SUPREME COURT OF APPEAL OF SOUTH AFRICA
MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal

DATE 3 December 2019

STATUS Immediate

Witzenberg Municipality v Bridgman NO & others **(685/2018) [2019] ZASCA 186 (3 December 2019)**

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

This case involved an application by the Witzenberg Municipality, in terms of section 17(2) (*f*) of the Superior Courts Act 10 of 2013, for reconsideration of a refusal of an application for leave to appeal. It was coupled with an appeal against the quantum of an award of damages. The SCA dismissed the application with costs and upheld the appeal against the amount awarded.

Miss L was born in Bulgaria. Her date of birth was uncertain. When she was approximately five months old she was diagnosed with spastic hemiparesis in her lower limbs and also suffered from other chronic illnesses. There was little, if any, hope of significant progress in the development of her human potential. The officials at the institution did not expect her to live. A South African couple, Mr and Mrs L, who were Christian missionaries stationed in Sofia, Bulgaria's capital city, first met Miss L in 1998, visited her regularly and saw in her the capacity for development. She was later admitted to the State University hospital in Sofia. At that stage she was in a badly neglected condition, passive and apathetic. Her head was shaven and her impermanent teeth were all decayed. She had no spontaneity of movement, could not communicate verbally and could not crawl, roll or perform any significant movements.

In 1999 Mr and Mrs L were granted permission to transport Miss L to South Africa on a hospital permit for a year. Here they arranged for her to see a range of professionals. Mr and Mrs L arranged for the removal of her decayed teeth. She underwent physiotherapy and attended numerous occupational therapy sessions. Miss L was also given speech therapy. After months of treatment she began to walk when held by the hand. She started showing signs of meaningful verbal communication and was able to draw shapes and colour-in. Miss L returned to Sofia and Mr and Mrs L were given instructions on how to assist her there to promote her further development. Mr and Mrs L and Miss L visited South Africa annually and the adults saw to it that she attended further therapy sessions here. Her development continued and she showed remarkable progress. Mr and Mrs L formally adopted Miss L in 2001.

On 16 January 2009 Miss L, her adoptive parents and their biological daughter Miss Z, registered and were admitted as residential guests at the Pine Forest Resort, Ceres (the resort). Miss L was approximately 18 years old at the time. The resort was owned and controlled by the Witzenberg Municipality (the Municipality), the applicant in the application for reconsideration and also the appellant in the appeal against quantum. Mr and Mrs L had visited and had been guests at the resort a number of times over the years preceding this last visit.

On 20 January 2009, Miss L asked her adoptive parents whether she could go out and play on her own in the playground close to their unit at the resort. She was given permission to do so. This was in line with the advice they had received that they should encourage her independence. Whilst at the playground she was forcefully and physically led away by three

minors who had gained access to the resort, aged 15, 14 and 11, respectively, up an external staircase leading to the entrance of a squash court within the resort, down an internal staircase to the floor of a squash court where she was brutally sexually assaulted and raped. The squash court formed part of a recreational hall. One of the boys apparently kept a lookout while the other two were actively involved in the sexual assault on her. Sometime after the attack, a curator *ad litem*, the first respondent in the present case, appointed by the Western Cape High Court on 20 December 2011, instituted an action in that court against the Municipality, claiming damages on Miss L's behalf flowing from the attack on her, on the basis of the negligence of its employees and / or officials.

The Municipality defended the action. First, it denied that it owed Miss L a legal duty to take steps, other than those that were in place at the resort at the time. Second, in the event that the court held that it ought to have taken certain steps to protect visitors to the resort, it denied that the failure to take such steps caused the attack and led to the injuries consequently sustained by Miss L. In addition, the Municipality issued a third party notice, in terms of which it sought to lay the basis for a claim for a contribution or indemnification by Mr and Mrs L. The Municipality averred that in the event of judgment being granted in favour of the first respondent, in his representative capacity, and in the event of it being ordered to pay damages it would be entitled to claim a contribution from Mr and Mrs L on the basis that they as her adoptive parents, aware of her mental disability, were themselves negligent in several respects.

Ceres Alarms, the security services provider at the resort at the time of the incident in question, had been appointed on an emergency basis after a predecessor's contract had been summarily terminated for poor performance. Ceres Alarms had been appointed in the absence of a thorough security assessment by the Municipality. Furthermore, at the time of the incident the entire municipal staff at the resort, a total of 18 out of 19 staff members, had left the resort to attend a staff meeting. The remaining member of staff was a cashier. The staff that attended the meeting away from the resort included, amongst others, the swimming pool manager and other supervisory staff. The number of security guards employed by Ceres Alarms in attendance at the resort at the time of the incident was limited to two, in the face of the Municipality's own stated technical requirements that at least four guards were required, with at least two needed to patrol the grounds within the resort on an hourly basis.

The SCA said the following at paras 24 -29 of its judgment:

'In essence, the court held that if there had been four guards in total with two guards doing hourly patrols and if the rest of the staff at the resort had been in place and if there had been proper access controls in relation to the squash court and more visible and pronounced access control, the opportunity for wrong-doing would have diminished and it was more likely than not that the rape would not have occurred. It had occurred because of the failure of the Municipality to take the steps outlined above. Moreover, in light of previous experiences, there ought to have been a greater awareness by the security service and the employees of the possibility of criminal conduct. Harm eventuating, in the absence of these measures, would have been foreseeable, particularly in the light of prior criminal conduct experienced at the resort coupled with municipal officials expressing concerns that criminal behaviour of a kind eclipsing those hitherto perpetrated might materialise. The court below concluded that the Municipality was negligent and liable to Miss L for the damages sustained by her.

The submission on behalf of the Municipality, in relation to negligence, that harm specifically in the form of a rape could not have been foreseen by it, is misconceived. The precise nature of the harm need not be foreseen. The general nature of serious criminal conduct with attendant consequences is what ought to have been foreseen. In the present circumstances it ought to have been foreseen.

It was submitted on behalf of the Municipality that in holding that it was negligent, the court below placed too great an emphasis on the fact that it was part of the State. This submission, too, is fallacious. Even if one were to have considered whether liability based on negligence should attach to a private resort owner against the circumstances set out in paras 10-13 above, the same result would have ensued, namely, that the resort owner would have been held to be negligent. That conclusion becomes even more compelling if regard is had to the Municipality as part of the State. It was accepted on behalf of the Municipality that this factor is one to be taken into account. An organ of state is expected to 'take reasonable measures to advance the realisation of the rights in the Bill of Rights' and the availability of resources is an important factor when determining what steps were available to the organ of state and whether reasonable steps were in fact taken. It is therefore necessary for the organ of state to present information to the court so that it can assess the reasonableness of the conduct in proper context. As stated above, no reliance was placed by the Municipality on budgetary constraints.

It was contended on behalf of the Municipality, in relation to wrongfulness, that holding it liable would result in limitless liability and would place an intolerable burden on local authorities. In the circumstances outlined above and considering constitutional norms, that contention is entirely without substance.
The court below also held that no fault could be attributed to Miss L's adoptive parents in allowing her to play on her own in the play area in the resort. In this regard the court below, inter alia, considered her right to freedom of movement, her right to dignity which includes her right to assert her independence and the rights of disabled persons, recognised in international conventions. I find the attitude of the Municipality in this regard both baffling and disturbing. As stated in para 13 above, it gave comfort to residents that the Municipality was serious about security at the resort and that security staff would pay attention to patrolling the area. In running the resort, the Municipality bore a duty to take appropriate steps to safeguard to the best of its ability the safety of visitors and residents. This it did not do. In the circumstances referred to, it was adding insult to injury to attempt to land Mr and Mrs L with liability.
In light of the findings set out above it follows that our colleagues who considered the application for leave to appeal in terms of s 17(2)(*b*) of the Act cannot be faulted for their conclusion that, on the merits, there were no reasonable prospects that another court would come to a different conclusion. The application for reconsideration therefore must fail.'

The SCA then turned to the question of whether the amount of R750 000 awarded by the court a quo for contumelia, shock, pain and suffering and loss of amenities of life was excessive. The SCA stated that the trauma Miss L was subjected to, was horrific. She continued to endure the consequences of the brutal attack on her. The degree of pain, suffering, anxiety and loss of confidence she experienced was severe, however, the amount awarded was rather high, considering that this amount was not sought. In the light of all the circumstances the amount sought, namely, R630 780 appeared to the SCA to be fair and just. The Municipality was prevailed upon, to consider, particularly in light of their prior conduct in the litigation to forego a costs order. The total amount of R630 780 awarded included the cost of the therapy sessions.