the back of the pit toilets were not initially there. She also confirmed that the toilet bowl is grey and the difference is that it has no lid, but they have always been like that.

[51] During cross-examination, Ms. Mokotedi confirmed that she was a class teacher in May 2016 and O[...] never sustained any injury and never fell. She mentioned that the school out time for Grade R learners is 12h00. She called R[...] a few minutes after O[...] left, and although she does not know the exact time of her call, she disputed that she called at 13h27. She reiterated that she informed Ms. Phiri that O[...] left with Mapula. She also said that she knew that Ms Phiri had always wanted to discuss some matters with R[...].

[52] She denied that the first call that R[...] received from the school was on 03<sup>rd</sup> May 2016. She also denied that anything bad happened to O[...] at school and that is not the reason why she called R[...]. She denied that O[...] fell into a pit toilet. She disputed that O[...] had bruises and that Granny N[...] washed his clothes. She maintained that O[...] was well on 4<sup>th</sup> May 2016 when he came to school and was not in pain. R[...] later walked in and told her to keep quiet, as she is not there for her. She took O[...] and left. She confirmed that she was not part of the SGB meeting that took place during August 2016.

[53] She found out about the alleged incident from R[...] and the principal Mrs. Phiri. She does not remember who was O[...]’s deskmate. She confirmed that no child goes to the toilet alone. She maintained that the women stationed at the toilets are not there because the toilets are not safe, but because they clean the toilets and give toilet paper to learners. She testified that the toilet bowl depicted there is not large and that the back of the pit toilets was the same as in 2016. She confirmed that she did not call Mapula. She confirmed that assembly is held on Mondays and Fridays only. All the teachers would have been informed if there was a special assembly.

[54] Ms. Mokededi’s testimony confirmed the strange conduct of R[...] by deciding to allow O[...] to go to school, despite the fact that he allegedly fell into the pit toilet and sustained the injuries as explained by her during her evidence. On the same day, O[...] remained at school until just few minutes before school out time. It does not make sense that a child who was traumatized as a result of the incident and injured, to be taken to the same environment the very next day. According to Ms. Mokededi’s evidence, there is no way in which O[...] could have used the pit toilets, when they were locked. If the pit toilets were unlocked and O[...] went to these toilets alone, he could have been seen by one of the ladies who were stationed at the toilets.

[55] **Ms. Monamentsi** testified. She is employed at the school as a cleaner. During 2016 she was cleaning both toilets and administrative offices. She was alternating weekly with Granny N[...]. During the week of the incident, the pit toilets were locked as there was



water in the flushable toilets. If there is no water, she reports to the principal and if it is her week she would sit outside the block of toilets. Asked about the difference between the state of the pit toilets in 2016 and as they appear now, she testified that during May 2016, there were no tyres, jungle gym, fence and the gate but as for the rest, nothing had changed.

[56] Under cross examination she testified that the toilets are spread over the school yard and one cannot possibly know what happens in the whole school yard. She testified that she was working in the administrative block on the week of the alleged incident, and that Granny N[...] would have reported if there was no water. She confirmed that she found the toilets the way they are currently and it was only the tyres that were fitted after 2016.

[57] **Mr. Andrew Pilane**, the gardener's evidence is to the following effect. He denied that he was on duty on the day of the alleged incident. He only worked two days per week. On the day of the alleged incident, he was not at work and he consequently denied that he took O[...] out of the pit toilet with a rope as testified to by Master Allanah Mongale. According to him, Godfrey came to call him saying R[...] wanted to see him.

[58] **Mr. Steenkamp** the current principal, testified. He was appointed at the school in 2019 as the Deputy principal and in 2022 as principal. H.O.P.E stands for Helping Other People Especially in South Africa, and is an organization from Holland. H.O.P.E assisted the school in 2019 with a feeding scheme and shifting of jungle gym, paving, benches and netball poles.

[59] The jungle gym was moved from the classes to near the toilets. He testified that he also decided to install tyres at the back of the toilets. He barricaded the whole area by putting up the fence and a gate. In 2019 when he joined the school, the toilets were there and in the same state as they appear on the pictures, except the tyres and the jungle gym and the barricade fence. He remembers very well about the pit toilets because of his background, he was not used to such kind of toilets. That was one of the things that caught his attention. The toilet pots in the pit toilets were always like that.

[60] There was much debate about the pit toilets structure. Counsel for both parties emphasized the need for an *inspection-in-loco*, which was held **before** the commencement of the trial. A joint minute was compiled, comprising of the following common cause facts and I quote:

- *The plaintiff's representatives recorded their intention to point out the following points at the School:*
  - *The pit toilets, including the area in which the plaintiff's son is alleged to have fallen;*
  - *The flush toilets for foundation phase learners; and  
The flush toilets for learners in the intermediate phase.*
- *The parties are in agreement that the toilets referred to in paragraphs 93.1.1 and 93.1.3 above were available for use at the time of the incident that gave rise to the plaintiff's claim.*
- *The parties are also in agreement that there are no toilets at the School in addition to those listed in paragraph 3 above.*
- *Photographs were taken by Ms Lizanne van Huyssteen of the plaintiff's attorneys of record. The parties agree that these photographs are an accurate depiction of what was observed during the inspection in loco.*

### **Observations**

#### **The pit toilets:**

*There are two blocks of pit toilets: one block for girls and one block for boys;*

*The attached photograph marked "A1" depicts the front of one block of pit toilets;*

*The attached photograph marked "A2" depicts the back of one block of pit toilets;*

*The two blocks of toilets are identical;*

*Each block of pit toilets has 7 (seven) toilets;*

*The toilets are dark grey in colour. This is illustrated in the attached photograph marked "A3";*

*The toilet holes are oval in shape, and measure 33 cm x 27 cm;*

*Behind each pit toilet block (as illustrated in the attached photographs marked "A4" and "A5"), there appear:*

- *Five concrete slabs, each measuring one pace in length;*
- *One long concrete slab, situated under the five concrete slabs referred to in paragraph 7.8.1 above and spanning the length of the toilet block;*
- *Four ventilation pipes; and*
- *Nine tyres, partially buried.*

**Flush toilets for foundation phase learners:**

*There are two blocks of flush toilets for foundation phase learners: one block for boys and one block for girls. This is illustrated in the attached photograph marked "B1";*

*The toilets are white in colour;*

*There is a visible exterior cistern and piping present in respect of each toilet. This is illustrated in the attached photograph marked "B2".*

**Flush toilets for intermediate phase learners:**

*There is one block of flush toilets for intermediate phase learners, with one side being reserved for boys and the other side being reserved for girls.*

*This is illustrated in the attached photograph marked "C1";*

*There are 8 (eight) girls' toilets and 7 (seven) boys' toilets;*

*There are also urinals available for use by boys;*

*The toilets are white in colour, as is illustrated in the attached photograph marked "C2";*

*Each toilet is situated on a raised platform;*

*There is visible exterior cistern and piping present in respect of each toilet.*

*This is illustrated in the attached photograph marked "C3".*

[61] It was submitted on behalf of the plaintiff, that the right to basic education necessarily includes safe and adequate school infrastructure, including sanitation, and to provide a conducive learning environment. This must be true and correct.

See: • **Equal Education and Another v Minister of Basic Education and others** 2019 (1) SA 421 (ECB).

• **Komape and Others v Minister of Basic Education and Others** (1416/2015) [2018] ZALMPPHC

• **Komape and Others v Minister of Basic Education and Others** 2020 (2) SA 37 SCA

That there still is inequality in the schooling system in South Africa after twenty-seven (27) years since the dawn of democracy is still a sad reality.

See: • **Head of Department: Mphumalanga Department of Education v Hoërskool Ermelo** 2010 (2) SA 415 (CC).

So too, is it still a sad reality that pit toilets in schools impact on the right to dignity and children's rights. However, each case must be decided on its own merits.

[62] It is quite apparent that the inside of the toilet pot or bucket in the pit toilets is more or less the same size of a standard toilet pot. This I observed during the inspection-in-loco. The building hosting the pit toilets are built with bricks and mortar with a cement floor, with no opening next to the toilet pot. This is unlike the self-made outside pit toilet comprising of corrugated iron sheets and a wooden floor and wooden elevated seat, which deteriorate with the passage of time and change into a dilapidated structure, causing a health hazard and risk, especially to young children.

- [63] On the back out the building on the outside, the holes are covered with a concrete slab and concrete lids which are very heavy. Too heavy for a child to lift up. **The pit itself is totally covered. This eliminate the possibility that the child O[...] (or any other child), could have fallen into the hole of the pit toilet on the outside of the toilet building block or on the inside of the toilet, because on the inside it is totally closed by a cement floor.**
- [64] The toilet pot itself is too small for a child aged five (5) to six (6) years and of average built to fall into. Even if it was at all possible, the down pipe of the said toilet pot is too narrow for the child to fall into the pit. The down pipe is the only way into the pit itself that is exposed. **This totally do away with the possibility that the child O[...] could have fallen into the pit toilet.** That being the case the only reasonable and plausible inference to be drawn or explanation that remains, which coincide with the evidence tendered, is that the child, O[...], most probably soiled himself. That explain why his clothes were cleaned or washed, if it was indeed the case. Sight should not be lost of the fact that the grandmother of O[...], who allegedly informed and made a report to R[...], was not called as a witness to testify in the plaintiff's case. It would have been prudent to call her. To reiterate, no reason was advanced why she was not called as a witness to testify in the plaintiff's case.
- [65] Nor Ms. R[...] the plaintiff, neither Ms. Makhahula the councillor, was at school to witness the incident. The class teacher Ms. Mokotedi, the former principal Ms. Phiri, Mr. Pilane the gardener and Mr. Godfrey Kgosi the caretaker all deny that an incident, as alleged by the plaintiff, occurred. Against their evidence stands the evidence of Masters Allanah and M[...] M[...], who are child witnesses. As alluded to earlier, Allanah allegedly saw that O[...] fell into the hole of the pit toilet and that Mr. Pilane pulled him out using a rope. This is denied by Mr. Pilane, who even denied that he has a rope or work with a rope and therefore, the evidence of Master Allanah Mongale is rejected. The evidence of Mr. Pilane is accepted. He was not at work on the day of the alleged incident.

[66] The onus is on the plaintiff to prove her case on a balance of probabilities. This, the plaintiff failed to do. Having regard to the probabilities, it is highly unlikely and totally improbable that O[...] could have fallen into the pit toilet. There was also reference made to a report from the Department of Education which launched an investigation into the alleged incident. This Court is however not bound by the results or conclusions of that report. Suffice to state that according to the evidence of Ms. Phiri, even in terms of the report submitted not too long after the date of the alleged incident, it too found it far-fetched that O[...] could possibly have fallen into the pit toilet. The minor alterations with regard to the extension of the ventilation pipes, the additional concrete blocks that are made around the ventilation pipes, the tyres, the jungle –gym, ect. is not of much significance and does not take the case for the plaintiff any further. The crux of the matter still remain that it is highly improbable that O[...], could have fallen into the said pit toilet. There was not a shred of any credible evidence presented, that there was negligence on the part of the defendant.

[67] Special emphasis was placed by counsel acting on behalf of the plaintiff Adv. Steyn, there was an admission made by the defendant in the pre-trial minute that O[...] fell and sustained injuries on the day of the incident. The inference to be drawn, so it was submitted, was that O[...] fell into the pit toilet and therefore he sustained the injuries, as admitted. Despite admitting that O[...] fell and sustained injuries on the day of the incident, it was never admitted that he fell **into the pit toilet** and sustained the injuries. Even if it were to be accepted that O[...] did fall on the day of the incident, it was not proven on a balance of probabilities that he fell into the pit toilet. The overwhelming evidence presented on behalf of the defendant pointed out above, proves the contrary to be more probable. The inevitable conclusion reached by this Court is that the plaintiffs' case should be dismissed.

[68] Insofar as costs are concerned, it normally follows the result and be awarded in favour of the successful litigant, in this instance the defendant. There is no plausible reason to direct differently. This Court had regard to the now well-known Biowatch-principle as enunciated in the case of **Biowatch Trust v Registrar Genetic Resources and Others**

2009 (6) SA 232 (CC), and finds that it does not find application in this matter. The plaintiff should pay the costs of suit.

**Order**

[69] Resultantly, the following order is made:

- (i) **The plaintiff's claim with regard to liability (merits) is dismissed.**
  
- (ii) **The plaintiff is ordered to pay the defendant's costs of suit on a party-and-party basis, to be taxed.**

**R D HENDRICKS  
JUDGE PRESIDENT OF THE HIGH COURT,  
NORTH WEST DIVISION, MAHIKENG**