EDUCATION LAW – LIABILITY OF STATE FOR CONTRACTUAL DAMAGES PAYABLE BY PUBLIC SCHOOL – SECTION 60(1) OF SOUTH AFRICAN SCHOOLS ACT 84 OF 1996

Technofin Leasing & Finance (Pty) Ltd v Framesby High School 2005 6 SA 87 (SE)

1 Introduction

The South African Schools Act 84 of 1996 ("Schools Act") is an important statute given the fact that there are more than 28 000 schools in South Africa which are attended by an estimated 12,5 million learners. There are thus very few people in the country who are not at some stage and in one capacity or another involved with a school as governed by the provisions of the Schools Act.

While the Schools Act is a pioneering and fairly sound piece of legislation, the legislature has had to amend it almost every year to provide for unforeseen difficulties, clarify certain matters and effect policy changes. It is thus not surprising that the Schools Act will probably be reviewed as a whole within the next two years in order, *inter alia*, to consolidate and better organise its provisions, solve certain technical problems and include certain matters that are currently dealt with in other statutes (eg the National Education Policy Act 27 of 1996).

In addition to legislative changes, there have been a number of court decisions concerning aspects of the Schools Act that have revealed problems with certain formulations and provisions (see generally *Ferdinand Postma Hoërskool v*

Stadsraad van Potchefstroom [1999] 3 All SA 623 (T); *Louw v LUR vir Onderwys en Kultuur, Vrystaat* 2005 6 SA 78 (O); *Die Lid van die Uitvoerende Raad van die Vrystaat belas met Onderwys en Kultuur v Louw and Oosthuizen* case no 483/2004 (SCA)).

The decision in the case under discussion has now produced an interesting development in the interpretation and application of the Schools Act. The court, *per* Pickering J, held that the State is not only (vicariously) liable for delicts connected to educational activities conducted by a public school, but also for contractual damages occasioned by a *breach of contract* committed by the school through its organs. Up to now it has been assumed by many that the relevant provisions in the Schools Act (see s 60(1)) only apply to delictual liability. However, the court *in casu* held that such wide language is used in section 60(1), that it would be inappropriate to limit liability to the obligation to pay delictual damages and that contractual liability must be included. This interpretation was supported by counsel acting for the State (as represented by the member of the executive council responsible for education in the Eastern Cape province). It would thus seem that the State is happy with this increase in its liability. However, it is not clear whether the national Department of Education is also officially in favour of such a stance.

2 Facts, reasoning and decision

In the current matter served before the court by way of a stated case (88–89), it appeared that the defendant (a public school known as Framesby High School) leased photocopier machines from the plaintiff. The school then sought to cancel the contract because of an alleged misrepresentation by the plaintiff. However, the plaintiff treated this as breach of contract (presumably repudiation) and claimed cancellation, return of the machines and contractual damages. In addition to its defence on the merits, the school introduced a special plea of non-joinder, namely that as a result of section 60(1) of the Schools Act the plaintiff should have sued the member of the executive council responsible for education in the Eastern Cape. This section provides as follows:

> "(1) The State is 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.
>
> (2) The provisions of the State Liability Act, 1957 (Act No 20 of 1957), apply to any claim under subsection (1).
>
> (3) Any claim for damage or loss contemplated in subsection (1) must be instituted against the Member of the Executive Council concerned.
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> (4) 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.
>
> (5) Any legal proceedings against a public school for any damage or loss contemplated in subsection (4), or in respect of any act or omission relating to its contractual responsibility as employer as contemplated in section 20(10), may only be instituted after written notice of the intention to institute proceedings against the school has been given to the Head of Department for his or her information."

In its reasoning, the court declared that it was common cause that the photocopier machines were acquired by the school "in connection with the 'educational activities' conducted by the first defendant" (90C). However, this matter was not canvassed or considered any further. The court then briefly examined relevant sections of the Schools Act relating to the school as a juristic person, the powers of the governing body in general and the fact that the leasing of the machines would have had to have been undertaken by the State if it had not been for the empowering provisions in the Schools Act (90D–91A).

The court referred to the "emerging trend" in the construction of statutory provisions, that regard is to be had to the context in which words appear, even though the words to be interpreted are clear and unambiguous (91C–E; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC) 526–528). In the present case, so the court concluded in effect, section 60 has to be read in the context of the entire Schools Act (92C).

After considering arguments on behalf of the plaintiff that need not be repeated here, the court observed that section 60 is couched in the broadest terms and that the State's liability is expressed in the most general language (92I). The relevant section does not make any reference to delictual liability and the court stressed the obvious, namely that words such as "damage" and "loss" are not concepts with an exclusive delictual connotation (92J). There is thus nothing in section 60 itself limiting the State's liability to delictual liability alone. The court further rejected arguments based on the alleged wide potential liability of the State if it would be held liable to pay damages for breach of contract by public schools and referred to "safeguards" in the Schools Act that would give the State some general control regarding contractual and financial activities by a public school (93G). Pickering J also observed (93J–94B):

> "A situation, for instance, whereby school equipment such as desks, chairs or learners' books were attached in order to satisfy a judgment debt or where an application was brought for the liquidation of the school, would be intolerable and the Legislature, in my view, could never have intended that a public school be exposed to such risks regardless of the degree of autonomy afforded to its governing body. In my view . . . s 60 has been enacted, *inter alia,* for the protection of any public school which would, but for the provisions of the section, have been liable to a plaintiff for contractual damage or loss. Most importantly, however, sight must not be lost of the fact that the responsibility for and the funding of all public schools . . . ultimately vests . . . in the State. Section 60 must, in my view, be interpreted in the context of the acceptance by the State of its obligations in this regard."

The court considered, but rejected, the argument that since the State was not a party to a contract, holding it liable for damages would interfere with the rights of the contractual parties (ie, the school and the business) (94E). While recognising procedural difficulties when a third party litigates against the school for certain purposes arising out of a contract (eg for restitution of performance already delivered or for specific performance) and against the State (for recovery of damages), this does not compel a conclusion that section 60 is to be limited to delictual liability (94H–95C).

The court agreed with the argument that if section 60 were to exclude the State's liability for contractual damages, there would have been no necessity for enacting section 21(10) of the Schools Act which provides as follows (95D–E):

> "Despite section 60, the State is not liable for any act or omission by the public school relating to its contractual responsibility as the employer in respect of staff employed [by the school governing body] in terms of subsections (4) and (5)."

(See on the consideration of s 20(10) in a somewhat different context *Die Lid van die Uitvoerende Raad van die Vrystaat belas met Onderwys en Kultuur v Louw and Oosthuizen* para 11 *et seq*). The court accordingly rejected any contention that section 60 should be limited to delictual loss and made an order holding the State liable "for any damage or loss occasioned to the plaintiff in respect of the agreement concluded between the plaintiff and first defendant [the school] in the event of it being established that the first defendant was in breach thereof" (95H–I). However, the court refused to dismiss the claim against the school itself (95G–H). In the process it held open the possibility that the State may, for some or other reason, presumably to be revealed by evidence at the trial, not be liable for damages, or to provide for aspects of the claim (eg regarding restitution) to be pursued against the school alone.

3 Evaluation and conclusions

As stated, the provincial government in the Eastern Cape argued in favour of the approach adopted by the court *in casu*. However, there has apparently been no official confirmation by the national government, which will ultimately be liable to provide money to satisfy claims for contractual damages against public schools, in support of this development. If the national government does not accept the increased risk of paying damages, it could initiate amendments to the Schools Act. Even if it is in favour of the interpretation of the Schools Act *in casu*, it may be well advised to consider provisions to limit its liability and/or provide better safeguards against injudicious financial transactions and breach of contract by public schools. There could also be improved legislative and administrative measures defining and restricting the contractual capacity of governing bodies of public schools and lowering the risk of corruption.

There are, in any event, some unanswered questions regarding aspects of section 60 and related provisions in the Schools Act, as well as the State Liability Act 20 of 1957. Recently, the Supreme Court of Appeal had to confirm that section 60(1) is also applicable with regard to delicts by educators appointed by the governing body of a school and who are not in the employ of the State (see *Die Lid van die Uitvoerende Raad van die Vrystaat belas met Onderwys en Kultuur v Louw and Oosthuizen supra*). The reference to the applicability of the State Liability Act also raises certain questions (see generally *Mateis v Ngwathe Plaaslike Munisipaliteit* 2003 4 SA 361 (SCA)). There are many examples in other statutes where this legislation is referred to – sometimes using the phrase *mutatis mutandis*. However, this phrase is not employed in the Schools Act and the significance of this omission will probably have to be considered at some stage. Section 1 of the State Liability Act provides as follows:

> "Any claim against the State which would, if that claim had arisen against a person, be the ground of an action in any competent court, shall be cognizable by such court, whether the claim arises out of any contract lawfully entered into on behalf of the State or out of any wrong committed by any servant of the State acting in his capacity and within the scope of his authority as such servant."

Does the reference to the State Liability Act mean that section 1 of this legislation also applies or is the intention only that the balance of the (more procedural) provisions are applicable? Furthermore, there is probably not enough clarity on whether a public school as a juristic person would be liable for the acts of educators active at a school but who are in the employ of the State. Can the State also be held liable for the actions of its employees (educators in the service of a

provincial government) outside the provisions of section 60(1)? When are actions by persons acting in the name of or in relation to a school attributable to the school to satisfy the requirement of "by a public school"? (There are other questions as well which do not need to be addressed in detail in this contribution – see generally Visser "Delictual liability in respect of unlawful initiation practices at a public school: When is the State liable?" 2004 *THRHR* 98–102.)

A number of further points may be raised to question aspects of the court's reasoning *in casu.* The far-reaching consequences of holding the State liable for all contractual damages occasioned by contracts concluded by the governing bodies of thousands of public schools, which cannot really be controlled effectively by the State, as well as the anomalies of when the school may be sued for certain aspects regarding a contract (eg performance or restitution), but the State only for damages, provide obvious examples of difficulties.

Prima facie, it appears a little artificial and strained to interpret the expression "any act or omission in connection with any educational activity conducted by a public school" to include breach of contract regarding equipment leased for administrative purposes allegedly in support of educational activities at the school. The State is evidently not liable merely because the public school would be liable, but only where the relevant act or omission is in *connection with any educational activity.* Where this requirement is not satisfied, only the school can be liable (if the other requirements are met). Section 60(1) is silent as to the nature and quality of this connection and a reasonable interpretation must be given to it to avoid absurd results. For example, if the governing body of a public school were to purchase cell phones for the school to be used by educators active there (obviously to facilitate proper communication to enable them to perform their "educational activities" on behalf of the school), would the State be liable to pay damages if the school's money dries up after excessive use of the phones and a huge claim for damages is instituted? (see generally on the purchase of a cell phone and associated corruption, *Despatch High School v Head, Department of Education, Eastern Cape* 2003 1 SA 246 (CkH)). And if a school purchases a luxury bus (to support educational activities of course), will taxpayers have to finance claims for damages as a result of some form of breach of contract associated with the transaction? In any event, while the *conclusion* of a leasing contract and the *use* of photocopiers *in casu* could presumably be seen as reasonably connected to educational activities, the *breaching* of such a contract (in terms of all the forms of breach of contract recognised by our law) is much further removed from the said activities. The court, while apparently generally aware of the dangers to the treasury posed by certain governing bodies and professional staff at public schools (93), mistakenly played down this factor and never properly considered the question of the nature of the link that there should be between the "act or omission" and the "educational activity" in question. The legislature will probably have to intervene in this regard. One way of inhibiting careless contracting and breach of contract would be to render the members of the governing body and relevant school staff personally liable for damages (see also s 38A(9) of the Schools Act dealing with the recovery of certain amounts paid illegally to educators at a school).

The court's handling of the argument by counsel for the plaintiff, that there is a link between section 5(3)(c) of the Schools Act (prohibiting a school to refuse admission to a learner if the parent does not want to enter into a contract waiving a damages claim) and section 60, while correct in rejecting this patently incorrect

submission, is not impressive. The court could have pointed out categorically that section 5(3)(c) does not "interfere" with contractual freedom and that this submission is not based on a proper reading of the provision (see generally on s 5(3)(c) Visser "Some principles regarding the rights, duties and functions of parents in terms of the provisions of the South African Schools Act 84 of 1996 applicable to public schools" 1997 *TSAR* 630). The fact that the school is unable to force a parent to conclude a contract, cannot be an indication of a restriction on the contractual freedom of the school and has nothing to do with the question of State liability.

While the court is correct in restating the obvious, namely that words like "damage" and "loss" do not have an exclusive delictual connotation (see generally on the concept of damage, Visser and Potgieter *Law of damages* (2003) 24 *et seq*), the expression "act or omission" in section 60(1) is more closely associated with delictual liability than liability for breach of contract, or other types of liability (eg for unlawful enrichment). However, the court did not consider this point.

The restrictions and safeguards that the court identified regarding the power of a governing body to conclude contracts for which the State will have to pay damages, are little more than illusory (93E–H). In view of the endemic corruption and culture of weak public management in many spheres, it is also somewhat alarming to read that the court is of the opinion that in the running of the school, governing bodies should be "unencumbered by the strict requirements relating to State procurement" (93H). In fact, more effective restrictions and controls are called for and not procedures to make it easier to spend the money contributed by the taxpayers or parents.

The court's argument that a school may be liquidated (93I; see quotation above) and that it is thus better to recognise a claim for damages against the State, is not based on solid legal authority. A public school can probably not be liquidated. The argument that "learners' books" should not be capable of attachment, is also unclear since if such books belong to learners, they could obviously not be so attached (93I). (The court possibly intended to refer to textbooks belonging to the school but utilised by learners.) In passing, reference may be made to section 58A(4) of the Schools Act (not yet in operation at the time of preparing this contribution), which stipulates that the assets of a public school may not be attached as a result of any legal action taken against the school. This provision could presumably be seen as neutral to the dispute in the case under discussion. However, it would create problems for third parties contracting with public schools and who are suing for performance or restitution – for which the State cannot be held liable.

The judgment *in casu* generally exaggerates the importance of State funding to public schools as rationale for the State's concomitant liability to pay contractual damages – if, in any event, this link is a logical one (94C). The provisions in the Schools Act regarding the raising of school fees from parents (s 39; see also generally Visser "Aspects of school fees at public schools" 2004 *De Jure* 358–362; "*Governing Body, Gene Louw Primary School v Roodtman* 2004 (1) SA 45 (C)" 2004 *THRHR* 533–537), the statutory duty on governing bodies to supplement State resources (s 36) and the fact that the State differentiates between schools in its funding model and gives much more to certain schools than to others (s 35), imply that partial self-sufficiency in funding has become important, especially in "section 21" schools with the maximum contractual capacity. The idea of State funding should thus be sparingly used as an argument in favour of State liability for contractual damages.

In conclusion it may be observed, that although the judgment in *Technofin* is thought-provoking and interesting, it is by no means the final word on the question of State liability for breach of contract by a public school in general, as well as related issues of detail.

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