

# Thoughts on the insurable interest of school governing bodies in the immovable property of the State occupied and used by the school

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## OPSOMMING

### **Gedagtes oor die versekerbare belang van skoolbeheerliggame in die vaste eiendom van die Staat wat deur skole beset en gebruik word**

In *St Helena Primary School v MEC, Department of Education, Free State Province* 2007 4 SA 16 (O) het Vusi R bevind dat die betrokke skool 'n verpligting gehad het om die skade wat deur 'n brand aan die skoolgebou veroorsaak is, te herstel. Die regter het sy bevinding gebaseer op die feit dat die skool die eiendom teen brand verseker het. In 'n artikel in *De Rebus* van Julie 2008 voer Sonnekus en Schlemmer aan dat skoolbeheerliggame ingevolge die Suid-Afrikaanse Skolewet slegs verantwoordelik is vir die gebruik en bestuur van die skoolgebou en dat die Staat verplig is om skoolgeboue te onderhou. In hierdie artikel ondersoek ons die voorsiening en finansiering van onderwys sowel as die funksies van skoolbeheerliggame. In die lig daarvan bespreek ons Sonnekus en Schlemmer se argumente krities en kom ons tot die gevolgtrekking dat ons nie kan saamstem met hulle bewering dat die skoolbeheerliggame geen versekerbare belang in die skoolgebou het nie. Ons stem ook nie saam dat onderhoud of herstel van skoolgeboue die uitsluitlike verantwoordelikheid en grondwetlike verpligting van die Staat is nie.

## 1 Introduction

Section 60(1) of the South African Schools Act<sup>1</sup> deals with State liability for any damage or loss caused as a result of any act or omission in connection with any school activity conducted by a public school. In terms of section 60(2) the provisions of the State Liability Act<sup>2</sup> apply to any claim under subsection (1).

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<sup>1</sup> 84 of 1996. Hereafter "SASA".

<sup>2</sup> 20 of 1957.

The application of section 60(1)(a) of the SASA is subject to the provisions of section 60(1)(b). This latter subsection provides that:

“Where a public school has taken out insurance and the school activity is an eventuality covered by the insurance policy, the liability of the State is limited to the extent that the damage or loss has not been compensated in terms of the policy.”

The school, as *legal persona*, must take out an insurance policy to cover such an eventuality. The State, however, is its own insurer.<sup>3</sup> Here the legislature provides for a shared responsibility for insurance and it follows that the responsible parties are regarded (by the legislature) as having an insurable interest in the subject matter of the insurance policy. In a different setting other analogous legislative provisions provide for a deeming provision, for example that the body corporate, in the case of a sectional title complex, will, for the purposes of effecting any insurance, under that particular subsection, be deemed to have an insurable interest for the replacement value of the building and will, for the purposes of effecting any other insurance under that subsection, be deemed to have an insurable interest in the subject matter of such insurance.<sup>4</sup>

Whether school governing bodies<sup>5</sup> have an obligation to maintain the immovable property of the State, that is the property occupied and used by the school, and therefore may have an insurable interest in such property, is the question discussed below. This question was also discussed by Schlemmer and Sonnekus, hereafter “the authors”, in a recent article<sup>6</sup> and we intend to present arguments contrary to their conclusion that governing bodies have no insurable interest in the immovable property of the State used and occupied by the school. We also submit that, should their arguments go unchallenged, some governing bodies may relinquish insurance that they may currently have and such a decision may have very serious implications for the education offered at the school in question should the property be damaged. Although the State is its own insurer, we do not believe it has the capacity to respond speedily to repair or re-construct damaged buildings so that education can resume as soon as possible. We submit it is prudent for governing bodies to insure the property they use and occupy.

## 2 The Development of Section 60 of the SASA

Section 60(4) was added to the Act in 1999 by section 14 of the Education Laws Amendment Act.<sup>7</sup> After its introduction and prior to the introduction of amendments to section 60(1) of the SASA by the provisions of the Education Laws Amendment Act,<sup>8</sup> all of the liability covered by section 60(1)

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<sup>3</sup> See the Public Finance Management Act 1 of 1999 and its Regulations in this regard.

<sup>4</sup> See the discussion below of the Sectional Titles Act 95 of 1986.

<sup>5</sup> Hereafter “SGB”.

<sup>6</sup> “Die instandhouding van skoolgeboue” 2008 *De Rebus* 22–25.

<sup>7</sup> 48 of 1999.

<sup>8</sup> 31 of 2007.

that arose pursuant to “any educational activity” conducted by a public school lay with the State. This situation changed with the introduction of section 60(1)(b) by section 12 of the Education Laws Amendment Act,<sup>9</sup> which established a statutory shared liability between the State and the school.<sup>10</sup> Section 4(c)<sup>11</sup> also amended section 1 of the SASA by the insertion of a definition of “school activity” which replaces the term “educational activity” formerly found in section 60 of the SASA but not defined by section 1. “School activity” is now defined as any official educational, cultural, recreational or social activity of the school within or outside the school premises.

### **3 The Occupation and Use of Immovable State Property by a Public School**

In the normal course of events, for an official school activity, the school would use some or all of the immovable property of the State. This may include the school buildings (classrooms, laboratories, school hall and library), playing fields, swimming pool, gymnasium and other immovable property, and also a variety of movable property belonging to the school.<sup>12</sup> Section 13(2) of the SASA provides, subject to section 20(1)(k), that a public school which occupies and uses immovable property owned by the State has the right, for the duration of the school’s existence, to occupy and use the immovable property for the benefit of the school for educational purposes at or in connection with the school. This section creates a usufruct to public schools on the immovable property owned by the State.<sup>13</sup> One would be inclined to think that the school would have an insurable interest against damage to or the loss of these buildings or facilities although it would appear below that the authors have doubts about such an assumption.

### **4 Obligations of School Governing Bodies**

The authors<sup>14</sup> discuss the obligations of SGBs to maintain school buildings. This is done against the backdrop of the obligations placed on the government by the Constitution and the relevant School Acts. They hold the view that:

“In terms of the South African Schools Act 84 of 1996, School Governing Bodies (SGBs) are merely entrusted with the use and management of the school property. The maintenance obligation rests on the government.”<sup>15</sup>

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9 *Ibid.*

10 *Supra.*

11 *Ibid.*

12 See SASA s 58A.

13 See the note under SASA s 13(2) in Boshoff & Morkel *Juta’s Education Law and Policy Handbook* (1999) 2A–14.

14 2008 *De Rebus* 22. “The authors” means Schlemmer and Sonnekus.

15 *Ibid.*

The authors discuss this proposition in the light of a High Court judgment, *St Helena Primary School v MEC, Department of Education, Free State Province*<sup>16</sup> where Musi J held that the school in question had an obligation to repair the damage to the school building after a fire broke out, basing his view on the fact that the SGB had insured the property against fire. In their contribution the authors argue, based on the relevant legislation and regulations published in terms of the SASA, that there is no obligation on an SGB to maintain or repair the school property. Hence they say, it remains the responsibility and constitutional obligation of the state. In addition, they maintain that the SGB has no insurable interest in the property. If this assumption were correct it would appear that subsection 60(1)(b) and its shared insurable interest in a “school activity” between the State and the SGB/school would be superfluous.<sup>17</sup>

The authors also argue that in the event that a SGB decides to take out insurance against an event, the insurer would be entitled to refuse to pay out when the insured event occurs because the SGB may not be able to show that it complies with the indemnity principle. They say that the school does not necessarily suffer any patrimonial loss. The loss is suffered by the State, the owner of the property, that has to repair the damaged building.

They also argue that SGBs who have so-called “section 21 functions”,<sup>18</sup> act as mandataries of the State – the legal relationship being equated with *mandatio* or *negotiorum gestio*. As such, SGBs are entitled to be reimbursed for any expenditure incurred on behalf of the principal, the State. We question the absolute terms in which the statement is couched. Section 20 of the SASA applies to the functions of all SGBs and it may be true to say that no statutory obligation to maintain or repair the fixed property of the State can be found in or read into this section. However, section 20(2), for example, provides that the SGB may allow the reasonable use of the facilities of the school for community, social and school fund-raising purposes, subject to such reasonable and equitable conditions as the governing body may determine. These may include the charging of a fee or tariff which accrues to the school. We see no reason why the SGB should not require the community to take out sufficient insurance to cover possible loss or damage to the building. This is something which many SGBs consistently do. The authors appear to believe that they should not. We will also return to this issue later.

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16 2007 4 SA 16 (O).

17 See the discussion below.

18 SASA s 20 deals with the (general) functions of all governing bodies, whilst s 21 deals with allocated functions of governing bodies, which include powers to maintain and improve the school's property, to determine the extra-mural curriculum of the school and the choice of subject options, to purchase textbooks, educational materials or equipment for the school, to pay for services to the school and to provide an adult basic education and training class or centre subject to any applicable law.

## 5 Allocated Functions of Governing Bodies

According to the authors, section 21 functions allow the SGB to act as mandatory of the State. Section 21(1)(a) provides that a governing body *may apply* to the Head of Department in writing to be allocated the function to maintain and improve the school's property, buildings and grounds occupied by the school, including school hostels. Logically, *if the SGB does not apply for this function*, it is not obliged, as mandatory of the State, to maintain and improve the school's property.

There are questions about section 21(6) too. It provides that the MEC:

“... *may*, by notice in the *Provincial Gazette*, *determine* that some governing bodies may exercise one or more functions without making an application contemplated in subsection (1), if –

(a) He or she is satisfied that the governing bodies concerned have the capacity to perform such function effectively; and

(b) *there is a reasonable and equitable basis for doing so*” (authors' emphasis).

It could be argued that this is just a repetition of section 21(1)(a) and that whatever the SGB may do, whether in terms of section 21(6) or section 21(1)(a), does not constitute a statutory obligation. In terms of section 21(6) SGBs may also exercise one or more of the relevant section 21 functions once the MEC has determined that:

“(a) They have the capacity to perform such function effectively; and

(b) There is a reasonable and equitable basis for doing so.”

If both subsections 21(1)(a) and 21(6) are discretionary and neither of them constitutes a statutory obligation, two such separate provisions would have no purpose. Could the determination by the MEC constitute the kind of statutory duty which Musi J had in mind in the *St Helena Primary School* case? However, whether it is a statutory function, which was allocated to the SGB upon application in terms of section 21(1) of the Act or whether the function was allocated to the SGB pursuant to a determination by the MEC in terms of section 21(6), it remains a statutory function to be exercised by the SGB until it is withdrawn by the Head of Department (HOD) in terms of section 22 of the SASA. Other possibilities will be considered below.

## 6 Recent History of the Development of the Schools Legislation

As far as the history of the development of the schools legislation goes, the authors refer to what we would call the two separate stages in the recent development of the legislation, namely the initial stage when the model C schools were the owners of the school property and were obliged to maintain and insure the property against future damage or loss<sup>19</sup> and the next stage with the advent of the SASA, and more particularly section 55(1) and (10)<sup>20</sup> thereof, when the ownership of school buildings and grounds was taken back by the State and the position changed.

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19 2008 *De Rebus* 22–25.

20 *Ibid.* Although the authors refer to some of the provisions of the SASA s 55, they appear to have missed an opportunity to consider the implications insofar as they

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The authors make a number of points in this regard, namely:

- The owner of the property and buildings is still obliged to maintain the property.
- In terms of the Constitution, the respective provincial school education Acts and the National Schools Act the State is obliged to establish schools and school buildings to comply with its duty to provide education to the children of South Africa. Should loss or damage to the property occur, the owner is obliged to repair the damage if it is obliged by law to provide school buildings.
- Should the state fail to do so, and no alternative provision is made for the education of the learners, it would be neglecting its constitutional duty. The damage is suffered by the State and it remains the duty of the State to repair those damages – not the accidental insurer or any other third party.<sup>21</sup>

They thus hold the view that the State is bound to provide and maintain suitable<sup>22</sup> school buildings, and to repair and also to replace them. They maintain that to repair the school buildings in the case under discussion remains the constitutional duty of the State and not that of the accidental<sup>23</sup> insurer or any other third party.

We submit that in the context of an insurable interest the provisions of section 36(1) of the SASA also need to be considered. The section requires the SGB to take all reasonable measures within its means to supplement the resources supplied by the State “in order to improve the quality of education provided by the school to all learners at the school”. In *Ferdinand Postma Hoërskool v Stadsraad van Potchefstroom*,<sup>24</sup> Bertelsmann J stated unequivocally that this provision places a duty on the SGB to take the measures contemplated in section 36(1). We will deal with this aspect in more detail below.

The reference by the authors to the accidental insurer or any other third party merits comment. If it concerns an insurer who insures the property at the request of the school/SGB, the insurer cannot be an accidental<sup>25</sup> (“toevallige”) insurer. The SGB is charged with the management of the property of the school and the insurance company cannot appear by accident (“per toeval”). The insurance company would enter into the contract of insurance seriously and, equally seriously, undertake to indemnify the school against the risks specified in the contract. We question the notion of an accidental insurer.

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relate to an insurable interest in the property, the issue of expropriation of the property, improvements effected by the parent community and compensation upon expropriation. We will return to this issue below.

21 *Idem* 22–23.

22 “Dienstige”.

23 “Toevallige”.

24 [1999] 3 All SA 623 (T).

25 “Toevallige”.

In *Unitrans Freight (Pty) Ltd v Santam Ltd*<sup>26</sup> Nugent JA said the following in this regard:

“... it would be surprising if an insurer who has given an earnest undertaking to indemnify a person in what is clearly a policy of insurance and not a gambling contract (as pointed out by Chaskalson (*et al*), the requirement of insurable interest is designed to ensure that insurance policies are not used as a basis of gambling) were to repudiate its obligations on those grounds.”

The latter stage of the development of the schools legislation with the change of ownership of the school property from the school back to the State is much more significant than the authors appear to realise. We submit this development has a significant implication for the question whether the school, after the change of ownership, has a residual interest in the property which could constitute the legal basis for their insurable interest in the property of the State.<sup>27</sup>

The authors<sup>28</sup> point out that in the *St Helena Primary School* judgment the learned judge:

“... works on the assumption that the school governing body was obliged to take out insurance to provide for those risks. The school governing body insured the school against the risk of fire, despite the fact that the school was the property of the Free State Provincial Government and simply on account of the fact that the governing body was responsible for the running of the school.”

The authors explore how the learned judge came to certain conclusions on the basis of the assumption that a governing body is obliged to repair damage to the property caused by fire and consequently. Using this assumption as a point of departure the court found that the authorities were in fact enriched by the exercise of this duty which the court believed to exist.<sup>29</sup>

The preamble to the SASA declares that the school and the Department have reciprocal obligations under the Act to accept responsibility for the governance of public schools in partnership with each other.<sup>30</sup> This also appears to be the purport of section 60(1)(6).

However, since the authors,<sup>31</sup> by their own admission, cannot find the source of, or any justification for, this assumption, they say that the validity of the assumption by the court that there is a duty on the SGB to insure the school against such risks or to repair the buildings should they become damaged when the risk occurs, is wrong. They submit that it is

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26 2004 6 SA 21 (SCA) 28 par 17.

27 This aspect will be discussed below with reference to the expropriation of the property and the payment of compensation or lack thereof.

28 2008 De Rebus 23.

29 *Ibid*.

30 Unreported case no 454/08 [2008] ZAECHC on 2008-10-21 and it was reiterated recently in the Eastern Cape High Court by Froneman J in a matter between Queens College Boys High School and the MEC for Education and Others, Eastern Cape.

31 2008 De Rebus 24 and 25.

doubtful whether the SGB could show an insurable interest in the property of the State.<sup>32</sup>

We have seen by way of analogy how the Sectional Titles Act<sup>33</sup> requires the corporate body of a building complex to insure the building or buildings against fires and such other risks and keep them insured to the replacement value thereof as may be prescribed. The authors fail to find similar authority in the schools' legislation. We submit, however, that there may not need to be any statutory duty, but merely a statutory function – whether it was applied for in terms of section 21(1) or allocated in terms of section 21(6). We submit further that section 60(4) of the SASA contains a similar type of deeming provision to that found in the Sectional Titles Act which would provide the basis for the insurable interest of the SGB in the immovable property of the State.

We have already alluded to the provisions of section 21(6) of the SASA which we submit contains an explicit statutory allocation of those duties and to our minds does not merely constitute an assumption but a statutory obligation accepted by the SGB. With regard to the so-called assumption the authors made it clear that, in their view, it is an assumption which is also shared by many SGBs. They say that many SGBs labour under the impression that they are still the owners of the property and should therefore provide for such catastrophic risks. They still take out expensive insurance and recoup these expensive premiums from unsuspecting parents. Such conduct borders on irresponsible wasting of parents' money.<sup>34</sup>

The SGB need not be the owner of the property to have an insurable interest in the property of the State occupied by the school.<sup>35</sup> Furthermore, we find it hard to understand how the authors can argue that by taking out insurance the conduct of the SGB borders on irresponsible wasting of parents' money, especially since section 60(1)(b) not only provides for a shared responsibility for insurance for certain defined risks, but also defines the limits of the liability, not of the school, but of the State:

“Where a public school has taken out insurance and the school activity is an eventuality covered by the insurance policy, the liability of the State is limited to the extent that the damage or loss has not been compensated in terms of the policy.”

As regards liability for a business or enterprise run by the SGB as contemplated in section 36(1) of the SASA, section 60(4) of the SASA divests the State from liability for any damage or loss caused as a result of any act or omission in connection with any enterprise or business operated under

32 *Ibid.* The authors state that it is doubtful whether SGBs will be able to show that they hold an insurable interest in the property. We submit that the authors misread this legal position and we will return to the issue of insurable interest below.

33 95 of 1986.

34 2008 *De Rebus* 22.

35 See the reference to the *Strydom* case below, the references to the provisions of the Sectional Titles Act 95 of 1986 and the reference to the position of a tenant and lessee below.



the authority of a public school for purposes of supplementing the resources of the school, *including* the offering of practical educational activities relating to that enterprise or business. This effectively makes it impossible to conclude that only the State has a constitutional duty to provide education or the sole liability in that regard.

For this reason, amongst others, we submit it cannot be correct for the authors to argue that a public school which is not the owner of particular immovable property, but conducts a business or an enterprise on the premises of the school which is State property, cannot have any obligations towards, or insurable interest in, the immovable property of the State in that regard. The provisions of section 60(4) militate against this view.

## 7 Economic Interest in the Property of the State

If the school conducts a business or enterprise on the State's property in terms of the obligations imposed by section 36 of the SASA, it has an economic interest in the maintenance of the building. If a public school then enters into an insurance contract with an insurance company in terms of which the company undertakes to indemnify the school against physical loss or damage to the school property, which currently in South Africa would be State property, one of the possible questions that could arise in the event of such damage or loss arising could be whether the school suffered any loss and had an insurable interest in the restoration or repair of the property. The authors argue that the insurers who receive the insurance premiums are not, in terms of insurance law, obliged to make any payment should the loss or damage insured against occur. Insurance against loss or damage relies on the indemnity principle and, unless the insured (the school) can show that it has suffered patrimonial loss, it is not entitled to be indemnified. Insurance against loss is not a gambling contract. Anyone can take out insurance on the property of another and such a contract of insurance would be valid, even though the insured may not be able to show an insurable interest. Despite the diligent payment of the insurance premiums, however, the insurer would not be obliged by law to make any payment to the insured, unless the requirements for indemnity are present.<sup>36</sup> The insurer would be free to make an *ex gratia* payment but, since he, she or it would be under no contractual obligation to indemnify the insured if no loss can be proved, any payment of insurance would not be recoverable on the basis that there was no obligation to make such payment<sup>37</sup> although such payment may have been made on the basis of poor legal advice that the payment was in fact to be made.<sup>38</sup>

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<sup>36</sup> Joubert 2002 12 LAWSA par 109 *et seq.*

<sup>37</sup> 2008 *De Rebus* 22–23.

<sup>38</sup> In a standard circular letter in our possession, Santam Ltd affirms that it “recognises the interest of a school in insuring the property on which a school is operated” and that “Santam Ltd will therefore not reject a claim by a school under its policy on the basis that such property does not belong to the school but to the State”.

Although the State and the school share the liability as contemplated by section 60(1)(b) of the SASA and the school bears the sole liability in terms of section 60(4), the authors nevertheless do not believe that the SGB has an insurable interest in the immovable property of the State. It would appear from the tenor of their argument that this conviction also leads them to think that the insured would not be able to show that he, she or it had in fact suffered any loss. In addition, with reference once more to the decision in the *St Helena Primary School* case, the authors quote the assertion by the court:

“[I]t will be noted that the school was obliged in terms of the provisions of the Act to maintain the buildings.”<sup>39</sup>

Schlemmer and Sonnekus submit that the court was under the impression that the SGB was obliged by statute to maintain the property of the State although the court fails to indicate which legislation contains this decisive duty and, furthermore, they submit that many advisers of SGBs and jurists are under the same mistaken impression that such a duty in fact does exist. It would require a major amendment to the law to establish a statutory duty on the SGB to maintain the property of another or to repair the property after it had been damaged by fire. Unless this was brought about by statute, the authors find it impossible to envisage such a duty.<sup>40</sup>

Further, with reference to the powers allocated to SGBs in terms of section 21 of the SASA, the authors insist that there are no indications in any of the statutory provisions that the State can divest itself of its constitutional duty in this manner – and then to expect taxpaying parents of children in the school that has been destroyed by fire, to take over this responsibility. They find no such duty in section 21.<sup>41</sup>

We would, however, argue that once an MEC has made the decision and determines, as contemplated by section 21(6) of the SASA, that some SGBs “may exercise one or more functions without making an application contemplated in subsection (1)”, that it is a function allocated in terms of statute and, once the SGB has decided to adopt the determination, it becomes a statutory function to maintain and improve the school’s property, buildings and grounds occupied by the school, including school hostels, based on the decision of the MEC in terms of statutory powers allocated to him or her.

If section 21(1) of the SASA is to stand on its own and to make sense, one may question whether an SGB would have a choice once an MEC has made the determination contemplated by section 21(6). If they fail to perform the function, it would be a dereliction of their duty to act in the best interests of the school, the learners and their education. In a publication based on the South African Education Law and Policy Association’s conference,<sup>42</sup> Bertelsmann J discussed the topic *Governance and the South*

39 *St Helena Primary School supra* 24D.

40 2008 *De Rebus* 24. We are not sure how the authors understand s 21(6) of SASA.

41 *Idem* 25.

42 De Groof, Heystek, Malherbe & Squelch (eds) *Governance of Educational Institutions in South Africa into the New Millennium* September (1999) (Conference proceedings of  
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*African Schools Act of 1996*.<sup>43</sup> He made reference to the position of trust of the SGB toward the school and then, more specifically, to the obligation on each member of an SGB to act with due diligence and application in respect of all activities which the SGB may undertake.<sup>44</sup> He also refers to the *Ferdinand Postma*<sup>45</sup> case where the court held that as the State could not fund and cannot fund schooling fully out of its own purse, a school is not only entitled, but indeed obliged, to endeavour to obtain further funds from the community in which it operates.<sup>46</sup>

After scrutinising the guidelines for the financing of school buildings, the authors assert that it is the duty of the State to build schools and to maintain them.<sup>47</sup>

One could say that this is axiomatic. The constitutional and statutory duty of the State is not really the issue here. The extent of that duty may well be. However, the authors do not examine the possibility of a limitation or qualification of this duty or obligation. It is the duties and functions of the SGB and the extent thereof that are in issue.<sup>48</sup>

From what we have examined thus far it can be confirmed that the State:

- (i) does have a constitutional obligation to provide education and funding, the necessary public schools and to provide enough school places for all learners;<sup>49</sup>
- (ii) is the owner of the immovable property (at least of the public school on state land);
- (iii) as owner of the property, is obliged to maintain, repair or even replace such property that has been damaged or destroyed; and
- (iv) as its own insurer is bound to bear the costs of this obligation.<sup>50</sup>

We have seen that the authors are unable to find the basis for the judge's assumption (as they see it) and subsequent decision in the *St Helena Primary School* case. On the limited view they take of the matter their conclusion may sound plausible. However, we do not agree that there necessarily has to be a statutory duty on the SGB for them to be able to

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the South African Education Law and Policy Association's conference held in Bloemfontein in 09-1999).

43 *Idem* 64–71.

44 *Idem* 67.

45 See *Die Ferdinand Postma Hoërskool v Die Stadsraad van Potchefstroom* [1999] 3 All SA 623 (T).

46 *Ibid.*

47 2008 *De Rebus supra* 25.

48 *Ibid.*

49 See, however, the discussion below of the term "basic education" (a qualification of the right to education), the extent of compulsory schooling and note the limitations on the ability of the State to provide school places and to fully fund education.

50 Note again, eg the provisions of s 36 read together with the provisions of s 60(4) of SASA (exclusion of the liability of the State) and also the provisions of s 60(1)(b) (the limitation of the liability of the State).

insure the school property – although this is indicated by section 60(4) and also to some extent by section 60(1)(b). Neither does it necessarily follow that, although there is no (or may be no) such statutory duty, that no circumstances exist or can arise under which the SGB will have an insurable interest in the immovable property. Nor can it be said, in our view, that no obligation can exist in the current situation which obliges a school/SGB to maintain or repair school property. This being so, as we have argued thus far, and as we will attempt to show below, the SGB would, in the exercise of their fiduciary duty,<sup>51</sup> take out insurance of their own accord to cover loss or damage which may arise and which will not accrue to the State but to the school (SGB) (as indicated by section 60(4)) or at least to both the State and the school as contemplated by section 60(1)(b) of the SASA.

## 8 Questionable Argument

It may be open to debate whether it is a valid assumption (of the court) that a SGB is obliged to repair damage caused to a school by fire. The authors also query the SGB's insurable interest and they consequently criticise the judge for working on the assumption that governing bodies do have such an obligation.<sup>52</sup>

We submit that the authors' statement that it is doubtful whether a governing body would be able to indicate an insurable interest in the property of the state is open to criticism.

The question of whether the school, as a legal *persona*, has an insurable interest in the immovable property of the public school belonging to the State remains unresolved.

In the recent case of *Fir & Ash Investments (Pty) Ltd v Cronje and Others*,<sup>53</sup> Griesel J commented as follows on the question of the tenant's interest in the leased property as:

"Counsel for the tenant adopted a restrictive interpretation of the tenant's 'interest', which he was advised to insure. He sought to limit such interest to the movables or stock of the tenant, or losses suffered by the tenant due to business interruption. *I am unable to agree with this interpretation.* In my view the interest of the tenant in the leased property is much wider than suggested. The position regarding a lessee's insurable interest under a lease is summarised as follows in LAWSA: 6. A lessee may insure the property let to him. In fact various insurable interests may be distinguished."<sup>54</sup>

The authors say that the above is not regulated in the SASA. We have referred to some of the provisions of the Sectional Titles Act with regard to the functions of a body corporate. If the above is the legal position as far as the lessee's insurable interest in the property is concerned, namely that the lessee may insure the property let to him, one may ask what will,

51 See Bertelsmann 67.

52 2008 *De Rebus* 22–25 24.

53 2008 1 SA 556 (C) 560–561.

54 Our emphasis.

by analogy, be the position of the school (SGB) in terms of the SASA with regard to the property entrusted to it by the State in terms of section 13(2)?

“[A] public school which occupies immovable property owned by the State has the right, for the duration of the school’s existence, to occupy and use the immovable property for the benefit of the school for educational purposes at or in connection with the school.”

The occupation and the use of the property includes the obligation to take measures to supplement the resources provided by the State and, as per the *Ferdinand Postma* case, this obligation applies to a business franchise on the premises of the State occupied by the school. The school has an interest in the maintenance of the building to prevent economic loss in the case of damage to or the destruction of the school buildings occupied and used for the business or enterprise, in the event of which the liability of the State is excluded by section 60(4) of the SASA. This interest, we submit, is an insurable interest.

## 9 Can the State Fully Comply with its Constitutional Duty to Provide (Basic) Education?<sup>55</sup>

Bertelsmann J, in the *Ferdinand Postma* case,<sup>56</sup> held that the State could not fully fund education out of its own purse. As far as the provision of public schools is concerned, section 12(1) of the SASA provides that the MEC must provide public schools for the education of learners out of funds appropriated for this purpose by the provincial legislature. It is important to remember that subsection (2) also provides for hostels for the residential accommodation of learners.<sup>57</sup> In the case of a public school on state property, section 13(2) provides that, subject to the provisions of section 20(1)(k), a public school which occupies immovable property owned by the State has the right, for the duration of the school’s existence, to occupy and use the immovable property for the benefit of the school for educational purposes at or in connection with the school.

The facilities that the public school occupies and uses have, in terms of the SASA, a certain commercial value which the SASA allows the school to exploit in terms of section 20(2) of the SASA. This section allows the reasonable use of such facilities of the school for community, social and school fund-raising purposes, subject to such reasonable and equitable conditions as the SGB may determine. These conditions may include the charging of a fee or tariff which accrues to the school. Is it still the SGB

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<sup>55</sup> See note on the implications of the extent of “basic education” below.

<sup>56</sup> See the discussion of the case in par 10 below.

<sup>57</sup> It will be important to deal with hostels later, since in many of the provinces the relevant department of education has divested itself, whether legally or illegally, of responsibility for hostels and it has become the responsibility of the SGB to run and maintain such hostels and to look after the learners. It is also noteworthy that this process has been the subject of a number of unreported labour disputes and Labour Court cases over the years.

that can determine these conditions? If it is not, does it strengthen or weaken our case? This fee or tariff must be paid into the school fund and this fund forms part of the assets of the school. The school buildings, facilities and hostel remain part of State property, and, as in the case of the lessee referred to above, the SGB has a very real commercial interest in the use thereof. The logical conclusion of this argument is that the SGB has an economic interest that translates into an insurable interest in the particular facility, for example a school gymnasium, sports field and lapa. This will be even more true in the case of a school hostel (a building on State property) no longer run or funded in many of the provinces by departments of education, but by the SGB of the school.

A stronger case with regard to the insurable interest of the school (SGB), however, comes to the fore when the implications of section 36 of the SASA and the use of school facilities in that connection are scrutinised further.

## 10 SGBs' Duty to Supplement the Resources Provided by the State

Section 36 of the SASA imposes an obligation on the SGB to take all reasonable measures within its means to supplement the resources supplied by the State in order to improve the quality of education provided by the school to all learners at the school.

We have already pointed out that the utilisation of school buildings, which include hostels, and the right to run a commercial enterprise in the interest of the school were the subject of the decision in the case of *Ferdinand Postma Hoërskool v Stadsraad van Potchefstroom*. It was accepted by the court, per Bertelsmann J, that school buildings may be used to run a commercial enterprise such as a restaurant, but schools must adhere to other laws and by-laws. The school was operating a business on a property zoned in terms of the town-planning schemes as an educational site and not a business site. Before a school can venture into such commercial activities, it must apply for the rezoning of the property to allow such activities.<sup>58</sup> At the time of this case, the State must have realised the possible implications of such enterprise or business conducted by the school, particularly as far as damage or loss resulting from such business or enterprise was concerned. The reason for the concern was the provisions of section 60(1) of the SASA. When this matter was heard, section 60(1) provided that the State was liable for any damage or loss caused as a result of any act or omission in connection with any *educational activity* conducted by a public school and for which such public school would have been liable but for the provisions of this section. Since then this section has been amended by the addition of the words "subject to paragraph (b)"; the term "educational activity" has been replaced by the term "school

58 See the note in Boshoff & Morkel 2A-20B where this summary is provided. See also Bertelsmann on "Governance and the South African Schools Act of 1996" in De Groof, Heystek, Malherbe & Squelch 67 & 69.

activity” and, more significantly, section 60(1) has become section 60(1)(a) and subsection 60(1)(b) has been added.<sup>59</sup>

The school is not obliged to take out insurance, but if the school has done so, then there would be a shared liability between the school and the State. The legislature thus appears to acknowledge a shared insurable interest between State and school. Importantly though, another amendment to section 60 does not impose a shared liability and does not indicate such a shared insurable interest. Section 60(4) was added in 1999 subsequent to the *Ferdinand Postma* decision, and provides that:

“Despite the provisions of subsection (1), the State is not liable for any damage or loss caused as a result of any act or omission in connection with any enterprise or business operated under the authority of a public school for purposes of supplementing the resources of the school as contemplated in section 36, including the offering of practical educational activities relating to that enterprise or business.”

Liability of the State is excluded. At first glance one would be tempted, to join *Sonnekus* and *Schlemmer* in arguing that this exclusion could only refer to loss or damage for which the state would otherwise have been liable. Section 60(4) deals with damage or loss caused as a result of any act or omission in connection with a business or enterprise operated under the authority of a public school. The State is its own insurer and the wording found in section 60(4) and not in subsection 60(1)(a) could then not be meant to refer to damage to or the loss suffered by the State as its own insurer of its own buildings. It must be loss or damage suffered by the school and has to be something in which the school has an economic interest. The insurable interest speaks for itself and the statute acknowledges it.

It is appropriate here to refer again to the *Fir & Ash Investments*<sup>60</sup> in which Griesel J comments that the interest of the tenant in leased property is much wider than suggested. Griesel referred to LAWSA which summarises a lessee’s insurable interest under a lease as follows: A lessee may insure the property let to him. In fact various insurable interests may be distinguished.<sup>61</sup>

We have already pointed out that section 13 of the SASA creates a usufruct for public schools on the immovable property of the State.<sup>62</sup> We submit that the right to occupy and use the immovable property, the obligation to generate additional income, the limitation of the liability of the State in some instances, and the exclusion of the liability of the State for loss or damage in other instances, form the basis for an insurable interest in the property for the SGB similar to that of the lessee in the property let to him or her. We would argue that this would apply, even though the State has not or may not have expressly concluded a written covenant with the SGB to repair or replace the property.<sup>63</sup> The obligation

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59 For the exact wording of s 60(1)(b) see pars 1 and 6 above.

60 *Supra*.

61 *Supra* 561.

62 See the discussion of the insurable interest with regard to this usufruct below.

63 See the *Fir & Ash Investments* case *supra* 560–561.

of the school to generate additional income to supplement the resources supplied by the State stems from, amongst other things, the fact that the State is unable to fully fund education. In addition, the State is not obliged to fund all education.

In the *Ferdinand Postma* case, it was accepted that the State cannot totally fund schooling out of its own budget. That being the case, the school carried the risk of the restaurant being destroyed by fire. The State was excluded from liability. Even if the State were liable, the State would be unable, immediately or in the foreseeable future, to repair or replace it. The school had every reason, and an obligation in terms of section 36 of the SASA, to continue with its enterprise or business. The liability fell on the school in terms of section 60(4) and to that end the school had a duty to insure the building and to have it replaced and operating again as soon as possible. This insurable interest in the building would, of course, be in addition to the interest which the school would have had in insuring the stock or income against loss or damage as a result of any act or omission in connection with the particular business or enterprise conducted by the school.

## 11 Limitations on the Right to Education

Apart from the general limitation of constitutional rights in terms of section 36 of the Constitution,<sup>64</sup> the SASA contains its own internal limitations with regard to loss or damage<sup>65</sup> and of the constitutional obligation of the State to provide education.<sup>66</sup>

The right to education is not unqualified. It is a right to a basic education in terms of section 29 of the Constitution. We will deal with this aspect further below.

## 12 Limited Resources of the State

Section 3 of the SASA acknowledges that there may be a limit to the available resources of the State to fund education. Every MEC must ensure that there are enough school places so that every child who lives in his or her province can attend school. If an MEC cannot comply with this obligation because of a lack of capacity existing at the date of commencement of the SASA, he or she must take steps to remedy any such lack of capacity as soon as possible and must make an annual report to the Minister on the progress achieved in doing so.<sup>67</sup>

This qualification of the duty of the State to provide education lends support to our view that the duty of the State is limited. The State has to provide basic education, schools where that education can be conducted and enough school places in those schools to accommodate the demand. The State's budget is limited and the State is its own insurer.

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64 Constitution of the Republic of South Africa Act 108 of 1996 ("the Constitution").

65 S 60.

66 SASA s 3; 2008 *De Rebus* 22.

67 See SASA s 3(3) & (4).



The school community represented by the SGB, though not the owners of the property, has a very real interest in the maintenance of the school buildings and facilities. They have every reason to insure the property to be able to ensure the repair or replacement of the school in the event of damage or loss so that the provision of education to their children can continue with the least possible disruption or interruption. Such insurance seems sensible in light of the State being its own insurer and having an inadequate budget to repair or replace buildings or facilities that have been damaged or destroyed. This argument has the same basis as the one with regard to the buildings where the school conducts a business or enterprise, since education is its main business or enterprise and regarding the position of the lessee dealt with above, namely the *losses suffered by the tenant (school/SGB) due to business interruption, and also the interruption and disruption of the of education of their children.*

In setting out this argument, we acknowledge that we have not even touched on the significance of the rights of children in terms of section 28 of the Constitution. In this regard, Bertelsmann J in *Laerskool Middelburg en 'n Ander v Departementshoof, Mpumalanga Departement van Onderwys*,<sup>68</sup> referred to section 28(2) of the Constitution and the “best interests of the child”, and found *inter alia*, that the courts had repeatedly emphasised that practical content was to be given to the fundamental right entrenched in section 28(2) of the Constitution, namely that a child’s best interests were of paramount importance in every matter concerning the child. It was self-evident that the provisions of section 28(2) of the Constitution were directly applicable to education and every situation in which a learner might find him- or herself.<sup>69</sup> We submit it would be difficult to argue that it would be in the best interests of the learners to be without school buildings after a natural or other disaster because the government cannot afford to repair or replace the buildings of a particular school and the SGB chose not to take out insurance on the buildings even where they could afford such insurance.

There is a further argument with regard to the insurable interest of the school (SGB) in the property of the State. In *Strydom v ABSA Bank Bpk*<sup>70</sup> Du Plessis J commented on ownership and economic loss and said that, in the case of damage to movable property, our law of delict does not require ownership of the property in question. The case dealt with damage suffered as a result of the loss of a cheque and Du Plessis J anticipates that in future a debate might arise where damage is suffered as a result of the loss of a document. In the case of pure economic loss ownership does not come into play either.<sup>71</sup>

We wish to emphasise that in terms of section 36(1) of the SASA a SGB of a public school *must take all reasonable measures* within its means to supplement the resources supplied by the State in order to improve the

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68 2003 4 SA 160 (T); 2002 4 All SA 745 (T).

69 *Idem* 175–176.

70 2001 3 SA 185 (T) 194B.

71 *Ibid.*

quality of education provided by the school to all learners at the school. Where the school, in compliance with this *statutory duty*, uses the school buildings to conduct an enterprise or business, destruction of or damage to the buildings, stopping or interrupting the business and giving rise to economic loss, most certainly gives the school, as in the case of a tenant, an insurable interest in the property of the State. In addition, section 60(4) excludes the State from liability for any damage or loss caused as a result of any act or omission in connection with any enterprise or business operated under the authority of a public school. In terms of section 60(1)(a) the State can be liable. In the case of section 60(1)(b) the State and the school can share liability because the school has taken out insurance, but the liability of the State is limited to the extent that the damage or loss has not been compensated in terms of the policy. The school does not have to have a statutory duty to perform the function of taking out insurance to cover these eventualities. The SASA recognises the insurable interest of the school and limits or even excludes the liability of the State accordingly.

The exact terms and conditions and the extent of the insurance cover will be contained in the contract of insurance.

We referred above to the problem that the authors appear to have with the cost of insurance. Even at the stage when the school was the owner of the property and could, according to their view of the legal position at the time, actually insure the school buildings, they still maintain that in order to budget for the insurance the compulsory contributions to the school fund were adjusted and significant funds flowed into the coffers of the insurers and their agents.

The conduct of SGBs after the return of the school property to the State (*expropriation*) seems to irk them even more and they say that many governing bodies, under the impression that they are still the owners of the school property, conclude contracts of insurance and recoup expensive premiums from unsuspecting parents. They say that this borders on irresponsible wasting of parents' money.

The authors proceed to discuss the insurers' receiving the insurance premiums without any obligation to pay when the damage materialises, the need for an insurable interest without attempting to establish whether in fact such an interest can exist even though the property belongs to the State, and then seem to cast aspersions on the insurer and the SGB by saying that, although they are contractually liable to pay the insurance premiums, such payments are wasted cost, since the insurer can retain the money. The reason for this is that the insurer would not be contractually liable to pay out any insurance if damage cannot be proved. However, an *ex gratia* payment is possible.

In *Steyn v AA Onderlinge Assuransie Assosiasie Bpk*<sup>72</sup> De Villiers J expressed a view on this line of thinking with reference to the fact that arguments concentrate on the lack of insurable interest without attempting to

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72 1985 4 SA 7 (T) 12.

establish whether or not the contract constituted a wager. It would have been surprising, he said, that the company, all the time knowing that it was a wager, should now aver that the agreement was not enforceable because it was a gambling contract despite the fact, that for all those years, they had been receiving the insurance premiums.

Whereas the authors state categorically that, in the process of taking out insurance and collecting school fees from parents to cover the cost thereof, SGBs act in a manner which borders on irresponsible wasting of parents' money, we submit that a responsible SGB of a public school which occupies immovable property owned by the State is merely exercising its fiduciary duties in terms of the SASA if it does so. It is also acting with due diligence towards the affairs of the school if it insures the property. In as much as the SGB stands in a position of trust towards the school,<sup>73</sup> they would be highly irresponsible and failing in their fiduciary duty if they do not take precisely those steps of which Schlemmer and Sonnekus are so critical. The SGB would be gambling with the very education and future of children if they fail to assist with the preservation and protection of the school buildings no matter what section 21 may or may not oblige them to do in that regard. It is clear from the above that we differ from Sonnekus and Schlemmer's view that the assumption, as they call it, by the court in *St Helena Primary School v MEC, Department of Education, Free State Province*,<sup>74</sup> was incorrect or uncalled for and from their view that it is doubtful whether a governing body would be able to demonstrate an insurable interest in the property of the State.

### **13 Usufruct Created for Public Schools on the Immovable Property Owned by the State**

We have already referred to the provisions of section 13 of the SASA which creates a usufruct to public schools on the immovable property of the State. We submit that there are various reasons why the school has an insurable interest in the property of the State on which the public school is situated. In terms of section 21(1)(a) or section 21(6) of the SASA some schools exercise the allocated function to maintain and improve the school's property and buildings occupied by the school, including school hostels. In many provinces school hostels are run solely by the SGB on behalf of the public school without any assistance or financial support from the State. The obligations on the school with regard to the immovable property subject to this statutory usufruct, read in the context of the SASA as a whole, can, therefore, extend to the payment of insurance premiums, municipal rates and taxes and even include the maintenance of the property.<sup>75</sup>

The school, therefore, has occupation and the use of the property for a specific purpose, namely to occupy and use the immovable property for

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<sup>73</sup> SASA s 16(2).

<sup>74</sup> 2007 4 SA 16 (O).

<sup>75</sup> See *Liebenberg v Liebenberg* 1986 3 SA 756 (C).

the benefit of the school for educational purposes at or in connection with the school. This would include the possession and use of the school for the purposes specified in section 36(1) read together with section 60(4) that is, to occupy and use the immovable property of the State for educational purposes and for a business or enterprise and the school is entitled to continue to occupy and use the property for as long as they comply with that purpose, potentially indefinitely. Surely the destruction of or damage to the buildings, stopping or interrupting the business and giving rise to economic loss, gives the school an insurable interest in the property of the State. This would also apply to the interruption of the use and possession of the immovable property of the State for educational purposes or even the use of the school hostel. It is interesting to note in passing that in terms of the common law the owner has the right to ensure that the usufructuary cares for the property, does not burden the property unduly by the use and enjoyment of it and provides security for the restoration of the property to the owner in good condition.<sup>76</sup>

#### 14 Expropriation of the School Property by the State and the Non-payment of Compensation

In establishing the line of argument of the authors<sup>77</sup> we referred to the stages of the development of the ownership of the school property, namely the first stage when the schools were the owners of the property,<sup>78</sup> and the subsequent stage with the advent of the SASA, and more particularly section 55(1) and (10), when ownership was returned to the State.<sup>79</sup>

We made the point<sup>80</sup> that, although the authors refer to some of the provisions of section 55 of the SASA, they appear to have missed an opportunity to consider the implications relating to an insurable interest in the property and the issue of the expropriation of the property and compensation for improvements effected by the parent community prior to expropriation or even after expropriation in terms of the provisions of section 21(1)(a) or 21(6) of the SASA.

Section 55(1) of the SASA provides that the immovable property of a school which was declared to be a state-aided school under section 29(2A) of the Education Affairs Act,<sup>81</sup> devolves upon the State on a date determined by the Minister by notice in the *Government Gazette*. This is one of a number of transitional provisions in the SASA. With regard to the liability

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76 *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC, Local Government and Housing, Gauteng (Kwazulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 1 SA 530 (CC) 555 per Yacoob J par 56.

77 2008 *De Rebus supra*.

78 *Idem* 22.

79 *Ibid*.

80 See 10 & 11 *supra*.

81 70 of 1988.

of the school, section 55(7) provides for transitional and residual obligations of the school concerning the immovable property:

“The rights of third parties with claims against the school in respect of the immovable property affected by the transfer contemplated in this section are not extinguished by the transfer and –

- (a) a third party acquires no right of execution against the immovable property as a result of such transfer alone;
- (b) a third party is obliged to excuss the school in question if the school fails to meet its commitments to the third party; and
- (c) the State indemnifies such a third party in its claims against the school which were secured by the immovable property, but the third party does not acquire a greater right against the State than that which it had against the school prior to the transfer.”

At the time of the transfer of the property the school retained its obligation to third parties with regard to its commitments to those third parties, and in that regard the school would have had an insurable interest in the property. These obligations may have been met or may have been extinguished by now, but, in the case of a bond, for example, this may not have happened yet, in which case the school would still be liable in terms of sub-paragraph (b) and the State for the balance in terms of sub-paragraph (c). It is hard to imagine that the school would continue to meet its obligations in terms of the bond if the property no longer belongs to the school but to the State. If the school has no interest in the property, the third party would in any event first look to the school before seeking compensation from the State.

It may be argued that this is an hypothetical example and will not materialise. It is not so. Not only can the SGB continue to improve the immovable property of the State (whether one takes the view that it is an obligation or a function in terms of section 21(1)(a) or 21(6) of the SASA, or part of the functions of a business or enterprise (section 36(1)). However, the authors themselves also argue that the SGB conducts the business of the owner and should be indemnified for their input to the extent that expenses were incurred in managing the interests of the State.<sup>82</sup>

If this is true, the SGB would have a claim for compensation and an insurable interest to that extent. This raises the crucial matter of expropriation and compensation.

During the period when the property was the property of the school, improvements to the fixed property amounting to millions of rands were effected by many of the schools in the Republic. Even now, after transfer back to the State, improvements amounting to many millions of rands are being effected to the school property by the schools or SGBs even though it is now property belonging to the State. Bodies representing SGBs, for example the Federation of South African Schools Governing Bodies (FED-SAS), quantified the amount of the improvements and these claims were submitted to the State after the completion of the expropriation and the subsequent transfer. The schools could not prevent the transfer pending

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82 2008 *De Rebus* 24.

the payment of compensation. Section 55(8) of the SASA provides that the fact that compensation for any land and real rights in or over land expropriated in terms of subsection (1) has not been finalised or paid, does not impede the transfer of such land and real rights in or over land to the State. In terms of section 55(10) any claim for compensation arising from subsection (1) had to be determined as contemplated in the Constitution. No such compensation was ever paid by the State to the public schools concerned. The State took the stance that, although they had expropriated the property (including valuable improvements) they had given back the property to the community to occupy and use for educational purposes.<sup>83</sup> The value added by the community has not been extinguished and compensation has not been paid. The enhanced value of the property remains an asset of the community and the school. Based on the same arguments we set out above regarding the establishment of an insurable interest for the school,<sup>84</sup> which until now has not been extinguished by compensation from the State to the school or the particular community. Even after expropriation and the return of the immovable property to the State, schools continue to maintain and improve the *school's property*, and buildings and grounds occupied by the school, including the school hostels as contemplated by section 21(1)(a). We submit that the term "school's property" in section 21(1)(a) should probably read "immovable property owned by the State".

## 15 The Constitutional Duty to Provide a Basic Education

In concluding we again question the absolute terms in which the authors state the obligations of the State with regard to the right to education and the provision of schools, namely that it is the constitutional duty of the state to provide schools and buildings and, should any of this property be damaged or destroyed by fire, the State would be failing in its constitutional duty if they did not repair or replace the schools and the buildings.

We have referred to the Bill of Rights and the limitation of rights. Section 29(1)(a) of the Constitution refers to the right to *basic education*. The definition of the term "school" in terms of section 1 of the SASA covers the years from grade R up to and including grade twelve. The authors have omitted to examine where basic education commences and how far *basic education* extends into the school life of a learner. They have not examined, for example, whether it even reaches grade eight. Had they done this, they may have discovered that at least part of the school life of a learner comes before basic education commences in many schools, or extends beyond the basic education phase. Even though they may be partially right with regard to the provision and maintenance of school buildings, the argument would be limited to only the basic education

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83 This is what we recollect of discussions and communications at the time. Documents are no longer available.

84 Par 7 ff.

phase. What happens thereafter would be in the lap of the gods or at the mercy of the schools and their SGBs in partnership with the State.<sup>85</sup>

Veriava states that “[a]n important feature of the right to basic education is that, unlike other socio-economic rights in the Constitution, it is unqualified”.<sup>86</sup>

As indicated above, we submit that the right to education is qualified and limited in many ways. What Veriava and Schlemmer and Sonnekus fail to appreciate is that the term “a basic” already qualifies or limits the right to education. A careful reading of the rest of section 29 of the Bill of Rights shows that a number of limitations and qualifications are contained in that section alone. Read together with the provisions of the SASA, the limitations and qualifications to the right to education multiply. Not least of all the limitations and qualifications is the aspect of financing education. In his address on governance and the South African Schools Act of 1996, Bertelsmann J made the point that “[a]s long as education is enshrined as a fundamental human right in the Constitution, the state remains responsible for the provision of at least primary education”.<sup>87</sup>

Although grade R forms part of the definition of “school” the majority of the schools in the country do not have such a grade with staff that are on the official staff of the school and who are paid by the Department of Education. Many schools operate a pre-primary school, including grade R, and this is financed by the school as part of a business enterprise as contemplated by section 36 of the SASA. Such a pre-primary school is often conducted in part of the school buildings which is immovable property belonging to the State.

The reference by the authors to the obligation of the State to provide schools and school buildings to comply with its obligation to provide education to the children of South Africa<sup>88</sup> also does not take into account that compulsory education, apart from basic education as indicated above, does not extend to grade twelve. This means that education, or a school beyond a basic education phase, or at best, beyond the compulsory education phase, apart from any other limitation or qualification, extends beyond the constitutional duty, and ability, of the State. In *Queens College Boys High School*,<sup>89</sup> counsel for the applicant argued that learners over the age of sixteen years do not have a constitutional right to education.<sup>90</sup> The authors fail to take this into account and to deal with it in their evaluation of the judgment of Musi J in the *St Helena Primary School* case.<sup>91</sup>

As far as the provision of schools may include the provision of a hostel, we have already referred to the fact that in many provinces the State does not operate or fund hostels anymore. The running of hostels is done on a

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85 See also Veriava “The amended legal framework for school fees and school funding: A boon or a barrier?” 2007 *SAJHR* 180.

86 *Idem* 193.

87 De Groof, Heystek, Malherbe & Squelch 64.

88 2008 *De Rebus* 25.

89 *Supra*.

90 Par 21.

91 *Supra*.

commercial basis by the SGB in buildings which are the immovable property of the State. The insurable interest of the school in these buildings, pre-primary school and hostels, has already been explained. It is also significant that legislation does not assign an obligation to the State to provide free basic or other further education. Had the authors considered this aspect of the right to education and the duty to provide basic education, particularly with respect to education beyond the phase of basic and compulsory education, we submit that they might well have arrived at a different conclusion in their article.

## 16 Conclusion

We must therefore conclude that we cannot agree with the authors that:

- (i) In terms of the South African Schools Act 84 of 1996, (all) school governing bodies (SGBs) are *merely* entrusted with the use and management of the school property and that the maintenance obligation rests on the government alone;
- (ii) based on the relevant legislation and regulations published in terms of the SASA, that there can be no obligation on a SGB to maintain or repair the school property; and hence
- (iii) it remains the (sole) responsibility and constitutional obligation of the state, and, in addition, the SGB has no insurable interest in the property.

We submit that a prudent SGB which has the resources to do so will be remiss if it does not insure its interest in the school buildings to ensure, *inter alia*, that the best interests of children are served and that sustainable education is provided. The State's capacity to establish and fund schools is limited and there is clear provision for SGBs to at least accept co-responsibility for the funding of education, including the maintenance of building.