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IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

DATE: 11/09/2006
CASE NO: A1170/05

UNREPORTABLE

In the matter between:

BASTIAN FINANCIAL
SERVICES (PTY) LTD APPELLANT

And

GENERAL HENDRIK SCHOEMAN
PRIMARY SCHOOL RESPONDENT

JUDGMENT

PRELLER, J

The appellant (plaintiff in the court *a quo*) instituted action in the magistrate's court of Brits against the defendant on the basis of a rental agreement in respect of three copiers and a copy printer. For the sake of convenience I shall refer to the parties in this judgment as they were in the court *a quo*.

The plaintiff alleged that the defendant had not paid the

instalments agreed upon and sued in terms of the agreement for:

(a) Confirmation of its cancellation of the agreement;

(b) The return of the rented goods;

(c) Payment of R461 318.33 plus vat;

(d) Interest on the latter amount at the agreed rate;

(e) Costs on the scale as between attorney and client.

The defendant raised three special pleas. The learned magistrate upheld the second one in respect of prayers (c) and (d) and dismissed it in respect of prayer (b), finding that the school can be ordered to return the machines. Consequently only two thirds of the defendant's costs were allowed.

I shall, however, deal briefly with the two pleas that were dismissed as well. Counsel had agreed at the trial that only the special pleas would be argued without the need to lead any evidence.

The formulation of the special pleas (as is the case with the plea on the merits) is obscure in the extreme. It is a mixture of evidence and confused legal argument and is furthermore grammatically of such a poor

standard that it is hard to understand how the creator thereof could ever have passed matric.

In the annexure to the summons the defendant is described as "General Hendrik Schoeman Primary School, a firm whose full and further particulars are unknown to the plaintiff with its principal place of business ...".

The point of the first special plea is that the Hendrik Schoeman Primary School is not a legal entity and has no *locus standi* to be cited in the action as a party. No motivation or explanation is given for this legal conclusion.

In his argument before the magistrate, which was transcribed and forms part of the record before us, counsel for the defendant stated that it is common cause that there is a public school with the name mentioned above and he referred to section 15 of the South African Schools Act 84 of 1996 which provides:

> "Every public school is a juristic person with legal capacity to perform its function in terms of this Act."

The argument then goes on to highlight various provisions in the Act that deal with the authority of schools to enter into agreements and the role of its governing body, all of which have nothing to do with the capacity of the school to be sued. It is not clear to me what the point of the argument was but what is clear is that a school has the necessary legal personality to be sued and the first special plea was correctly dismissed.

The third special plea reads:

> "(a) That the defendant fall (*sic*) within the ambit and is regulated by the provisions of the South African Schools Act, Act 84 of 1996;
>
> (b) That the plaintiff is therefore required to comply with the provisions of section 60 of Act 84 of 1996 when instituting action for damages arising from or caused by any act or omission in connection with any educational activity.
>
> (c) That the plaintiff failed to comply with the provisions

of the State Liability Act 20 of 1957, as required by section 60(2) of Act 84 of 1996.

(d) Therefore this action must be dismissed with costs."

This plea relies on two findings that have to be made before it can succeed i.e.:

(a) That the claim is one for damages as contemplated in section 60 of the Act; and

(b) That the contract was concluded in connection with an educational activity.

It is therefore a defence that could properly have been raised by the MEC for education of the North-West province if he had been joined in the action.

This plea was likewise correctly dismissed.

The second special plea raised a question which has as far as I

could establish not yet been considered by the High Court. The effect of the plea is the following:

(a) The claim is one for damages;

(b) It arises from an act or omission in connection with educational activity;

(c) Accordingly and because of the provisions of section 60(1) the State and not the school is the proper defendant and the action should have been instituted against the MEC concerned.

The crux of Mr Strobl's argument on behalf of the plaintiff was:

(a) The claim concerned was one for specific performance and not damages; and

(b) In any event on a proper construction of section 60(1) the State is only liable for a delictual and not for contractual damages.

In order to decide the first leg of the argument it is necessary to consider the provisions of the contract that had been entered into between the parties as well as the allegations made in the plaintiff's particulars of claim. The contract provides that in the event of the defendant failing to make any of the agreed payments on or before the due date the plaintiff shall be entitled, *inter alia*, to:

> "9.1 Claim immediate payment of all amounts which would have been payable in terms of this agreement until expiry of the rental period ... whether such amounts are then due for payment or not; or
>
> 9.2 Immediately terminate this agreement without prior notice, take possession of the equipment, retain all amounts already paid by the user and claim all outstanding rentals, all legal costs on the attorney and own client scale and, as agreed, pre-estimated liquidated damages, the aggregate value of the rentals which would have been payable had this agreement continued until expiry of the rental period stated in the

equipment schedule." (Underlining added)

In its particulars of claim the plaintiff alleges the relevant terms of the agreement and defendant's failure to pay the agreed instalments and continues with the following paragraph:

> "8. In so failing to pay ... the defendant has committed a breach of the agreement entitling the plaintiff to cancel the agreement which it hereby does."

The prayers which are paraphrased at the beginning of this judgment confirm that the plaintiff intended to cancel the agreement and that paragraph 8 quoted above was not included inadvertently.

The particulars of claim give no clue as to how the amount claimed is made up but it seems clear that what the plaintiff is claiming in prayer (c) is all the outstanding instalments. The plaintiff therefore claimed, in addition to the return of the machines, all the rentals that would have become due over the remaining four years of the contract period. Had the plaintiff chosen to enforce the contract, it would ordinarily have been entitled to the rentals and the defendant to the use of

the machines. That would have been a claim for specific performance. In view of the plaintiff's choice to cancel the agreement it would normally have been entitled to restitution, i.e. return of the machines and, if applicable, damages. Unless the machines had become worthless as a result of the defendant's use of them for a year, which seems highly unlikely, the full outstanding rentals would probably not be the true measure of plaintiff's loss. The plaintiff relies for this extraordinary remedy on clause 9.2 of the contract which is quoted above. That clause is a penalty stipulation as defined in section 1 of the Conventional Penalties Act 15 of 1962 and would be enforceable, subject to the provisions of the Act.

The parties have chosen to describe the amount to be paid by the defendant as "agreed, pre-estimated liquidated damages". In view of the absence of evidence I cannot say whether this is a genuine pre-estimate of the plaintiff's damage or a provision intended to operate in *terrorem*. It seems that if the breach and cancellation occur during the early stages of the contract period, the latter would be more likely and *vice versa* if it occurs more towards the end of the period. In terms of section 3 of the act the court may reduce the amount of the penalty to bring it in line with the prejudice actually suffered by the creditor. Either way the remedy

provided for in the quoted clause is not specific performance of the contract but in essence damages. Mr Strobl's first contention accordingly fails.

At the hearing of the appeal counsel could not refer us to any reported case in which the question whether section 60(1) also applies to contractual damage was considered. I could not find any authority on the point either.

Section 60(1) reads:

> "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."

In submitting that the magistrate interpreted section 60(1) incorrectly Mr Stobl advanced several arguments on the interpretation of the provision. I shall deal with each one that I could identify as a separate argument.

1. The inclusion of the words "any act or omission in connection with" in the subsection indicates an intention to limit its operation to claims in delict against a public school. If not, the words may as well have been omitted without changing the meaning of the provision at all.

I do not agree for the following reasons:

(a) Statutory provisions often contain words that are not strictly necessary or to some extent tautologous. It would be dangerous to draw the inference sought by Mr Strobl on such flimsy grounds.

(b) If that had indeed been the intention of the legislature its meaning could easily have been made clear beyond doubt by an express reference to delictual liability, eg by including the word "delictual" before "damage" or "in delict" before "caused".

2. The reference to "act or omission" has a particular delictual

flavour.

It is true that the words are often used with reference to delicts but that use is not sufficiently exclusive to justify the drawing of the inference sought. So, for example, the words are used in section 20(10) with specific reference to a school's contractual responsibility in labour law and were similarly used in *Van Staden v Central SA Lands and Mines* 1969 4 SA 349 (W) 351, to name but one case. Nor does his reference to section 60(4) take the matter any further. Subsection (1) deals with claims (leaving aside for the moment the question whether they are contractual or delictual) that arise from educational activities; subsection (4) deals with similar claims arising from an enterprise that is not an educational activity. The same question of interpretation arises in reading both subsections (1) and (4).

3. The intention of the legislature was to give public schools a high degree of autonomy. In doing so they were given the freedom to enter into contracts and the intention is that they should be accountable under contracts concluded by them.

In my view this argument does not hold water. The moment public

schools were given legal personality (and with it the freedom to conclude contracts) they also acquired the "freedom" to commit delicts and to be sued for the consequences. There seems to be no reason in logic why they should be protected against the claim for damages arising from the one and not from the other.

4. The reason for the distinction is that a delictual claim arising from e.g. severe personal injuries may have a quantum so high that it may cripple the school.

The answer to that argument can be found in the present case: a rural primary school will probably find a claim for more than R460 000.00 together with costs and interest from October 2000 just as financially crippling as a claim for personal injuries.

5. A school might effectively and dishonestly increase the subsidy it receives from the State by refusing to pay for its purchases, hoping that it will be sued for (contractual) damages and not for payment of the purchase price so that it can pass the liability on to the state.

As remarked by Mr Strobl in argument, the vast majority of

contracts entered into by schools will be simple contracts for goods or services. If litigation results from such contracts it will almost invariably be for payment of the contract price and not for damages. I have no doubt that if schools were to see and exploit this loophole, the statute will be appropriately amended.

6. Mr Strobl also referred to section 20(10) and submitted that it was enacted in order to remove any doubt about the State's possible liability for labour related claims brought by employees of a school.

The subsection reads:

> "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 in terms of subsections (4) and (5)."

The submission seems to be a sound one but does not help to solve the problem under consideration subject to my remarks about the use of the words "act or omission" with reference to a school's contractual

responsibility in labour matters.

In conclusion, in my view, the ordinary grammatical meaning of the words "damage or loss caused as a result of any act or omission" include claims for damages arising from both contract and delict.

In the result the appeal must fail.

I would make the following order:

The appeal is dismissed with costs.

F G PRELLER
JUDGE OF THE HIGH COURT

I agree

J ENGELBRECHT
ACTING JUDGE OF THE HIGH COURT

A1170/05

HEARD ON:	29/05/2006
FOR THE APPELLANT:	ADV W STROBL
INSTRUCTED BY:	MESSRS KRAMER & VILLION ATT, JOHANNESBURG

FOR THE RESPONDENT:	ADV J KLOPPER
INSTRUCTED BY:	MESSRS VAN HUYSTEEN & KRIEL, PRETORIA
DATE OF JUDGMENT:	11/09/2006