

The state's liability for damage or loss in connection with educational activity in public schools: Recent minor judgments

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Introduction

In recent times, court judgments on matters such as language policy and teacher appointments in public school have dominated the education law landscape in South Africa.¹ Such cases enjoy much publicity given the emotive issues of language medium and the right to choose languages of education in a public school. On a policy and political level, these cases offer landmark positions that will no doubt be debated and challenged well into the future.

One could be forgiven, therefore, for not paying attention to minor judgments, such as the *Ficksburg* case² and the *Southview* case.³ These cases have received very little if any coverage in the media. Yet, these are profound cases in education law with respect to the responsibility of the state for the provision of education to the people. Moreover, these so-called minor cases represent somewhat unexpected contestations of state decisions regarding the decentralisation of rights, powers and responsibilities in education.

It is well-known that the birth of the new education system was preceded by intense contestations on the merits and demerits of centralising or decentralising power and responsibility in the education system.⁴ Indeed, the system that evolved after 1994 represents

¹ For example: *Governing Body of Mikro Primary School & Another v Western Cape Minister of Education & Others* [2005] JOL 13716 C.

² In the matter between the Member of the Executive Council of the Free State for Education and Culture and Manda Louw (first respondent), and Martin Lourens Oosthuizen (second respondent) heard in the Highest Board of Appeal of South Africa (*Ficksburg* case). Case number 483/04.

³ In the matter between Southview High School (first applicant) and governing body of the Southview High School (second applicant) and Chairperson of the governing body of the Southview High School (third respondent) and Financial Services of South Africa (Pty) Ltd key (first respondent) and the Sheriff, Westonaria (second respondent) heard in the High Court of South Africa (Transvaal Provincial Division), (*Southview* case). Case number: 7612/2001.

⁴ This tension has been recorded extensively among others by Beckmann ("The emergence of self-managing schools in South Africa" 2002 *Education and the Law* 153-166), Beckmann and Visser ("Some thoughts on the legal position and role of governing bodies of public schools in the new educational

an uneasy compromise between the forces that sought to establish a strongly centralised system and those that wanted to establish a strongly decentralised system. One of the features of the hybrid system that emerged is that the state seemingly endeavoured to shed some responsibilities and obligations, while retaining other powers and functions.

As it was generally accepted that the state could not on its own provide public education of a sufficiently high quality, the South African Schools Act, No 84 of 1996 (Schools Act) proposed a partnership between the state, parents, educators and learners concerning the funding, governance and organisation of schools. This included the creation of governing bodies which would have the power, among others, to levy school fees and to augment funds made available to schools by the various provincial education departments.

Section 15 of the Schools Act provides that public schools are juristic persons, with legal capacity to perform its functions in terms of this Act. Section 16 assigns the governance of public schools to school governing bodies and limits the powers of governing bodies to those that are described in the Act. The professional management of schools is assigned to the principal under the authority of the provincial head of department.

The two minor judgments

The two cases in question dealt with two aspects in particular, namely, the power of governing bodies to create educator posts in addition to the posts on the official post establishment. The other aspect is the power of a public school acting through its governing body to buy educational equipment for the school, and to enter into financial agreements for such a purchase.

Southview High School

The school borrowed money from Financial Services of South Africa (PTY) Ltd to purchase educational equipment (desks, chairs and computer equipment). When the school defaulted on payment, Financial Services of South Africa obtained default judgment against school for the payment of R682 848-60 with interest and costs. To execute this order, Financial Services of South Africa instructed the sheriff of Westonia to attach the movables of the school.

Ficksburg Primary School⁵

This case followed an incident at Ficksburg Primary School crooks when a learner nearly drowned and, as a consequence, suffered severe brain damage. Damages were sought from the Free State Department of Education in terms of Section 60(1) of the Schools Act, which provides that an education department is liable for damage or loss caused by the act or omission of a staff member of the public school. The Department argued that it should not be held liable as the staff members on duty were not employed by the Department but by the school in terms of section 20(4) of the Schools Act.

environment" *Journal for Contemporary Roman-Dutch Law* 1999 108-113), Fleisch ("Managing educational change. The state and school reform in South Africa" 2002. Heinemann), Malherbe in De Groof *et al.* ("The education clause in the South African Bill of Rights: Background and contents" 1997 *Human Rights in South African Education. From the Constitutional drawing board to the chalkboard* Acco, 66) and Sayed ("Discourses of the policy of educational decentralisation in South Africa since 1994: An examination of the South African Schools Act" 2000 *Compare* 141-152).

⁵ Judgment delivered in Afrikaans.

Discussion

Southview High School

In this case Roux J referred to section 60 of the South African Schools Act, which reads 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 20 of 1957), apply to any claim under subsection (1).

The Court also referred to the fact that the school was a public school in terms of Chapter 3 of the South African Schools Act. Section 37 (5) of this Act provides: "All assets acquired by a public school on or after the commencement of this Act are the property of the school."

In the opinion of the Court, "the contract of a loan to provide educational facilities" constituted an educational activity as defined in section 60 (1) of the Schools Act. The court concluded that the provisions of section 3 of the State Liability Act of 1957 render the attachment of the movables belonging to a public school, in the circumstances of the case, unlawful.

It is perfectly understandable that Financial Services of South Africa would have tried to recuperate its losses from the school, which is a public school and therefore a juristic person, with legal capacity to perform its functions in terms of this Act (Section 15 of the Schools Act). Because the school has the legal capacity to enter into a financial agreement which creates obligations for it, it seems logical that those who offered credit facilities to the school should be able to recover their losses from the school in case of non-compliance with the terms of a contract. If the court had upheld this view, it would have meant that the state would have been exempted from part of its liability for a state function, namely the provision of public education. The liability for aspects of public education would in this case have been devolved to the school itself. This seems to fly in the face of section 7(2) of the Constitution of 1996 which holds that the state must respect, protect, promote and fulfil the rights [including the right to education as enunciated in section 29] in the Bill of Rights. What the court has therefore done is to reaffirm the state's liability in connection with losses or damages arising from educational activities in public schools.

Ficksburg Primary School

In this case, the essential question was whether the state could be held liable for damage caused by educators not employed by the state, but by the school itself. In terms of Section 20(4) of the South African Schools Act a public school may establish posts for educators and employ educators additional to the establishment determined by the Member of the Executive Council in terms of section 3 (1) of the Employment of Educators Act, 1994. This provision is subject to this Act [the Schools Act], the Labour Relations Act, 1995 (Act 66 of 1995), and any other applicable law. Section 20(10) provides that despite section 60 (see above), 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 in terms of subsections (4) and (5).

When damages were sought from the state, the state argued that the fact that the educators in question were employed in terms of section 20(4) of the Schools Act [therefore not state employees] and the provisions of section 20(10) meant that the state could not be held liable for the damages suffered through the negligence of employees of the school. However, Streicher AR held that that the state could not invoke section 20(10) as it only protected the state against liability for acts or omissions at a public school arising from

contractual responsibility of the school as employer of staff appointed in terms of section 20(4). The court therefore found that negligent acts of staff members employed by public schools in terms of section 20(4) of the Schools Act did not exclude the state's liability for damages. The case therefore established the state's liability in this particular case.

Implications

These two cases provide a measure of clarity on certain issues, which may not have been given sufficient attention when the new suite of post-apartheid education legislation came into being:

- It was unclear whether the devolution of power to the school might reduce the liability of the state. At first blush, it appeared that the functions given to governing bodies and to schools in terms of Sections 16 and 15 of the Schools Act might have created the possibility of reduced state liability for damages and losses suffered at the public schools. It could be argued that the state may have endeavoured, in creating the Schools Act, to shed some of its financial responsibilities and liabilities regarding the provision of public education. As the state is its own insurer, the sums of money involved in liability cases could run into millions.

The two cases have confirmed that the state's liability for loss or damage issuing from educational activities at public schools remains firm. Schools themselves should not be the only agencies from which people try to recover damages and losses.

- The two cases also expose the state to greater liability arising from negligent commissions or omissions of people. In this regard, one could imagine many different actors contributing to the educational activities of public schools under the auspices of the provisions of the Schools Act. The Schools Act envisages governing bodies contributing to the provision of quality education and public schools through supporting the principal and staff in their professional duties. It seems possible that state liability may arise from the acts or omissions of people in the school's educational activities under the provisions of this Act such as teacher aides, governing body members, participants in sports and cultural activities, student teachers doing teaching practice, police members helping with safety at the school, politicians visiting schools, and injury or death caused by learners using fire-arms and other dangerous weapons.
- In terms of the Employment of Educators Act, 76 of 1998, the fact that two employers operate on the same premises does not seem to present a problem regarding liability. It is, however, a very interesting question why the legislator created legislation that would make it possible for the employees of one employer to create problems for another employer regarding damages or losses emanating from negligent actions or omissions.

The two cases leave several questions in the air. For example,

- If school employees can cause the state to incur liability (vicarious liability), will the state as reasonable employer not make more and more demands regarding the employment and conduct of such educators?
- How are recent case law developments (e.g. in the matter between: Natasha Kern Applicant and the Minister of Safety and Security Respondent. Constitutional Court of South Africa Case CCT52/04; *Media 24 Ltd and Another v Grobler* 2005 (6) SA 328 (SCA) regarding the vicarious liability of employers for the actions of their employees, relevant to such cases?
- How is it possible that an employer does not incur liability for the negligent acts or omissions of its employees? Or are the state's obligations regarding the education of its citizens and the enabling provisions it has created (e.g. where it enables schools in the Schools Act to appoint additional educators) reason enough to retain and continue this apparent anomaly?