IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

Appeal Case No A758/06
Delivered: 07/02/2008

UNREPORTABLE

In the matter between

**MEMBER OF THE EXECUTIVE COUNCIL OF GAUTENG RESPONSIBLE FOR EDUCATION** **Appellant**
(Defendant a *quo)*

And

**CARI PIERRE RABIE** **Respondent**
(Plaintiff a *quo)*

**SUMMARY:** Negligence - action by parent for damages for injury to a child on school premises - duty owed by school to keep learners under supervision to prevent injury caused by playing dangerous games - school held to have been in negligent breach of the duty on the facts - contributory negligence on the part of the father and child not proved.

**CORAM: Jones, Leeuw and Lacock JJ**

**JUDGMENT**

**JONES J:**

[1] In 2003 C R, a minor child, was a grade 8 learner at Waterkloof High School in Pretoria. During the course of the morning of 31 July 2003 he participated in a game being played in the school grounds during and shortly after morning break. The game entailed a child getting on to a cricket net which had been pulled tight by other children, and then being tossed up into

the air and afterwards being caught in the net when he came to land. C was tossed into the air. But he was not caught in the net when he came to land. He fell to the ground and sustained serious head injuries.

[2] The result was that C's father, the plaintiff a *quo,* claimed delictual damages from the school authority. He claimed for medical and hospital expenses incurred in his personal capacity by reason of C's injuries, and, in his capacity as C's father and natural guardian, he also claimed for loss suffered by C for future medical expenses, future loss of earnings, and general damages.

[3] The trial came before Combrinck J on 2 May 2006. At its commencement he made an order by consent that the issue of the quantum of damages be separated from the issue of liability in terms of rule 33(4). On 15 May 2006 he gave judgment in favour of the plaintiff, and made a declaratory order that the defendant was liable in respect of the plaintiff's claim in his personal capacity and his representative capacity. This order was based on three findings of fact –

(a) that the staff of the school were negligent in the respects alleged by the plaintiff in his particulars of claim, and that their negligence was causally connected to the damage which the plaintiff alleged that he had suffered;

(b) that, in raspect of contributory negligence, there was no evidence in support of the defendant's contention that there was negligence on the part of

the plaintiff; and
(c) that the defendant had also failed to prove that there was any contributory negligence on C's part.

These findings are now before us on appeal. For convenience, I shall refer to the appellant - the Member of the Executive Council of Gauteng responsible for education - either as the defendant or 'the school', and to the respondent on appeal as the plaintiff.

[4] It was common cause at the trial that the defendant was vicariously liable for any wrongful conduct of the school employees which gave rise to the damage. The cause of action alleged in the particulars of plaintiff's claim was primarily directed at the school's duty to keep learners under supervision. It began with an allegation that the employee responsible for professional management of the school was able to arrange effective control and supervision of learners on the grounds of the school during breaks and at other times when they were not in class, and that the school's employees generally were responsible for the control and supervision of learners whilst they attended school and participated in school activities. These allegations were admitted. So was an allegation that" it was foreseeable that learners could be injured in unsupervised activities, and that the plaintiff and C would suffer damages in the event of C being injured. The plea also admitted that the employees of the school owed the plaintiff and C a legal duty

- to provide control and supervision of learners that would create

and maintain a safe environment;

- to exercise control and supervision without negligence; and
- to take reasonable precautions to prevent physical harm being sustained by C whilst attending the school.

This admission was subject to two further allegations:- (a) that both the plaintiff and C had a duty to prevent C - from engaging in dangerous activities that may cause harm, and (b) that the defendants duty to the plaintiff and C was to prevent C from engaging in foreseeable dangerous activities that would cause foreseeable harm.

[5] The particulars of claim then described the events of 31 July 2003. The allegation was that during break on that date and on the school premises, grade 11 learners commenced with and participated in a dangerous activity which entailed individual learners being thrown high into the air by means of a - cricket net. During the course of this activity C was thrown high into the air and fell to the ground sustaining serious injuries. Paragraph 7 alleged that C was injured due to the negligent breach of the legal duty previously referred to above, committed by the school's employees, who were allegedly negligent in the following respects:

7.1 The employee or employees responsible for the control and supervision of learners during school breaks failed to ensure that there was sufficient control and supervision on 31 July 2003;

7.2 The employees responsible for control and supervision of learners on 31 July 2003 failed to exercise such control and supervision, alternatively failed to effectively exercise such control and supervision, when in the circumstances they could and should have done so;

7.3 The employees responsible for control and supervision of learners during breaks on 31 July 2003 failed to properly perform their functions, alternatively failed to ensure that learners returned to their classrooms after break when, in the circumstances, they could and should have done so;

7.4 The employee responsible for the control of out of bound areas failed to prevent the aforesaid dangerous activity in an out of bound area on 31 July 2003 when, in the circumstances. he/she could and should have done so;

7.5 The employees responsible for control and supervision of -learners failed to take reasonable precautions to prevent injury to learners, alternatively failed to ensure that such precautions were adhered to when, in the circumstances they could and should have done so;

7.6 The employees responsible for control and supervision Of learners failed to prevent the aforesaid dangerous activity taking place when, in the circumstances, they could and should have done so.

[6] The plea does not deny the occurrence of the dangerous activity which gave rise to C becoming injured, but alleged that it took place after break when the learners were expected to have been in their class rooms, and that it took place at a place where learners were forbidden access unless under the supervision of a sport's coach. The plea alleges that C and the other learners who participated in the dangerous activity knew that they should not have done so in terms of the school's rules and regulations, and that their participation in the dangerous activity could cause them harm. The grounds of negligence are denied, and the defendant pleaded further to them in the following terms:

9.2 Employees of the defendant are deployed around the school perimeter every school break- to ensure that the learners adhere to the school rules and regulations;

9.3 Some of the school rules and regulations are that

9.3.1 They must ensure that learners like C do not access the area behind the cricket screen next to the cricket clubhouse;

9.3.2 That they do not engage in dangerous activities;

9.4 The said perimeter control educators and or any other educator observed nothing during that period that ought to or could have alerted them that C, after the break, could engage in an activity that might cause him harm.

[7] The facts pleaded in paragraph 9 of the plea were common cause. These facts and the facts admitted by the defendant in the pleadings confine the issues considerably. There is not much in dispute. Indeed, it seems to me that there were hardly any factual issues in the evidence which required resolution. In this context, I should mention that during the course of arguing the appeal Mr *Khoza* for the defendant suggested that C gave unreliable and, indeed, false or unacceptable evidence by suggesting that he was not aware of the school rules relating to areas being out of bounds and participating in dangerous activities, and that he was forced by older boys to join in the game. These are not, to my mind, valid or material criticisms. C had been at the school only for a few months. In line with most of the children who testified, he professed a measure of ignorance about the school rules and out of bounds

areas (which. are not defined in the school rules). There is no good reason for concluding that their evidence on the point was false. Further, the tenor of C's evidence, viewed properly in context, was not that he was forced to do anything. It was that he joined in the game although he did not want to because he found it dlfficul1 to say no to the older boys. In other words, he voluntarily-gave in to-group or peer pressure. To me, this is completely understandable, and not a sound basis for criticism. As I read the record, the credibility of his evidence was not attacked in cross-examination. It was not suggested to him that he was being untruthful. Combrinck J made no adverse credibility finding against him. In the circumstances, it is not fair or proper to make such a finding for the first time on appeal.

[8] The pleadings admitted that it was foreseeable that learners could be injured in the course of unsupervised activities, and the consequent legal duty on the school to control and supervise the children was also admitted. The issue before Combrinck J was whether or not staff members of the school were in negligent breach of that duty. It is not an easy task to exercise proper supervision over learners at a large school. In 2003 there were some 2200 learners at this school and 1 13 members of academic staff available for supervision duty. In order for effective supervision before commencement of school in the morning, during breaks. and when learners leave their class rooms at the end of the school day, a system was devised for placing members of staff at strategic positions 'throughout the school. A roster was

prepared for the entire year which indicated the member of staff who was to be on duty at each designated position or area, as shown on a plan of the school grounds, for each week of the school year. Certain areas in the school were declared to be out of bounds. These included parts of three rugby fields at the northern end of the school. Learners were not permitted beyond the halfway line of the rugby fields because the areas beyond the halfway line were far removed from the rest of the school and it was more difficult to exercise proper supervision there. The outot bounds area included the cricket nets, the cricket pavilion, and the cricket sight screen. It was common cause that the dangerous game with the cricket net took place behind the sight screen. It was part of the duty of the member of staff positioned in that area to ensure that the learners did not go out of bounds, and to see to it that they returned to their classrooms at the end of break. As I understand the way in which the trial was conducted, the plaintiff accepted that this system was an efficient and effective method of exercising supervision during normal school activities.

[9] 31 July 2003 was not a normal school day. It had been set aside for taking photographs of sports teams and learners involved in cultural activities. There were no lessons that day. The learners were confined to their class rooms under the supervision of their class teachers except when called out for a photograph. The names of the team would be announced on the intercom, and the members would leave their class room, proceed to the hall for the

photograph, and were thereafter to return to their class room. But that is not how things always happened. Some learners took the opportunity to wander round the school unsupervised, visiting other class rooms before going back to their own class room. Normal discipline was relaxed, and normal supervision was not always kept.

[10] Some of the grade 8 learners had' permission to attend a special cricket practice at the nets, which had been arranged for between 09h00 and about 10h30. There .were some 20 or more children in the group. C was among them. After the cricket practice they did not immediately return to their class rooms. They carried on playing cricket. Some grade 11 learners - 20 to 25 of them - apparently saw the cricket from their class room window, and got permission from their class teacher to join in. At that time, which was shortly before, during and just after morning break there were some 40 to 50 children playing cricket in the nets, or standing and moving around in that vicinity. The evidence of the children who testified at the trial is that they did not return to their class rooms at the end of break. That was also the case pleaded by the defendant.

[11] Some of the grade 11 boys found an unused cricket net in the vicinity of the nets or the pavilion. They decided to put it to a use for which it was not intended - they pulled it taught, tossed a child from it high into the air, and then caught him in the tightened net when he came down. The grade 11 boys

were too heavy to go as high as they wanted. They decided to bring in the smaller grade 8 youngsters to see how high they could be thrown. After a few of his friends had had a turn, C was called up. He was nervous and hesitant, but he climbed on to the net. As he was thrown up he held on to the net with his left hand and was thrown side ways from the net. He fell to the ground, suffering serious head injuries. This happened after break, when the children should have been back in their Class rooms.

[12] The starting point for Combrinck J in the enquiry whether, in these circumstances, the plaintiff had discharged the onus of proving a breach of the school's legal duty of supervision was the classic statement of principle in *Kruger* v *Coetzee* 1966 (2) SA 428 (A) at 430E which reads:

> 'For the purposes of liability *culpa* arises if –
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> (a) a *diligens paterfamilias* in the position of the defendant –
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> (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
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> (ij) would take reasonable steps to guard against such occurrence; and
>
> (b) the defendant failed to take such steps'.

In respect of the first part of the rule - the duty of the *diligens paterfamilias* in the position of the defendant to foresee and take precautions against the reasonable possibility of injury - Combrinck J held that the school foresaw that

during school hours the children could take part in dangerous activities in the school grounds, which would include a dangerous game like the game with the cricket net, and that such games or activities could take place at more remote areas in the school grounds where supervision was more difficult. For this reason the school decided on the preventive step of introducing a roster system of supervision by staff at designated places throughout the school grounds, and creating areas which were out of bounds. In my view, these findings follow inexorably from the admissions in the pleadings and the undisputed facts which emerged from the evidence. There were, furthermore, concessions to that effect in the evidence of the assistant head master, Mr De Beer. The requirements of foreseeability and preventability set out in *Kruger* v *Coetzee* are met. Combrinck J then found that the evidence showed unquestionably that during and after morning break at least 40 to 50 children were out of bounds in the vicinity of the cricket nets, pavilion and sight screen, and that they were not being supervised. If there had been a member of staff at the designated position in that area, he or she could not have failed to have seen them. Either there was nobody at the designated position, or the staff member on duty there failed to do his or her duty. Mr De Beer testified that if a member of staff had seen the children in the area in question he or she should have removed them to an area that was not out of bounds, and that, in that event, the incident in which C was injured would not have taken place. In these circumstances the most probable inference is that paragraph (b) of the statement in *Kruger* v *Coetzee* is satisfied: the defendant failed to take the

requisite preventive steps. The school was therefore in negligent breach of its legal duty to the children in all of the respects set out in paragraph 5 above (paragraph 7 of the particulars of claim), and its negligence was causally related to the consequences which followed.

[13] I am not able to find fault with the learned trial judge's reasoning. However, Mr *Khoza* on behalf of the defendant attempted to do so. He argued. first, that the judgment incorrectly held that the particular dangerous activity which caused the damage was reasonably foreseeable, or alternatively and if it was, that the possibility of the activity taking place was so remote that the reasonable man would not have considered it necessary to take steps to prevent it. His argument rested on a well known proposition of Schreiner JA in *Herschel* v *Mrupe,* 1954 (3) SA 464 (A) at 477A-C which reads:

> But the circumstances may be such that a reasonable man would foresee the possibility of harm but would nevertheless consider that the slightness of the chance that the risk would turn into actual harm, correlated with the probable lack of seriousness if it did, would require no precautionary action on his part. Apart from the cost or difficulty of taking precautions, which may be a factor to be considered by the reasonable man, there are two variables, the seriousness of the harm and the chances of its happening. If the harm would probably be

> serious if it happened the reasonable man would guard against it unless the chances of its happening were very slight. If, on the other hand, the harm, if it happened, would probably be trivial the reasonable man might not guard against it even if the chances of its happening were fair or substantial. An extensive gradation from remote possibility to near certainty and from insignificant inconvenience to deadly harm can, by way of illustration, be envisaged in relation to uneven patches and excavations in or near ways used by other persons.

On the facts, however, this is not a case of only a slight risk of harm resulting or a probability that any possible harm which might result would be trivial. It cannot be suggested, in the light of the admissions in the pleadings, the concessions in the evidence and the facts found proved, that the dangerous activity was so bizarre an occurrence that the reasonable man would not have foreseen it and taken steps to prevent it. Here, the school acknowledged that it foresaw the reasonable possibility of the children engaging in a dangerous activity which might cause injury if they were not properly supervised, and it put in place a system to guard against that very possibility.

[14] There are a number of answers to Mr *Khoza's* submission that it was not foreseeable that *these* children would engage in *this* particular activity at *this* school, especially because it had never happened before. The submission ignores the facts of the case and makes nonsense of the basis of

the school deciding to set up an elaborate programme for supervising the children at all times throughout the year when they were not under the direct supervision of their teachers in the class room. Even at the pleading stage it was accepted that it was reasonably foreseeable that learners might be injured in the course of unsupervised activities, and that the plaintiff and C would suffer damage if C was injured as a result. The plea alleged that employees of the defendant were deployed around the school perimeter to ensure that learners adhered to the school rules, which included ensuring that the children did not gain access to the area behind the sight screen and that they did not engage in dangerous activities.

[15] A second answer is that Mr *Khoza's* submission is based on the untenable proposition, contrary to principle, that the *specific* game of throwing children into the air with a tightened cricket net, which had never been played before at the school, was not foreseen and not foreseeable. The foreseeability test does not require foresight of the exact manner of the occurrence or the precise form of the dangerous activity or game or event which gives rise to the damage, any more than it requires foresight of the specific damage which in fact eventuates. As Combrinck J correctly put it, what must be foreseeable is participation in a game which is dangerous and which could lead to damage. It is, I believe, well recognized as sufficient for culpabili1y that the general kind of event which caused the damaged, or the general kind of damage, is reasonably foreseeable, provided, of course, that it falls within the framework

of the particular legal duty to take care in the circumstances and subject to the rules of remoteness of damage *(Robinson* v *Roseman* 1964 (1) SA 710 (T) 715H; *Kruger* v *Van der Merwe* 1966 (2) SA 266 (A) 272F-G; *Minister van Polisie en Binnelandse Sake* v *Van Aswegen* 1974 (2) SA 101 (A) 107E-F; *Stratton* v *Spoornet* 1994 (1) SA 803 m 809 E-J; *Standard Chartered Bank of Canada* v *Nedperm Bank Ltd* 1994 (4) SA 747 (A) 768G[1]**;** ***Mukheiber* v *Raath* 1999 (3) SA 1065 (SCA) 1 077E - F;** ***Sea Harvest Corporation (Pty) Ltd* v *Duncan Dock Cold Storage (Pty) Ltd:* 2000 (1) SA 827 (SCA) 840A-H;** ***Minister of Defence* v *Mkhatshwa* 2000 (1) SA 1104 (SCA) 1111G-1112H; ([2000] 1 All SA 188) and the full bench judgment in (1997] 3 All SA 376 (W) at 386e-h, 383d, 388c-e). Mr *Khoza's* broad contention flies in the face of the principle laid down in these authorities.**

[16] Mr *Khoza's* next argument was that Combrinck J's judgment places an intolerable burden on a school by imposing on it the duty to keep all children under constant supervision at all times when they are on school premises or engaged in school activities. This might indeed be a telling criticism if it were so. But it is not so. Combrinck J's judgment does not require constant supervision at all times. On the contrary the judgment implies instead that the programme of supervision put in place by the school was a reasonable and effective method of supervising the children, and it finds that if the programme

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1 *Per* Corbett CJ: 'In delict, the reasonable foreseeability test does not require that the precise nature or the exact extent of the loss suffered or the precise manner of the harm occuring should have been reasol]sbly fOt:e$e_eable for liability to result. It is sufficient if the general nature of the harm suffered by the plaintiff and the generaLmanner of the harm occurring was reasonably foreseeable'.

had properly been in operation on the day in question, C would not have been injured. This is a far cry from the intolerable burden which Mr *Khoza* suggested. His reliance on various portions of the judgments in *Rusere* v *The Jesuit Fathers* 1970 (4) SA 537 (R) and *Minister of Education* v *Wynkwart NO* 2004 (3) SA 577 CC) is misplaced.

[17] Mr *Khoza* submitted that the judgment *is* based on material misdirections of fact in that it contains implications and assumptions which were ‘very fundamental and wrong', and factual findings which were not supported by the evidence. These misdirections were summarized in paragraphs 13.1, 2, 4 & 5 of his heads of argument as follows:

> 13.1 The restricted or prohibited area is a dangerous place for learners where the educators have to ensure by all means that no learner should be seen there without a teacher on guard at all times. The learners of this particular school required constant supervision once they step into the restricted areas;
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> 13.2 That the learners have a propensity or an irresistible urge, whilst in a restricted area if unsupervised, to partake in dangerous activities which may result in them being injured. That the teachers were aware of this likelihood;
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> 13.3 …
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> 13.4 The learners had no knowledge of the school rules preventing them from participating in dangerous activities. In particular, C was not aware of such. Such ignored that the parent had a duty to teach his children of the school rules and not to engage in

dangerous activities;

13.5 Despite that, in its history, the school, together with its learners, never experienced such a dangerous activity or incident, where a learner sustained serious injuries, the school authorities were aware or ought to have been aware of the likelihood of it happening and of one of the learners getting injured from such.

The terms of the judgment are clear and unambiguous. Nowhere does the judgment make incorrect factual findings as set out above. There is no indication anywhere in the judgment that it was founded on an implication or assumption on the strength of such facts. This argument by Mr *Khoza* is patently without substance.

[18] There were a number of other arguments. It was submitted that the dangerous activity took place behind the sight screen in an attempt by the learners to avoid being seen by staff members, and that the staff could not therefore have been negligent in failing to observe it. This flies in the face of the evidence - for example, evidence that 40 to 50 children were standing about in the general vicinity who could not have been missed by a member of staff on perimeter duty; evidence that some of the children were thrown into the air as high as the top of the sight screen and were hence visible; evidence of the photographs which make it clear that a teacher patrolling at his or her post could not have failed to see what was going on at the far end of the rugby field; and the clear implication from Mr De Beer's evidence that a teacher on duty would have seen and stopped what was going on. Another argument was based on the fact that the plaintiff signed the school rules, and

C acted in contravention thereof by taking part in a dangerous activity. But I am in agreement with Mr *Smalbergers* submission for the plaintiff that little, if anything, turns on the school rules. The school very properly did not seek to suggest, either in the conduct of its case or in argument before us, that its duty to provide and maintain a safe and properly supervised environment for the children comes to an end if a child should break the school rules. The plaintiff's signature to the school rules did no more than subject the child to school discipline if he should break them.

[19] The appeal against the first finding of fact - that the plaintiff failed to discharge the onus of proving causal negligence on the part of the school has no merit and must fail.

[20] The onus was on the school to prove contributory negligence by the plaintiff. The only ground of contributory negligence alleged in the plea was that the plaintiff failed as a parent to teach C not to participate in activities which could cause him injury. The defendant led no evidence to support this allegation. There was nothing in the other evidence to support it. It seems to me that this justifies Combrinck J's remark that nothing further need be said on the subject. However, during the course of giving evidence C stated that his father did not go through the school rules with him. Mr *Khoza* sought to use this statement as the basis for an argument for an apportionment, the suggestion being that the omission to teach C the school rules amounted to

contributory negligence. This was not pleaded as a ground of contributory negligence, it was not dealt with in the evidence as a ground of contributory negligence, and I have difficulty in seeing how a failure by the plaintiff to explain the school rules to C could be regarded as wrongful and negligent conduct on his part which contributed to the injuries sustained by C. There is, in my opinion, no merit whatever in this ground of appeal.

[21] There remains the issue of contributory negligence on the part of C. C was 13 years and 11 months old when he sustained his injury. He is presumed to have been *culpae incapax.* The onus was on the defendant to show not only that he was *culpae capax,* but that his conduct amounted to contributory negligence.

[22] Questions of negligence and contributory negligence are judged objectively. The touchstone is the standard of care of the reasonable man in the circumstances, not the standard of care to be expected of a reasonable child. If, on an application of that test, the conduct of a child is held to fall short of the standard of care of the reasonable man, and is therefore labelled as negligent) the question of capacity - arises *(Jones NO* v *Santam Varsekeringsmaatskappy Bpk* 1965 (2) SA 542 (A); *Weber* v *Santam Versekeringsmaatskappy Bpk* 1983 (1) -SA 381 (A) *Damba* v *AA Mutual Insurance Association Ltd* 1981 3 SA 740 (E) 742H-743; *Haffajee* v *South African Railways and Harbours* 1981 (3) SA 1062 (W) 1065 E-H; and *Eskom*

*Holdings Ltd* v *Hendricks* 2005 (5) SA 503 (SCA)). Combrinck J held that a reasonable adult in C's position would have foreseen the possibility that he could be injured by participating in the game, and would have guarded against that possibility by not participating. This was a finding that C was negligent in taking part in the game.[2] But he found that the child was not *culpae capax* in the circumstances because, on the evidence, he lacked the maturity and judgment to comply with the standard of care of the reasonable man in respect of the particular situation with which he was confronted. He was cross-examined about whether he had not regarded the game as dangerous. His answer was that quite. a number of boys had safely been thrown up and caught in the net before his turn came round, and that he did not therefore appreciate the danger. He cannot have been *culpae capax* if he did not realise the danger to which he was exposed. Combrinck J further considered, correctly in my view, that C's decision to participate in the game should be seen in the context of his hesitation and nervousness, and the fact that he succumbed to group or peer pressure to take part, despite being unwilling, which was an additional reason to conclude that he lacked the maturity to comply with the standard of care of the reasonable man in the circumstances. In the result, I am of the view that Combrinck J correctly concluded that the defendant did not discharge the onus of proving the defence of contributory negligence by C.

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2 The learned judge did not hold that C was negligent in holding on to the net. He correctly regarded this as probably a reflex action. rather than culpable conduct.

[23] There is another reason why the defence of contributory negligence on C's part must fail. The grounds of contributory negligence alleged in the plea were

'20.3.2 C participated in the so-called dangerous activity fully aware that he might be seriously injured if he fell;

20.3.3 C failed to heed warnings of the other learners, with whom he was participating in that activity, not to hold on to the net with his hands, and, further, to lie in the middle of the net;
20.3.4 C held on to the net with his left hand in circumstances when he ought to have known that by so doing, upon being thrust upwards, he would be catapulted to the side and off the safety of the net.'

C's evidence was that other learners had been thrown into the air before him without mishap and that he did not know that what he was doing was dangerous. There was nothing to contradict this evidence, and Combrinck J accepted it. C was therefore not 'fully aware that he might be seriously injured' as alleged in sub-paragraph 2. There was no evidence that anybody warned C .not to hold on to the net. The evidence was that he was told to lie in, the middle of the net, which he did. There was no evidence that C knew or ought to have known that by holding on to the net he would be catapulted to the side and off the safety of the net. The result is that there was no evidence to support any of the grounds of negligence alleged in the pleadings. The defendant cannot therefore have discharged the onus on her to prove this defence.

[24] In the result the appeal is dismissed with costs, such costs to include the costs of the employment of senior council.

RJW JONES
Judge of the High Court
4 February 2008

LEEUW J: I agree.

MM LEEUW
Judge of the High Court

LACOCK J: I agree.

HJ LACOCK
Judge of the High Court