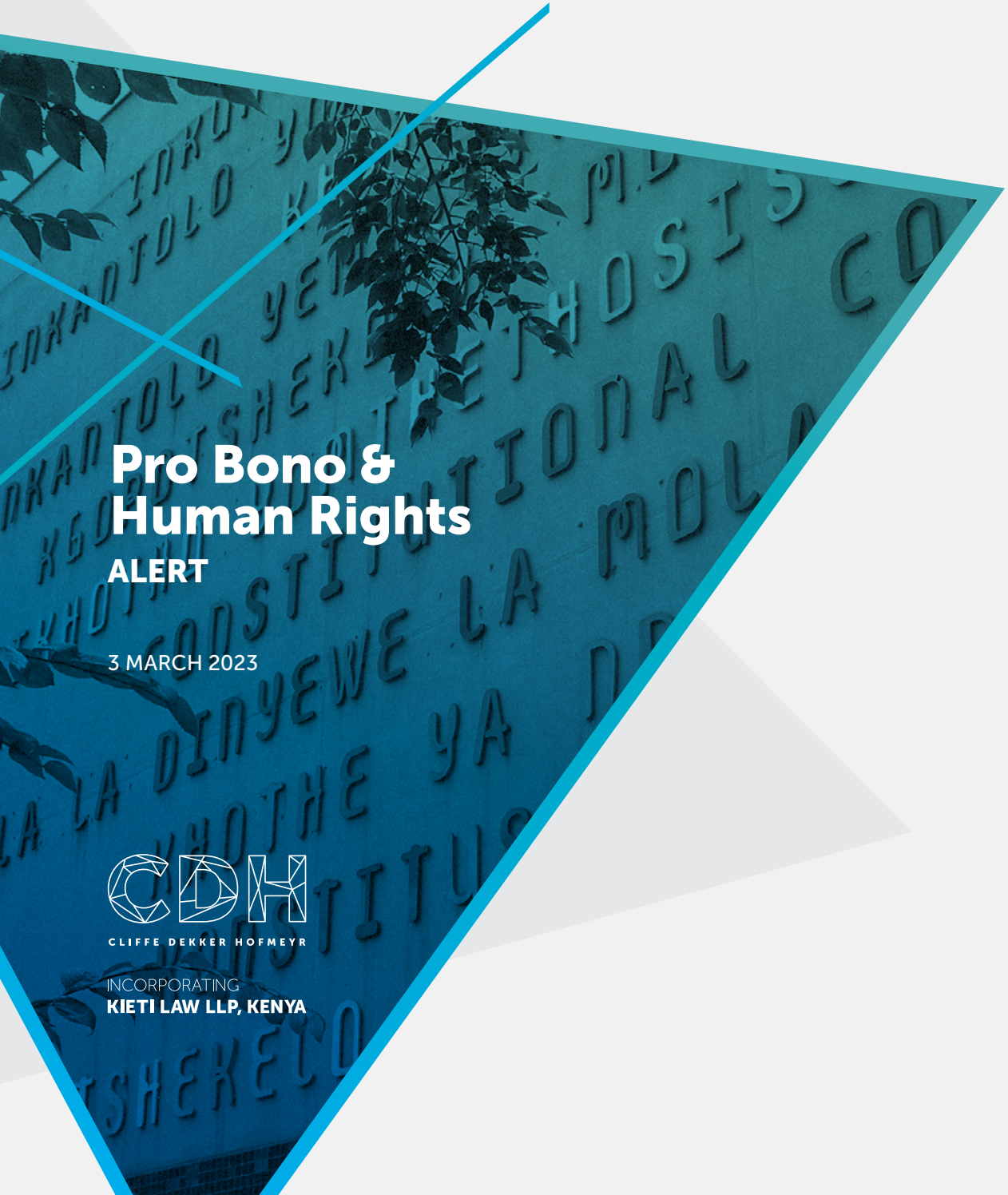

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ALERT

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CLIFFE DEKKER HOFMEYR

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In loco parentis: Schools' liability and duty to take reasonable steps to prevent foreseeable harm to learners under their care

"After the event, even a fool is wise. But it is not the hindsight of a fool; it is the foresight of a reasonable man which can determine responsibility" – Viscount Simonds

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In loco parentis: Schools' liability and duty to take reasonable steps to prevent foreseeable harm to learners under their care

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Recently, in the matter of *The Member of the Executive Council, Education, North West Province v Izak Boshoff Foster and Others* [2023] (Case no 471/2021) [2023] ZASCA 11 (13 February 2023) the Supreme Court of Appeal (SCA) had to consider a school's liability for an injury suffered by a learner under its care at a school rugby match, and in particular whether it was negligent in failing to ensure the presence of competent and suitably equipped first aid providers at the rugby match. While the case dealt specifically with liability for a sports injury, the legal principles at issue are of relevance more generally to the standards of care expected of schools and the state in relation to learners under their care and control. Given that there are over 26,000 schools in South Africa and given the unfortunate rising number of injuries and deaths of learners at schools in recent years, this is an issue of increasing public interest.

The facts and legal issues

The main question the SCA had to decide was whether the North West MEC of Education (MEC) was liable in terms of section 60 of the Schools Act 84 of 1996 (Schools Act) for damages suffered by a learner during a school rugby match. Section 60 provides that the state is liable for any delictual or contractual damage or loss caused as a result of any act of omission in connection with any school activity by a public school and for which such public school would have been liable but for the provisions of this section. It provides further that any such claim for damage or loss must be instituted against the relevant MEC.

In this case, the learner was tackled and fell to the ground, after which another player fell on top of him. After this, two first aid personnel employed by the fourth respondent, an independent contractor appointed to provide first aid personnel at the games, came onto the field and, notwithstanding his protest,

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removed him off the field without first stabilising his neck with a spine board or solid neck brace. This caused a second injury to the learner. It was common cause that this second injury caused him to become paralysed. This injury was at the heart of the claim. The learner was then transported to the hospital where he was told that due to his spine injury, he would never regain his ability to walk.

It was also common cause that the rugby game was *"an activity in connection with an educational activity"*, as described in the Schools Act. The MEC also admitted that he would be liable for damages caused by a wrongful and negligent omission on the part of the school as a legal duty to avoid negligently causing harm rested on it, based on the relationship of *loco parentis* – which the educators and coaches have *vis-à-vis* the learners as players during school games when the latter are in their custody. Thus, in determining liability the only question the SCA had to decide on was whether the court *a quo* correctly held that the school in this case was negligent in failing to take reasonable steps to ensure the presence of a competent and properly equipped first aid provider.

The MEC conceded that based on the evidence presented on behalf of the respondents, both schools, in particular the host school, had to take reasonable steps to ensure that competent and sufficient first aid personnel were present at the game to adequately deal with foreseeable injuries sustained by the learner and any other player on the day in question. He argued, however, that the host school could only be expected to take reasonable steps and provide the degree of care that was demanded "*by the prevailing circumstances*".

The school sought to deny responsibility for the learner's second injury because, on the common cause facts and experts' opinion, the second injury was caused by the first aid personnel in the manner in which they carried the learner off the field – without first stabilising his neck. The MEC contended that when the school appointed the fourth respondent (who employed the first aid personnel) as an independent contractor, it acted reasonably. He submitted that the entity had the necessary expertise and therefore the school took reasonable steps under the circumstances. Ultimately the matter turned on whether the steps taken by the school had been reasonable.

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The majority found that, based on the evidence, they were not. Crucially, the evidence on record on behalf of the learner showed that the school engaged the services of the independent contractor on the simple basis that Mr X (who was the sole director of the entity) was well known in the area and had provided emergency first aid services for schools in the area and that there had been no previous complaints about his services. The evidence also showed that it was only discovered after the tragic incident that Mr X and, by extension his employees, did not have the necessary qualifications and competence to do the work. In reaching its decision, the majority emphasised that evidence showed that the school had hosted sports events, including rugby, for years. It was a well-resourced school and its educators included dedicated sports events organisers, trained by the Department of Sport, (Arts), Recreation and Culture in partnership with the Department of Basic Education. The educators were equipped to organise games and were fully aware of the basic requirements that needed to be in place at the commencement of every game. The school had the necessary resources to manage all sports codes during the various sports seasons. Its educators had the necessary experience and knowledge to ensure that there were, *inter alia*, equipment, proper facilities, and emergency services available during the games. They therefore found that the school should have foreseen that if any neck injury was not treated properly and immediately, it could lead to a spinal injury. The majority went on to hold further that the steps the school took in preparation for the game to prevent the foreseeable injury were not reasonable under the circumstances.

The learner, who was 18 and in Grade 12 at the time of the incident, stated without contradiction that while he was lying on the field he could not feel his legs and that when the first aid personnel approached him, he protested more than once that they should not carry him off the field without a spine board. He was concerned that he had suffered a neck injury and "*did not want anything that was wrong with me to worsen*". The first aid personnel nevertheless proceeded to carry him off the field, against his wishes, without a spine board – and as they were carrying him off his head "*fell backwards and frontwards and was loose, as [he] was unable to keep it still*".

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Judge Masipa AJA (dissenting), however, disagreed with the reasoning and conclusion of the majority judgment and found that a case of negligence by the school had not been made out against the MEC. She held that having received Mr X's certificate (which qualifies him to be an ambulance driver) and having been aware of his experience it was reasonable to accept that he was suitably qualified.

Bearing in mind the constitutional, statutory and common law obligations resting on educators with respect to the learners under their charge, we agree with the view of the majority that the steps taken by the school did not meet the standard of reasonableness. This particularly given the seriousness of the risks attendant upon failure to properly treat a neck and back injury, and the simple steps that could have been taken to ensure the competence of the independent contractor. The MEC's counsel had conceded that the school assumed the *loco parentis* role and as the host school, had to take **reasonable steps** to ensure that **competent and sufficient** first aid personnel were at the game to deal adequately with foreseeable injuries sustained. The evidence showed that the school made no effort to establish the credibility and qualifications (or lack thereof) of the independent contractor appointed or to source verified appropriate providers but went according to the mere say-so that the entity had provided emergency services for many years without complaints about its service. In a context where the Department of Education and the school have constitutional obligations to ensure, amongst other things, that the best interests of the learners under their care are protected and are required to act transparently and accountably, the majority was correct to conclude the school had failed to meet the test of reasonable conduct. The outcome of its negligent conduct resulted in permanent paralysis.

This judgment is yet another reminder of the urgent need for our educational authorities to begin to address the manifold, serious safety concerns plaguing our schools across the country.

Jacquie Cassette, Gift Xaba and Karabo Nemudibisa

OUR TEAM

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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